

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-19-00508-CR**

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**Isidro Mendez Felipe a/k/a Sergio Mendez, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE 390TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-DC-19-904019, THE HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Isidro Mendez Felipe was convicted of the offense of burglary of a habitation and sentenced to eleven years' imprisonment. *See* Tex. Penal Code §§ 12.33, 30.02. On appeal, Felipe argues that the trial court erred by admitting evidence pertaining to three extraneous offenses that he allegedly committed before the offense in question. We will affirm the trial court's judgment of conviction.

**BACKGROUND**

Felipe was charged with the offense of burglary of a habitation. The indictment alleged that the offense occurred in August 2018, that the victim was Ingrid Lorena Roque, and that Felipe "intentionally and knowingly enter[ed] a habitation without the effective consent of" Roque "with the intent to commit assault . . . and did then and there commit assault[]

by intentionally and knowingly threatening another with imminent bodily injury, to wit: by threatening to kill one or more of the occupants of said habitation while holding a weapon.”

During the guilt-innocence phase of the trial, the State called the following witnesses: Roque; Hayde Carbajal, who was Roque’s sister-in-law and who lived with Roque and Roque’s six children at the time of the alleged offense; Officers Justin Crook and Nicholas Brunnet, who were dispatched to Roque’s apartment on the night in question; Officer Raul Arelis, who was dispatched to Roque’s apartment a few months before the incident in question; Diana Triana, who was a certified court interpreter; and Jeannie Tomanetz, who was a victim-services counselor.

Testimony at trial showed that Felipe and Roque had been romantically involved but that the relationship ended in May 2018. One night in August 2018, Roque heard glass breaking in the living room of her apartment. When she investigated, she found Felipe standing in the living room holding what appeared to her to be a rifle. After hearing the disturbance, Carbajal and Roque’s four children also went to the living room to see what was happening. Felipe told everyone in the apartment to hand over their cellphones, but Roque told one of her children to call 911. While in the living room, Felipe pointed the weapon at Roque, threatened to kill everyone in the apartment, and told her that he wanted her to agree to start dating him again.

After being notified about the 911 call, Officers Crook and Brunnet responded to the scene. While walking up to Roque’s apartment, they noticed that the window “had been broken out.” Further, they heard some individuals inside the living room of the apartment and saw a man later identified as Felipe holding a gun. When Felipe noticed the police officers, he dropped the weapon, went to the back of the apartment, jumped off the balcony, and ran to the parking lot. Officer Brunnet pursued Felipe, caught up to him, and handcuffed him.

During the trial, a recording of the 911 call by one of Roque's children was admitted into evidence, and Triana translated portions of the recording for the jury. On the background of the recording, a brief exchange between a man and a woman speaking Spanish can be heard, and Triana testified that she heard the man on the recording telling someone to give him the phone and that she heard someone saying the words "kill," "me," "family," "kids come," and "come" but could not determine whether the man or the woman said the words. In addition, a recording from Officer Brunnet's body camera was admitted into evidence. On the recording, three officers can be seen approaching Roque's apartment and commenting that the front window was "busted." In addition, the recording depicts three individuals identified at trial as Felipe, Roque, and Carbajal inside the living room of Roque's apartment and shows the officers repeatedly telling Felipe to "drop the gun," Felipe running to the back of the apartment, and one of the officers running to the backside of the apartment building, chasing Felipe, and placing him in handcuffs.

In its case-in-chief, the State offered evidence of Felipe's prior extraneous offenses, and Felipe objected to the admission of the evidence. After considering the parties' arguments, the trial court sustained Felipe's objections to evidence of many of the extraneous offenses but allowed the State to present evidence regarding the following three extraneous offenses: (1) Felipe's arrest for assaulting Roque; (2) his breaking Roque's apartment window another time; and (3) his breaking Roque's cell phone.

Regarding the first extraneous offense, Roque testified that in May 2018, three months before the incident in question, Felipe got "very drunk" while she was cooking, grabbed a knife, threatened to kill her, threw her, and injured her arm in the assault. Further, Roque explained that Felipe fled the scene before the police arrived, kept calling her to ask if he could

come back to the apartment, and started to follow her when she left the apartment, and she recalled that the police saw him following her and arrested him.<sup>1</sup> Similarly, Officer Arelis testified that when he responded to Roque's apartment, Roque told him that Felipe pushed her while she was cooking "causing her to fall to the ground and injuring her right elbow." Further, Officer Arelis explained that Felipe kept calling Roque while she was talking to the police, that he later saw a man matching Felipe's description "trying to catch up to" Roque outside of her apartment, and that he arrested Felipe for assault family violence shortly after noticing Felipe walking toward Roque. When describing this same incident, Carbajal stated that Felipe pushed Roque while she was cooking and that Roque's arm was burned during the incident.

Regarding the second extraneous offense, Roque stated that when she was walking home to her apartment a few days before the incident in question, she noticed that the front window to her apartment was broken and that the apartment complex later replaced the window.<sup>2</sup> In her testimony, Carbajal related that the front window had previously been broken and initially indicated that Felipe broke the window but later admitted that she did not know who broke the window.<sup>3</sup>

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<sup>1</sup> Following this exchange, the State asked Roque if she obtained a protective order after this incident. Before Roque answered the question, Felipe objected on the ground that the State had not provided notice of its intent to introduce evidence about a protective order, and the trial court sustained the objection and instructed the jury to disregard the State's question regarding the protective order.

<sup>2</sup> Roque testified that Felipe was the person who broke her window. However, Felipe made a hearsay objection to the response, and the trial court sustained the objection and instructed the jury to disregard Roque's statement.

<sup>3</sup> Although Carbajal testified that she did not know who broke the window and although no additional evidence was introduced indicating that Felipe was responsible for the broken window, we note that the jury was instructed that it could only consider extraneous-offense evidence if it believed beyond a reasonable doubt that Felipe committed the extraneous

Regarding the third extraneous offense, Roque explained that Felipe broke her cell phone in May 2018 after her male cousin called her and that Felipe broke the phone because he was jealous that she was speaking to another man.

After Roque, Carbajal, and Officer Arelis finished testifying, the State called Tomanetz to the stand. In her testimony, Tomanetz described the dynamics involved in domestic violence, explained that some of the prior misconduct exhibited by Felipe was consistent with the dynamics of domestic violence, and stated that the most dangerous time for a victim of domestic violence is when that individual tries to leave the relationship.

After considering the evidence, the jury convicted Felipe of burglary.

## DISCUSSION

In his sole issue on appeal, Felipe argues that the trial court erred by admitting evidence regarding the three extraneous offenses described above because the evidence was impermissible extraneous-offense evidence, because the evidence was not relevant, and because the prejudicial effect of the evidence outweighed any probative value.<sup>4</sup> *See* Tex. R. Evid. 401, 403, 404(b).

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offense and that we assume that juries follow those instructions. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). Accordingly, any error from admitting this evidence would be harmless.

<sup>4</sup> In this issue, Felipe also contends that the trial court erred by concluding that the evidence was admissible under the version of article 38.371 of the Code of Criminal Procedure in effect during the relevant time even though that provision allows parties to present evidence “regarding the nature of the relationship between the actor and the alleged victim.” *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1086, § 1, art. 38.371, 2015 Tex. Gen. Laws 3732, 3732 (amended 2017 and 2019) (current version at Tex. Code Crim. Proc. art. 38.371). Specifically, Felipe argues that the former version of article 38.371 only allowed “nature of the relationship” evidence in trials in which the defendant is alleged to have violated certain types of court orders

## Rules of Evidence 401 and 404(b)

Appellate courts review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *See Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Moreover, the ruling will be upheld provided that the trial court's decision "is reasonably supported by the record and is correct under any theory of law applicable to the case." *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). In addition, an appellate court reviews the trial court's ruling in light of the record before the court "at the time the ruling was made." *Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.).

Under the Rules of Evidence, "[r]elevant evidence is admissible unless" provided otherwise by "the United States or Texas Constitution," "a statute," the Rules of Evidence, or

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or bond conditions or to have committed certain types of assault but did not authorize the admission of that type of evidence for burglary offenses. *See id.* In its appellee's brief, the State asserts that Felipe did not preserve for appellate consideration his assertion that former article 38.371 did not apply in this case. Although the State acknowledges that Felipe presented arguments regarding former article 38.371, the State contends that Felipe did not argue that former article 38.371 did not apply to burglary offenses. *See Tex. R. App. P. 33.1.* Given our ultimate determination that the evidence was admissible under the Rules of Evidence, we need not address whether the evidence was also admissible under former article 38.371 or whether Felipe preserved this complaint for appellate consideration. *See id.* R. 47.1; *see also Tran v. State*, No. 03-17-00155-CR, 2018 WL 3118464, at \*2-4 (Tex. App.—Austin June 26, 2018, pet. ref'd) (mem. op., not designated for publication) (acknowledging that admission of evidence under article 38.371 was improper because statute did not apply to offense in question but noting that appellate courts "uphold [a] trial court's evidentiary ruling if it is correct under any applicable legal theory" and concluding that trial court did not abuse its discretion by admitting evidence regarding prior act of domestic abuse because evidence of arrest "was relevant and admissible under Rule 404(b)").

“other rules prescribed under statutory authority,” and evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and if “the fact is of consequence in determining the action.” Tex. R. Evid. 401, 402. However, “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character,” but this type of “evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* R. 404(b). “Rule 404(b) . . . is a rule of inclusion rather than exclusion,” *Chaparro v. State*, 505 S.W.3d 111, 115-16 (Tex. App.—Amarillo 2016, no pet.), and the “enumerated exceptions” listed under Rule 404(b) “are neither mutually exclusive nor collectively exhaustive,” *Torres v. State*, 543 S.W.3d 404, 420 (Tex. App.—El Paso 2018, pet. ref’d). Accordingly, courts have explained that “extraneous-offense evidence, under Rule 404(b), is admissible to rebut a defensive theory raised in an opening statement or raised by the State’s witnesses during cross-examination.” *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.). “An extraneous offense may be admissible to prove the culpable mental state required for the charged offense if the required intent cannot be inferred from the act itself, or if the accused presents evidence to rebut that inference.” *Sandoval v. State*, 409 S.W.3d 259, 299 (Tex. App.—Austin 2013, no pet.). The admission of extraneous-offense evidence to show intent is proper if the defendant contradicts the State’s evidence showing intent or undermines the State’s evidence during cross-examination of the State’s witnesses. *See id.*

On appeal, Felipe acknowledges that Rule 404(b) allows for the admission of extraneous-offense evidence for certain permissible uses, *see* Tex. R. Evid. 404(b), but he argues that, to be admissible, the extraneous-offense evidence must still be relevant and that the

evidence at issue was not relevant because it did not help prove any fact of consequence or bear upon any of the permissible uses listed in Rule 404(b), *see id.* R. 401, 402. For example, Felipe contends that there was no dispute about his identity as the offender in this case because the testimony from trial, including the testimony from Roque herself, and the body-camera recording established that Felipe was in the apartment with a weapon. Further, Felipe asserts that he did not argue during trial that he was not the aggressor on the night in question and that the admission of the extraneous-offense evidence was unnecessary to establish a motive in this case given the other evidence that was introduced. Along those same lines, Felipe contends that he did not challenge Roque’s credibility or her testimony regarding the fear that she felt during the alleged assault and that, therefore, he did not open the door to the admission of the extraneous-offense evidence. *See Rankin v. State*, 974 S.W.2d 707, 719 (Tex. Crim. App. 1998) (op. on reh’g) (stating that “[i]f the appellate court finds that the proffered evidence would not tend to make the existence of a material fact more or less probable, then the court must conclude that the trial court abused its discretion”); *Clark v. State*, 726 S.W.2d 120, 124 (Tex. Crim. App. 1987) (op. on reh’g) (observing that “in cases where proof of the act itself provides ample evidence of the element to be proved, and such has not been contested by the defendant, extraneous offense evidence is not generally admissible to prove that element”).

As set out above, Felipe was charged with burglary, and the indictment alleged that he intentionally and knowingly entered Roque’s home without her consent with the intent to commit assault and committed assault by intentionally and knowingly threatening another with bodily harm. During her cross-examination by Felipe, Roque repeatedly testified that Felipe did not shoot or otherwise injure her or anyone else in the apartment despite having ample opportunity to do so and even though she grabbed the weapon. Similarly, during his cross-



examination by Felipe, Officer Crook testified that he saw the gun in Felipe's lap when he arrived at the apartment, that the gun was pointing at a door, and that Felipe was not aiming the gun at Roque. In addition, Officer Brunnet testified in his cross-examination by Felipe that the barrel of the weapon "was empty so it was either fired or never loaded" and that he was unaware of anything indicating that the weapon had been fired during any struggle between the parties.

All the above testimony was presented before the trial court made its ruling regarding the admissibility of the extraneous-offense evidence and shows that the issue of Felipe's intent to commit assault when he entered Roque's home was a contested issue. Accordingly, we conclude that the trial court did not abuse its discretion by determining that the evidence was admissible for the noncharacter-conforming purpose of establishing Felipe's intent and that the extraneous-offense evidence was relevant in the sense that the evidence helped to establish a fact of consequence that was in dispute (Felipe's intent). *See* Tex. R. Evid. 401, 404(b); *see also Nash v. State*, Nos. 02-17-00236—00237-CR, 2018 WL 4495440, at \*6 (Tex. App.—Fort Worth Sept. 20, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that evidence of prior instances of domestic violence was admissible under Rule 404(b) to establish, among other things, defendant's intent); *Foster v. State*, No. 01-17-00537-CR, 2018 WL 1914871, at \*3, \*4 (Tex. App.—Houston [1st Dist.] Apr. 24, 2018, pet. ref'd) (mem. op., not designated for publication) (deciding that testimony "recounting prior incidents of domestic violence" was not impermissible character evidence and was admissible under Rule 404(b) because it showed, among other things, defendant's "intent . . . in injuring" victim); *Gipson v. State*, 82 S.W.3d 715, 723 (Tex. App.—Waco 2002, no pet.) (determining "that evidence of . . . prior altercations and violence between [defendant] and the victim was admissible to show [the defendant]'s . . . intent to commit the subsequent acts of violence against the victim").

### **Rule 403**

Having determined that the trial court did not abuse its discretion by deciding that the extraneous-offense evidence was admissible under Rules 401 and 404(b), we now turn to Felipe's assertion that the evidence should have been excluded under Rule 403. Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. "Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. The rule envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (footnotes and internal quotation marks omitted). Accordingly, "the plain language of Rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial. Indeed, all evidence against a defendant is, by its very nature, designed to be prejudicial." *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013) (internal citation omitted). Moreover, reviewing courts should afford trial courts a high level of deference regarding admissibility determinations under Rule 403. *See Robisheaux v. State*, 483 S.W.3d 205, 218 (Tex. App.—Austin 2016, pet. ref'd).

When evaluating the admissibility of evidence under Rule 403, courts should balance the following factors:

- (1) the inherent probative force of the proffered item of evidence along with
- (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of

the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

*Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006) (footnote omitted); *see Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) (explaining that “probative value” refers to how strongly evidence makes existence of fact more or less probable and to how much proponent needs evidence and that “unfair prejudice” considers how likely it is that evidence might result in decision made on improper basis, including emotional one).

Turning to the Rule 403 factors, Felipe argues that the extraneous-offense evidence had no probative value and that the State had no need for the evidence in light of the body-camera recording and the eyewitness testimony. However, as set out earlier, the issue of Felipe’s intent was in dispute, and the extraneous-offense evidence was relevant to that issue. Moreover, all three extraneous offenses occurred within a few months of the charged offense and involved similar allegations. Accordingly, the trial court could have reasonably determined that the probative value of the evidence and the State’s need for the evidence either weighed in favor of admission or were neutral regarding its admission. *Cf. Robinson v. State*, 701 S.W.2d 895, 898-99 (Tex. Crim. App. 1985) (determining that extraneous-offense evidence “had probative value as to appellant’s intent,” in part, where extraneous offense was similar to charged offense and had close proximity in time to charged offense because it occurred between four and six months earlier).

As for the potential of the evidence to suggest a decision on an improper basis, Felipe argues that “the extraneous offense evidence was inherently emotional and fear-provoking” because it was designed “to convince the jury that [he] was a violent and dangerous

abuser on the verge of killing Roque.”<sup>5</sup> See *Gigliobianco*, 210 S.W.3d at 641 (stating that evidence might encourage decision on improper basis if “it arouses the jury’s hostility or sympathy . . . without regard to the logical probative force of the evidence”). For example, Felipe highlights the testimony from Tomanetz, who discussed the dynamics of domestic abuse, stated that Felipe’s prior conduct was consistent with the patterns of domestic abuse, and mentioned that the most dangerous time for a victim of domestic abuse is when he or she leaves the relationship. However, none of the testimony addressing the extraneous offenses was any more inflammatory than the testimony regarding the charged offense. Cf. *Norwood v. State*, No. 03-13-00230-CR, 2014 WL 4058820, at \*5 (Tex. App.—Austin Aug. 15, 2014, pet. ref’d) (mem. op., not designated for publication) (explaining that “[w]hen the extraneous offense is no more heinous than the charged offense, evidence concerning the extraneous offense is unlikely to cause unfair prejudice”). Moreover, during the trial and later in the jury charge, the trial court gave a limiting instruction informing the jury that it could only consider the extraneous-offense evidence for certain purposes, including determining Felipe’s intent on the night in question, and only if the jury determined beyond a reasonable doubt that he committed the prior offenses. See *id.* (noting that “any impermissible inference of character conformity can be minimized by the use of a limiting instruction”). Accordingly, the trial court could have reasonably determined

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<sup>5</sup> As support for this assertion, Felipe points to statements made by the State during its closing argument regarding the extraneous offenses. However, the trial court made its evidentiary ruling before the State made its closing arguments. See *Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.). Moreover, to the extent that Felipe is arguing that he was harmed by the State’s closing arguments, we would only need to address those arguments if we determined that the trial court did abuse its discretion by admitting the extraneous-offense evidence. Cf. *Perez v. State*, 562 S.W.3d 676, 691-92 (Tex. App.—Fort Worth 2018, pet. ref’d) (listing factors to consider when deciding whether erroneous admission of extraneous-offense evidence resulted in harm).

that the potential for the evidence to result in a decision on an improper basis either weighed in favor of admission or was neutral regarding admission.

Regarding the time needed to present the evidence, Felipe argues that “[t]he State expended substantial time during trial developing the extraneous offense evidence and the” testimony by Tomanetz that referenced those prior acts in the context of explaining the dynamics of domestic violence. More specifically, Felipe urges that presenting this evidence took up a full day of the guilt-or-innocence phase of the trial and notes that this phase of the trial only lasted a couple of days. Although the testimony from the four witnesses who discussed the extraneous offenses constituted the majority of one of the reporter’s records in this case, that particular record was only 155 pages long and was significantly shorter than the record from the previous day in which the State presented evidence regarding the charged offense. Moreover, in their testimony, many of those witnesses discussed other topics, including the charged offense, and multiple hearings regarding the admissibility of evidence were held outside the presence of the jury, which reduced the amount of time spent presenting the extraneous-offense evidence to the jury. For these reasons, the trial court could have reasonably concluded that the time needed to develop the three extraneous offenses was neutral regarding the admission of the evidence. *Cf. McGregor v. State*, 394 S.W.3d 90, 121-22 (Tex. App.—Houston [1st Dist.] 2012, pet. ref’d) (concluding that fact that evidence of extraneous offenses constituted one-third of trial weighed against admissibility).

Turning to the potential for the evidence to confuse the jury, we note that the evidence pertained to three discrete acts between Felipe and Roque occurring days and months before the incident in question. Additionally, as discussed above, although multiple witnesses presented the extraneous-offense evidence, significantly less time was spent developing the

extraneous-offense evidence than was spent developing the evidence pertaining to the charged offense. *See Gigliobianco*, 210 S.W.3d at 641, 642 (explaining that presentation “that consumes an inordinate amount of time” might “confuse or distract jury from the main issues”). Accordingly, the trial court could have determined that this factor either was neutral regarding admission or weighed in favor of admission of the evidence.

Finally, regarding the potential for the jury to give undue weight to the evidence, the trial court could have reasonably concluded that the jury would not give undue weight to the evidence given that the evidence did not address a complex subject matter. *Cf. id.* at 641 (explaining that scientific evidence is one type of evidence that might mislead jury not properly equipped to consider probative value). Therefore, the trial court could have reasonably determined that this factor weighed in favor of admission.

Given our standard of review, the presumption in favor of admissibility, and the resolution of the factors discussed above, we cannot conclude that the trial court abused its discretion by overruling Felipe’s Rule 403 objection. *Cf. Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at \*12 (Tex. App.—Austin May 24, 2018, pet. granted) (mem. op., not designated for publication) (affirming trial court’s ruling denying Rule 403 objection when majority of factors weighed in favor of admission of evidence).

For all these reasons, we overrule Felipe’s issue on appeal.

## **CONCLUSION**

Having overruled Felipe’s issue on appeal, we affirm the trial court’s judgment of conviction.

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Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: July 8, 2020

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