

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-16-00126-CR**

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**ADOLFO ARIAS LARA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 9th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 15-01-00299-CR**

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**MEMORANDUM OPINION**

A jury found appellant Adolfo Arias Lara guilty of the third degree felony offense of assault family violence by strangulation. *See* Tex. Penal Code Ann. § 22.01(b)(2)(B) (West Supp. 2016). After hearing punishment evidence, the trial court assessed punishment at three years in prison, but then suspended the imposition of the sentence and placed Lara on community supervision for a period of three years. In two issues on appeal, Lara complains that the evidence is legally insufficient to support the jury’s verdict and that the trial court erred when it limited

his cross-examination of a witness, violating his rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. *See* U.S. Const. amend. VI. We affirm the trial court's judgment.

## BACKGROUND

Officer Dustin Thompson testified that on January 10, 2015, he was on patrol with the Conroe Police Department when he was dispatched to investigate an assault. Upon arriving at the scene, Thompson heard a commotion and observed a male, whom he identified as Lara, attempting to back out of the driveway at a very high rate of speed. Based on Lara's actions, Thompson assumed that a crime had possibly occurred and that Lara was attempting to flee. Thompson testified that Lara disregarded his signal to stop, and only stopped when another officer arrived. According to Thompson, Lara claimed to have only had a verbal altercation with J.O. However, Thompson explained that when he first encountered J.O., J.O. appeared frightened and was crying.

Thompson also testified that J.O. spoke very little English, and Lara's teenage daughter, C.L., had to translate for her. Thompson testified that J.O. reported that Lara was intoxicated and that J.O. had verbally argued with Lara because J.O. did not want to drink alcohol. According to Thompson, J.O. explained that because Lara was angry at her for not drinking alcohol, Lara shoved her to the couch, positioned

his body on top of hers, and poured beer onto her face. J.O. told Thompson that when she tried to get out from underneath Lara, Lara grabbed a plastic bag that was nearby and forcefully placed it over her face, restricting her airway. Thompson testified that J.O. had a fresh, “bluish/purplish mark[]” on her face that had already started to swell and a fresh scratch across her chest. According to Thompson, J.O.’s injuries were consistent with her account of what had happened.

Thompson further testified that when he went inside the home, he could tell that a struggle had occurred in the living room, which had a very strong odor of alcohol. Thompson also saw a bag in the living room next to the couch. According to Thompson, it was a “normal, everyday household bag” that you would get at a convenience store. Based on J.O.’s statement and Thompson’s observations at the scene, Thompson believed that an assault family violence by strangulation had occurred.

Officer Andrew Lupnitz of the Conroe Police Department testified that he was the second officer on the scene. Lupnitz testified that when he knocked on the door he did not get a response, but when he looked in the window he saw J.O. and two children, and they “seemed to be quite distraught and in fear, crying.” Lupnitz also noticed that J.O. had pushed a piece of furniture against the door. Lupnitz explained that J.O. spoke very little English, so he utilized C.L. as a translator. Lupnitz testified

that through his investigation, he learned that J.O. and Lara had an argument, during which Lara poured beer on J.O., punched J.O. on the left cheek, and tried to shove a plastic grocery shopping bag into J.O.'s mouth. Lupnitz testified that J.O. reported that after Lara had restricted her air flow so that she could not breathe, J.O. ran and tried to call the police. According to Lupnitz, J.O. explained that Lara took the phone away from her and pushed her down, and at that point, C.L. helped J.O. and Lara walked away. Lupnitz testified that J.O. reported that she had locked herself in a room with the children, barricaded the door, and called the police, and Lara tried to get into the room.

Lupnitz testified that during his investigation, he observed that J.O. had a scratch on her chest and a bruise and swelling on her left cheekbone. Lupnitz also testified that it looked like an altercation had occurred in the living room. Lupnitz explained that his investigation of the assault had been recorded on his body camera, and the video recording was admitted into evidence, along with certified transcription translations of the video recording. Lupnitz testified that J.O. had reported that Lara had strangled her with the bag. Lupnitz further testified that based on J.O.'s account of the assault, he determined that Lara had committed assault family violence by strangulation.

J.O. testified that when the assault occurred, she and Lara had been in a dating relationship for approximately two years, and they had a child together. According to J.O., Lara became very aggressive and controlling when they began living together. J.O. explained that the night the assault occurred, she and Lara had argued about the children and Lara got mad because she did not want to drink beer. J.O. testified that after Lara insulted her, she tried to leave the room, but Lara pushed her onto the couch and threw beer in her face. J.O. explained that Lara got on top of her and punched her face, causing her pain. J.O. further testified that Lara tried to kill her by holding a plastic bag over her nose and mouth for approximately five minutes, and that she could not breathe. J.O. used a mannequin to demonstrate for the jury how Lara had placed the bag over her face. J.O. explained that when she tried to breathe the bag went into her mouth. J.O. testified that she believed Lara wanted to kill her because, while holding the bag over her face, he said, ““Die, bitch.”” According to J.O., she was able to run away from Lara by pretending that she had passed out. J.O. explained that after she fell in the hallway, C.L. came out of her room and screamed at Lara, and J.O. locked herself in the bedroom and tried to call the police, but Lara broke in and took the phone. J.O. testified that Lara left the room after he took the phone. J.O. explained that she put a dresser in front of the door, and then the police arrived.

C.L. testified in Lara's defense. C.L. testified that the night the alleged assault occurred, she heard J.O. and Lara arguing and she thought that they were both drunk. C.L. testified that she saw J.O. drinking that day. C.L. explained that she heard a thump by her door and when she opened the door she saw J.O. on the floor with C.L.'s baby sister. According to C.L., after Lara picked up the baby and walked back into the living room, C.L. hugged J.O. because she could tell that J.O. was upset. C.L. testified that she returned to her room and did not hear any more fighting. C.L. explained that she translated for J.O. when the police arrived, but because C.L.'s Spanish is not very good, C.L. was not able to accurately translate J.O.'s statements because C.L. did not understand everything that J.O. said.

#### ANALYSIS

In issue two, Lara complains that the evidence was legally insufficient to support the jury's finding that he was guilty of assault family violence by strangulation beyond a reasonable doubt. According to Lara, the lack of corroborating evidence and the lack of certainty in J.O.'s testimony concerning whether Lara had used a bag to cover J.O.'s mouth created a reasonable doubt as to whether any impeding of J.O.'s breathing had occurred.

In reviewing the legal sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational fact finder

could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The fact finder is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). We give full deference to the fact finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. If the record contains conflicting inferences, we must presume that the fact finder resolved such facts in favor of the verdict and defer to that resolution. *Brooks v. State*, 323 S.W.3d 893, 899 n.13 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We “determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.” *Clayton*, 235 S.W.3d at 778 (quoting *Hooper*, 214 S.W.3d at 16-17). “Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.” *Id.* (quoting *Hooper*, 214 S.W.3d at 13).

To prove that Lara committed assault family violence by strangulation, the State had to establish beyond a reasonable doubt that Lara intentionally, knowingly,

or recklessly caused bodily injury to J.O., a member of Lara’s family or household or a person with whom Lara has or has had a dating relationship, by impeding J.O.’s normal breathing or circulation of the blood by blocking J.O.’s nose or mouth. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(2)(B) (West Supp. 2016). A person acts intentionally “when it is his conscious objective or desire to engage in the conduct or cause the result[;]” a person acts knowingly “when he is aware of the nature of his conduct or that the circumstances exist[;]” and a person acts recklessly “when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” *Id.* § 6.03(a), (b), (c) (West 2011). Bodily injury is defined as “physical pain, illness, or any impairment of physical condition.” *Id.* § 1.07(a)(8) (West Supp. 2016). The jury may infer intent from circumstantial evidence, such as the defendant’s acts, words, and conduct. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). A victim’s testimony alone can provide sufficient evidence to support a conviction of felony assault of a family member by strangulation, and the evidence need not show that the victim lost consciousness or was completely unable to breathe. *See Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016).

The record shows that J.O. testified that Lara tried to kill her by holding a plastic bag over her nose and mouth for approximately five minutes, and that she



could not breathe. Thompson testified that J.O. had reported that Lara had restricted her air way by forcefully placing a plastic bag over her face and that J.O.'s injuries were consistent with her account of what had happened. Lupnitz testified that J.O. reported that Lara had tried to shove a plastic grocery shopping bag into her mouth and had restricted her air flow so that she could not breathe. Both Thompson and Lupnitz testified that based on J.O.'s statement, they believed that an assault family violence by strangulation had occurred. Additionally, although not necessary, there was evidence corroborating J.O.'s account of the assault. *See Marshall*, 479 S.W.3d at 845. The evidence showed that a physical altercation had occurred, the police found a plastic bag near the location of the assault, and that Lara had attempted to flee.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have reasonably concluded beyond a reasonable doubt that Lara committed the offense of assault family violence by strangulation. *See Tex. Penal Code Ann. § 22.01(a)(1), (b)(2)(B); see also Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899 n.13; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 13; *Penagraph*, 623 S.W.2d at 343. Accordingly, we overrule Lara's second issue.

In issue one, Lara complains that the trial court erred when it limited his cross-examination of J.O., thereby violating his rights under the Confrontation Clause of

the Sixth Amendment of the United States Constitution. Specifically, Lara complains that the trial erred by limiting his cross-examination of J.O. concerning the theft of a safe from Lara's residence the day after his arrest. Lara argues that the excluded testimony would have shown that J.O. had a motive to fabricate the charges and have Lara arrested and would have given the jury a reason to question J.O.'s credibility. Lara further argues that the error was harmful because J.O.'s testimony was crucial to the State's case because there were no other witnesses to the alleged strangulation. According to Lara, without J.O. being credible, the State's case would not have been as strong.

The record shows that during a bench conference, Lara's counsel asked that the trial court allow him the opportunity to cross-examine J.O. about the theft of Lara's safe, which Lara's counsel represented had occurred the day after the alleged assault. The trial court questioned the relevance of the theft of Lara's safe because it happened after the alleged assault. Lara's counsel argued that the testimony concerning the theft was relevant because it brought J.O.'s credibility into question and gave her a motive to fabricate the assault charge. The trial court, noting that the defense would have a good argument for admitting the testimony if the theft had happened at or near the time of the alleged assault, denied Lara's counsel's request because the theft occurred after the alleged assault.

To preserve error on Confrontation Clause grounds, a defendant must make a sufficiently specific objection on that basis. *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005); *see also* Tex. R. App. P. 33.1(a)(1). The record shows that during trial, Lara's counsel did not argue that the Confrontation Clause demanded that Lara be given the opportunity to cross-examine J.O. concerning the theft. Rather, Lara's counsel argued that the purpose of admitting the testimony was to attack J.O.'s credibility and to show that she had a motive to fabricate the assault charge. At no point did Lara's counsel articulate that he was objecting to the trial court's ruling regarding the admissibility of the testimony based upon the Confrontation Clause. Thus, Lara failed to clearly articulate his position regarding the Confrontation Clause to the trial court, depriving the trial court of the opportunity to rule upon its admissibility based upon Lara's rationale. *See Reyna*, 168 S.W.3d at 179; *Smallwood v. State*, 471 S.W.3d 601, 614 (Tex. App.—Fort Worth 2015, pet. ref'd).

Because Lara's counsel failed to object that the trial court violated Lara's constitutional right to confront witnesses when it refused to allow Lara's counsel to cross-examine J.O. concerning the theft, Lara has failed to preserve error on Confrontation Clause grounds. *See Reyna*, 168 S.W.3d at 179; *Smallwood*, 471

S.W.3d at 614; *see also* Tex. R. App. P. 33.1(a)(1). We overrule issue one. Having overruled both of Lara's issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN  
Chief Justice

Submitted on April 11, 2017  
Opinion Delivered May 31, 2017  
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.