

AFFIRM; and Opinion Filed November 28, 2017.



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

No. 05-16-01070-CR

IVAN DEJESUS PALACIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1600093-V**

MEMORANDUM OPINION

**Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Boatright**

A jury convicted appellant of assault, concluding he caused his girlfriend bodily injury by impeding her breathing or circulation. The trial court assessed his punishment at seven years' confinement. Appellant challenges the sufficiency of the evidence supporting his conviction and complains of the trial court's failure to instruct the jury concerning extraneous offenses. We affirm.

Background

Appellant's girlfriend, Margie Murillo, testified that during the years she lived with appellant, he became increasingly jealous and abusive. Approximately four days before appellant was arrested, appellant accused Murillo of cheating on him and demanded to know the name of the other man. Appellant struck Murillo repeatedly with a phone charger and then grabbed a piece of clothing and pressed it against Murillo's neck until she blacked out. Two days later,

appellant confronted Murillo with a recording of what he claimed was she and another man having sex. This time, appellant slapped her, knocked her to the floor, kicked her in the stomach, and stepped on her head. Afterwards, he sexually assaulted her.

Murillo never called the police, but she did call her mother after both incidents. After hearing about the second incident, Murillo's mother called the police herself. When officers arrived at the apartment, appellant fled through a window.

Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence supporting his conviction. Specifically, he contends there is no evidence that he strangled Murillo. A person commits an assault if he intentionally, knowingly, or recklessly causes bodily injury to another person. TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2017). The assault is a third degree felony if the person was in a dating relationship with the victim, and the assault was committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the victim by applying pressure to her throat or neck or by blocking her nose or mouth. *Id.* § 22.01(b)(2)(B); TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2017). We review appellant's challenge by examining the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Appellant argues that if Murillo had been strangled, her neck would have been bruised, and there is no testimony or photograph indicating such bruising occurred.

The State's expert witness, Dr. Stephen Hastings, testified that symptoms of strangling can be "completely variable" depending on the amount of pressure, how it was applied, and the nature of the victim. He testified that abrasions and bruises can sometimes be seen on the exterior of skin, but they are not necessarily visible; sometimes hemorrhages caused by strangulation can only be seen deep in the tissue when an autopsy is performed. He described

small hemorrhages called petechiae that can result anywhere above the neck following strangulation, and he explained that if the pressure applied is great enough, the victim can have larger hemorrhages caused by ruptures of larger vessels. Police photographs admitted at trial show Murillo experienced large hemorrhages in both eyes and smaller petechiae-like markings on her ear, consistent with Hastings's description of strangulation bruising. Murillo's testimony was also consistent with Hastings's description of the effects of strangulation: she experienced pain, altered vision, and weakness, and she ultimately lost consciousness.

The State produced evidence from which a reasonable juror could have concluded that appellant impeded Murillo's normal breathing or circulation by applying pressure to her throat or neck. We overrule his first issue.

Instruction Concerning Extraneous Offenses

In his second issue, appellant contends the trial court erred by failing to instruct the jury concerning the State's burden of proof on extraneous offenses admitted at trial, namely the sexual assault of Murillo and appellant's evading arrest. When evidence of these offenses was offered, appellant did not object or ask the judge to limit the jury's consideration of the evidence in any way. Likewise, at the charge conference, appellant did not request an instruction limiting consideration of the extraneous offenses or explaining the State's burden of proof on those offenses. Indeed, appellant affirmatively stated he had no objection to the charge prepared by the trial court.

Appellant argues the trial court was obliged, *sua sponte*, to instruct the jury concerning the State's burden to prove the extraneous offenses beyond a reasonable doubt. He relies on *Rodgers v. State*, 180 S.W.3d 716, 723–24 (Tex. App.—Waco, no pet.), but the Court of Criminal Appeals expressly disapproved of *Rodgers* in *Delgado v. State*, 235 S.W.3d 244, 246 n.2 (Tex. Crim. App. 2007). The *Delgado* court concluded:

a limiting instruction concerning the use of extraneous offense evidence should be requested, and given, in the guilt-stage jury charge only if the defendant requested a limiting instruction at the time the evidence was first admitted. When the defendant has properly requested a limiting instruction in the jury charge, the trial court must also include an instruction on the State's burden of proof at that time.

Id. at 251. Thus, at the guilt-innocence stage of trial, “there is no statutory or legal requirement to give *any* instructions concerning the use of extraneous offenses absent a timely request.” *Id.* at 253 (emphasis original). Because appellant failed to request any limiting instruction from the trial court when evidence of the extraneous offenses was first offered, the court had no obligation to give either a limiting instruction or a burden-of-proof instruction in the charge.

Appellant also relies on *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994), asserting that the Court of Criminal Appeals consistently holds the trial court commits error if it fails to instruct the jury on the State's burden of proof when considering extraneous offenses. But the *George* defendant requested an instruction, and the court held that “if the defendant so requests at the guilt/innocence phase of trial, the trial court must instruct the jury not to consider extraneous offense evidence admitted for a limited purpose unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense.” *Id.* Because appellant failed to request the instruction he wanted in this case, his reliance on *George* is misplaced.

The trial court had no obligation in this case to instruct the jury on the State's burden of proof concerning extraneous offenses. We overrule appellant's second issue.

We affirm the trial court's judgment.

/Jason Boatright/

JASON BOATRIGHT

JUSTICE

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

JUDGMENT

IVAN DEJESUS PALACIOS, Appellant

No. 05-16-01070-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District
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Trial Court Cause No. F-1600093-V.

Opinion delivered by Justice Boatright.

Justices Lang-Miers and Brown
participating.

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

Judgment entered this 28th day of November, 2017.