

Affirmed as Modified and Opinion Filed August 4, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

**No. 05-16-00058-CR
No. 05-16-00059-CR**

**ANDREW REY ACOSTA, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F08-00813-P, F15-23574-P**

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Bridges, and Justice Lang
Opinion by Justice Bridges

Andrew Rey Acosta appeals his conviction, following the adjudication of his guilt, for injury to a child in cause no. 05-16-00058-CR and his conviction for aggravated assault with a deadly weapon in cause no. 05-16-00059-CR. In two issues, appellant contends that in the first case his due process rights were violated, and the judgment in the second case should be modified to show there was no plea agreement. We affirm the trial court's judgment adjudicating guilt in the first case and we modify the trial court's judgment and affirm as modified in the second case.

BACKGROUND

In cause no. 05-16-00058-CR, appellant waived a jury and pleaded nolo contendere to injury to a child younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 22.04(a)

(West Supp. 2014). Pursuant to a plea agreement, the trial court deferred adjudicating guilt, placed appellant on ten years' community supervision, and assessed a \$1,500 fine. The State later moved to adjudicate guilt, alleging appellant violated a condition of his community supervision. During a hearing on the motion, appellant stated he understood the State had filed a motion to revoke his community supervision alleging he violated condition A by committing a new offense, an aggravated assault with a deadly weapon. Appellant stated he wanted the hearing to consider both the motion to revoke and a plea on the new aggravated assault case. Appellant pleaded true to the allegation in the motion to revoke. The trial court found the allegation true, adjudicated appellant guilty of injury to a child, and sentenced him to ten years' imprisonment.

In cause no. 05-16-00059-CR, appellant waived a jury and pleaded guilty to aggravated assault with a deadly weapon, a motor vehicle. *See* TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011). After finding appellant guilty, the trial court sentenced him to ten years' imprisonment.

DUE PROCESS

In his first issue, appellant contends he was not served with the motion to revoke, in cause no. 05-16-00058-CR, until after he entered his plea, in violation of his due process rights to notice in a timely manner. Appellant asserts he did not have the opportunity to prepare a defense because he received written notice about the motion to revoke five days after the revocation hearing. The State responds that appellant has not preserved this issue for appellate review and alternatively, any error would have been harmless.

To preserve error for appellate review, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). Even constitutional rights may be waived. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). The record must show appellant made some type of due process objection at the time the trial court conducted the

hearing, at the time community supervision was actually revoked, or at the time the sentence was imposed. *See Rogers v. State*, 640 S.W.2d 248, 263–64 (Tex. Crim. App. 1981). Appellant did not assert a due process violation at the adjudication hearing, and his motion for new trial complained the verdict was “contrary to the law and evidence.”

Moreover, the record shows that at the beginning of the hearing, appellant clearly knew the State’s motion to revoke contained only one allegation, and appellant pleaded true to that allegation. We overrule appellant’s first issue.

MODIFY JUDGMENT

In his second issue, appellant contends the judgment in cause no. 05-16-00059-CR should be modified to show there was no plea agreement. The State agrees the judgment should be modified to correctly reflect appellant’s plea.

The record shows appellant entered an open plea of guilty to the charges in the indictment. The judgment, however, incorrectly states terms of plea bargain as “10 years TDCJ Fine \$-0-.” Accordingly, we modify the section of the judgment entitled “terms of plea bargain” to state “open.” *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref’d).

CONCLUSION

In cause no. 05-16-00058-CR, we affirm the trial court’s judgment adjudicating guilt. In cause no. 05-16-00059-CR, we affirm the trial court’s judgment as modified.

/David L. Bridges/

DAVID L. BRIDGES
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ANDREW REY ACOSTA, Appellant

No. 05-16-00058-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District
Court, Dallas County, Texas
Trial Court Cause No. F08-00813-P.
Opinion delivered by Justice Bridges. Chief
Justice Wright and Justice Lang
participating.

Based on the Court's opinion of this date, the judgment adjudicating guilt of the trial court is **AFFIRMED**.

Judgment entered August 4, 2016.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ANDREW REY ACOSTA, Appellant

No. 05-16-00059-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District
Court, Dallas County, Texas
Trial Court Cause No. F15-23574-P.
Opinion delivered by Justice Bridges. Chief
Justice Wright and Justice Lang
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED**
as follows:

The section entitled "Terms of Plea Bargain" is modified to show "Open."

As modified, we **AFFIRM** the trial court's judgment.

Judgment entered August 4, 2016.