

AFFIRMED and Opinion Filed December 15, 2020



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

**Nos. 05-19-01094-CR,
05-19-01095-CR,
05-19-01096-CR,
05-19-01097-CR**

**FABIAN ENRIQUE TUCKER, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F16-14061-R, F16-14062-R,
F16-14063-R, and F16-14064-R**

MEMORANDUM OPINION

**Before Justices Myers, Nowell, and Evans
Opinion by Justice Evans**

Appellant Fabian Enrique Tucker appeals his convictions for aggravated robbery. In a sole issue, he contends that the trial court made the deadly weapon findings prematurely in each of the four cases. We affirm.

BACKGROUND

On December 1, 2016, the State charged appellant by four separate indictments with committing four aggravated robberies on October 16, 2016. Each of the four indictments alleged that appellant used a deadly weapon, a firearm, during

the commission of the crime. On May 10, 2017, before a presiding magistrate, appellant entered negotiated guilty pleas for each of the charged offenses. Each of the plea agreements specifically referenced an affirmative finding of a deadly weapon. Appellant affirmed he read, understood, and signed his four plea agreements and entered his pleas freely and voluntarily. In addition, appellant signed a judicial confession and stipulation of evidence in each case in which he specifically confesses to using and exhibiting a firearm for each offense. The trial court accepted the guilty pleas for each case, followed the plea agreement in all four cases, deferred adjudication of appellant's guilt, made affirmative deadly-weapon findings, and placed appellant on community supervision for a period of seven years in each case. The magistrate entered the following findings, conclusions and recommendations in each case: (1) "Defendant used or exhibited a deadly weapon, to wit: firearm during the commission of or during immediate flight from the offense."; and (2) "A deadly weapon was used or exhibited." The presiding judge of the 265th District Court subsequently adopted the magistrate's actions including the deadly-weapon findings. Each of the four orders of deferred adjudication entered by the 265th District Court included a finding that appellant had used a deadly weapon.

The State subsequently filed motions to adjudicate in each of the four cases alleging that appellant violated certain terms and conditions of the probations. On August 23, 2019, appellant entered an open plea and plead true to the allegations in

the State's motions. The trial court revoked appellant's community supervision, found him guilty, and assessed punishment at fifteen years confinement in the Texas Department of Criminal Justice for each case with the sentences to run concurrently. The trial court also made "an affirmative finding that a deadly weapon, to-wit, exactly what's alleged in each of the indictments was used or exhibited." The adjudication judgments stated that appellant had used a deadly weapon, a firearm, in each offense. Appellant then filed notice of appeal in each of the four cases.

ANALYSIS

Appellant asserts that the Court should delete the deadly weapons findings in each of the deferred adjudication orders and in each of the adjudication judgments or, alternatively, vacate the findings and remand the cases because the "revocation judge made no reference to the question of any deadly weapon use until the end of the proceeding where it made cursory deadly weapons findings" and "adopted the premature, illegal deadly weapon findings without substantive consideration." We disagree.

A. Preservation of Error

As an initial matter, for error to be preserved, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). In a similar case where appellant challenged the trial court's deadly weapon finding as premature after the trial court had adjudicated his guilt and revoked his deferred adjudication, this Court held that appellant had failed to preserve his claim for review

because it should have been raised at the time the court placed him on deferred adjudication not following revocation. *See Anderson v. State*, No. 05-08-00864-CR, 2009 WL 3740783, at *2 (Tex. App.—Dallas Nov. 10, 2009, no pet.) (mem. op., not designated for publication) (“Appellant’s contention that the judge who presided over the trial court at the time of appellant’s original plea hearing exceeded his authority by making a “pre-mature” deadly weapon finding is an issue relating to the original plea hearing. The record shows appellant did not appeal at the time deferred adjudication community supervision was first imposed. Therefore, appellant’s claim regarding that issue presents nothing for this Court’s review.”); *see also Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999) (holding a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in appeals taken when deferred adjudication community supervision is first imposed.”). Similarly, in this case, appellant did not appeal at the time the community supervision was first imposed at the 2017 hearing before the magistrate. Accordingly, appellant’s claim presents nothing for this Court’s review.

B. Deadly Weapon Findings

Notwithstanding appellant’s failure to preserve error, however, his argument fails. The Texas Code of Criminal Procedure provides:

(c) On an affirmative finding regarding the use or exhibition of a deadly weapon as described by Subsection (b), the trial court shall enter the finding in the judgment of the court.

(d) On an affirmative finding that the deadly weapon under Subsection (c) was a firearm, the court shall enter that finding in its judgment.

See TEX. CODE CRIM. PROC. art. 42A.054(c), (d). The purpose of a trial court making an affirmative finding of a deadly weapon is to aid the Department of Criminal Justice in calculating a parole-eligibility date. *Sampson v. State*, 983 S.W.2d 842, 843 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). For example, a defendant's parole-eligibility date is extended when a trial court's judgment reflects an affirmative finding that a defendant used a deadly weapon during the commission of a felony. *Id.*, TEX. GOV'T CODE § 508.145(d). Our sister court has previously noted:

An affirmative finding of a deadly weapon is not applicable to an order of deferred adjudication because parole eligibility only applies to persons who are imprisoned. When a defendant's adjudication of guilt is deferred, the defendant is not imprisoned; instead, the defendant is placed on community supervision. If a trial court determines that a defendant has violated the terms of his deferred adjudication and assesses imprisonment as punishment, the trial court is required to enter any affirmative finding of a deadly weapon in its order adjudicating guilt. It is at this point that the affirmative finding of a deadly weapon becomes applicable.

Sampson, 983 S.W.2d at 843. In the *Sampson* case, the trial court circled "N/A" in regard to whether there was an affirmative finding of a deadly weapon. *Id.* The defendant argued that because the trial court circled "N/A" on the order of adjudication, the trial court abused its discretion by making an affirmative finding of a deadly weapon on the order adjudicating guilt. *Id.* Our sister court overruled this assertion by noting that an affirmative finding of a deadly weapon was not applicable to the trial court's order of deferred adjudication, and was only applicable

to the order adjudicating guilt.” *Id.* at 844. To the extent that appellant is arguing in this case that the revocation court should not have relied on the “premature” and “illegal” finding in the order of deferred adjudication, we similarly conclude that the finding was irrelevant to the trial court’s order of deferred adjudication and we only look to the order adjudicating guilt.

Appellant next argues that the deadly weapons finding should be stricken from the adjudication judgments because the revocation judge made “cursory” deadly weapons findings “without substantive consideration.” Appellant asserts that “there is no indication that the revocation judge was aware that the Court retained authority, despite the earlier deadly weapon finding, to decline to make the findings.” Essentially, appellant argues that the record does not demonstrate the trial court’s awareness of his discretion to make the finding. We find this argument unpersuasive.

In this case, the trial court’s record contained the negotiated guilty pleas for each of the charged offenses. Each one of those plea agreements in the record specifically referenced an affirmative finding of a deadly weapon. Further, the record contained the signed judicial confessions in which he confesses to using and exhibiting a firearm for each offense. We have previously held that a “defendant’s judicial confession is sufficient to show that he used a deadly weapon, and the record need not otherwise provide proof.” *See Burns v. State*, No. 05-15-00971-CR, 2016 WL 2903589, at *2 (Tex. App.—Dallas May 12, 2016, no pet.) (mem. op., not

designated for publication). We have also previously declined to conclude that a trial court's failure to verbally acknowledge his discretion to enter the finding indicates a lack of awareness of that discretion. *See Calhoun v. State*, Nos. 05-19-00264-CR, 05-19-00265-CR, 2019 WL 5616898, at *2 (Tex. App.—Dallas Oct. 31, 2019, no pet.) (mem. op., not designated for publication). To the contrary, the trial court affirmatively stated: "I'll also make an affirmative finding that a deadly weapon, to-wit, exactly what's alleged in each of the indictments was used or exhibited." Accordingly, on this record, we cannot conclude that the trial court's deadly weapon findings were erroneous. We overrule appellant's sole issue.

CONCLUSION

We resolve appellant's issue against him and affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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TEX. R. APP. P. 47.2(b)
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

FABIAN ENRIQUE TUCKER,
Appellant

No. 05-19-01094-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F16-14061-R.
Opinion delivered by Justice Evans.
Justices Myers and Nowell
participating.

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

Judgment entered December 15, 2020.



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

JUDGMENT

FABIAN ENRIQUE TUCKER,
Appellant

No. 05-19-01095-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F16-14062-R.
Opinion delivered by Justice Evans.
Justices Myers and Nowell
participating.

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

Judgment entered December 15, 2020.



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

JUDGMENT

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Appellant

No. 05-19-01096-CR V.

THE STATE OF TEXAS, Appellee

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Trial Court Cause No. F16-14063-R.
Opinion delivered by Justice Evans.
Justices Myers and Nowell
participating.

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

Judgment entered December 15, 2020.



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

JUDGMENT

FABIAN ENRIQUE TUCKER,
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No. 05-19-01097-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F16-14064-R.
Opinion delivered by Justice Evans.
Justices Myers and Nowell
participating.

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

Judgment entered December 15, 2020.