COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| IN RE: | § | No. 08-21-00181-CV |
| THE COMMITEMENT OF | § | Appeal from the |
| WILLIAM EARL FLETCHER. | § | 52nd Judicial District Court |
| | § | of Coryell County, Texas |
| | § | (TC# DC-20-50809) |

**O P I N I O N**

The State of Texas filed a petition to commit Appellant William Earl Fletcher as a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.153 (the SVP Act). At trial, a jury unanimously found, beyond a reasonable doubt, that Fletcher was a sexually violent predator. The trial court signed a judgment and order of commitment in accordance with the jury's verdict, and, after the trial court denied his motion for new trial, Appellant timely appealed.

In three issues, Appellant contends the trial court reversibly erred in: (1) prohibiting Appellant from discussing with the venire panel the applicable burden of proof; (2) sustaining the State's objection to Appellant's discussion of the burden of proof during his opening statement;

and (3) thereafter, erroneously instructing the jury on the burden of proof during Appellant's opening statement. We affirm the trial court's judgment and order of civil commitment.[1]

## I. BACKGROUND

### A. Statutory framework

To establish that an individual is an SVP, the State must prove the individual: "(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." TEX. HEALTH & SAFETY CODE ANN. § 841.003(a). Under the first element of the SVP statute, a person is a "repeat sexually violent offender" if "the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses . . . ." *Id.* § 841.003(b). And as relevant here, sexual assault and aggravated sexual assault are sexually violent offenses. *Id.* § 841.002(8)(A); *see also* TEX. PENAL CODE ANN. §§ 22.011, 22.021. Under the second element of the SVP statute, a "[b]ehavioral abnormality" is "a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." TEX. HEALTH & SAFETY CODE ANN. § 841.002(2).

The State bears the burden of proving these two elements beyond a reasonable doubt. TEX. HEALTH & SAFETY CODE ANN. § 841.062.

### B. The procedural history

Appellant William Earl Fletcher was convicted of three sexually violent offenses for which he was incarcerated in 1983, 1988, and 1994, respectively. Those offenses included rape,

[1] This case was transferred from our sister court in Waco (10th District), and we decide it in accordance with the precedent of that court to the extent required by TEX. R. APP. P. 41.3.

aggravated sexual assault, and sexual assault. In 2020, and before his release from prison, the State petitioned to civilly commit Appellant under the SVP Act, which permits commitment of individuals upon a finding that they (1) are a "repeat sexually violent offender"; and (2) suffer "from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." TEX. HEALTH & SAFETY CODE ANN. § 841.003(a)(1), (2).

The case was tried to a jury over three days. After the close of evidence, the trial court read the court's charge to the jury. Among other instructions, the trial court informed the jury it had found as a matter of law that Fletcher was a repeat sexually violent offender, and the jury was instructed that the State had satisfied the first required element. As to the second required element, the jury was alternatively instructed, that if all twelve members believed, beyond a reasonable doubt, that the State had proven that Appellant suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence, it was instructed to answer the question yes as to that element; or, if ten or more jurors believed the State had failed to prove beyond a reasonable doubt that Appellant suffered from such a behavioral abnormality, it was instructed to answer the question no.

After deliberating, the jury returned a unanimous verdict, finding beyond a reasonable doubt that Fletcher was a sexually violent predator. The trial court subsequently entered a final judgment and order civilly committing Fletcher under the SVP Act. On appeal, Appellant challenges certain rulings made during various phases of the jury trial. Accordingly, we include a detailed review of the trial record relevant to those issues raised on appeal.

## C. The trial

### 1. Voir dire

Before the parties' examination of the venire, the trial court instructed the jury on the State's burden of proof as follows:

> [T]he standard of proof that the State has to meet in this case is the criminal standard . . . . There are different standards of proof in a civil case, preponderance of the evidence, clear and convincing evidence. But the standard in a criminal case is proof beyond a reasonable doubt. No one charged with a crime can be convicted unless each element of the offense is proved beyond a reasonable doubt. That is the standard that applies in this case . . . . The State has to prove their case by the standard called proof beyond a reasonable doubt.
>
> What is proof beyond a reasonable doubt? Well, you get to tell us. There is no legal definition of what constitutes proof beyond a reasonable doubt. It is the highest standard of proof that we have [in] our system of jurisprudence. But we leave it up to each individual juror to determine for themselves if that standard has been met. . . . And after hearing all those [20 or 30] witnesses that the State or the defense brought you, you might think ["]I don't care how much information they presented to me, I'm not convinced beyond a reasonable doubt of the verdict.["] If that's the case then you should answer the question ["]no["] as to whether the man is a violent sexual predator or not. On the other hand, at the end of those 20 witnesses, there may be one that you heard and convinced you beyond a reasonable doubt that he is a violent sexual predator. In that case, if you're convinced beyond a reasonable doubt, then you should answer the question ["]yes["]. It is not determined by how much information you hear.

Echoing this instruction, the prosecutor told the venire panel it was the State's burden to prove the case beyond a reasonable doubt, and further adding, "like the Judge said, it's what it means to you. It doesn't have a definition." As an example, the prosecutor asked whether someone could be convinced of his or her birth date beyond a reasonable doubt, even though he or she did not remember being born. Through questioning of prospective juror number sixteen, the prosecutor posited that a person could be convinced, beyond a reasonable doubt, of their own date of birth based on representations made by his or her parents, as well as by corroborating records (such as

a birth certificate), if the person found his or her parents and the corroborative records credible. The prosecutor explained further:

> But it's beyond a reasonable doubt. It's not beyond all doubt. It's not beyond an unreasonable doubt. . . . And that—we know that is not one hundred percent proof of something because—did anybody recognize Mr. Fletcher when he stood up? No. So if you had one hundred percent proof of something, you are typically a witness, right? . . . So we know it's not 100 percent proof. It's something lower than that, but it's what it means to you in this case.

Thereafter, the prosecutor urged venire members, if seated on the jury, to focus on the quality, not the quantity, of the evidence presented to them, reiterating that whether the State met its burden depended on whether the jury believed the evidence, regardless of its quantity.

During his discussion of the burden of proof, Fletcher's counsel followed up on the prosecutor's previous "birth date" example. Returning to juror number sixteen, who was questioned by the prosecutor, she asked whether she would still believe, beyond a reasonable doubt, that her birthday was on January 14th, the date she previously provided, if her sibling or other family member showed her adoption papers with a different date of birth. The prospective juror answered that she did not know and would need "more evidence than that." To this response, Fletcher's counsel countered:

> I would consider that to be reasonable doubt actually, what you just said. . . . There's going to be information where you may—one person is going to say something in this case and there might be controverted or different information that's told. And so what I'm trying to get you all to understand is that beyond a reasonable doubt [] means then you can't have a question about whether the evidence is true or not.

Immediately thereafter, counsel asked, "So is there anyone here who will have trouble requiring the prosecutor to prove its [sic] case against Mr. Fletcher beyond a reasonable doubt?" No one responded. Fletcher's counsel then continued her presentation on the applicable burden of proof:

> We've talked about [sic] there's no real definition for it. But do you all understand by a show of hands that beyond a reasonable doubt is the highest level of proof that a prosecutor or petitioner would have against this respondent? . . . In some civil cases, the burden of proof is the responsibility of a plaintiff, and that burden of proof could be by a preponderance of the evidence, and that's a civil case, a regular civil case, maybe an automobile accident. . . . [T]hey show that 51 percent is the fault of the defendant and in that particular case preponderance of the evidence, 51 percent, they win.

At that point, the trial court interjected:

> [Trial Court]: Counsel, counsel, let me correct you. I've heard that phrase all my life in the legal profession.
>
> [Fletcher's counsel]: Yes, sir.
>
> [Trial Court]: There's not a single case or a statute that determines a standard of proof based on percentage. How in the world do you know if you believe something by 51 percent? There's no way to know. So it's not percentage. It's your degree of confidence in the evidence that you heard whether it's one witness or a hundred witnesses. So there's not a percentage involved here at all. Okay. So it's not like proof beyond a reasonable doubt has to be 80 percent certainty. It doesn't work that way. Everybody understand that? Okay. No more percentages.
>
> [Fletcher's counsel]: Well, does everyone understand that in a case like this, this serious type of case, beyond a reasonable doubt is the highest level of proof in which the prosecutor is going to be put to? There's no higher level beyond—does everyone understand beyond a reasonable doubt is in criminal cases, in capital murder cases? . . . That is the seriousness and the level in which they have to prove. So is—is anyone here going to require the prosecutor to show less than beyond a reasonable doubt? Is there anyone here going [sic] to require not a percentage but less than? Alright. Thank you very much. I'm going to move one because I had some more percentages. I did. All right.

**2. Fletcher's opening statement**

Fletcher's other counsel gave an opening statement. He began by discussing his client's due-process rights, specifically with respect to the applicable standard of proof and what he contended was the legal definition of "beyond a reasonable doubt," as follows:

> The Constitution then allows Mr. Fletcher here of [sic] certain due process before anyone tries to take any of these foundational beliefs and rights from him. . . . That due process requires you to find to a level of certainty what they say is true. And it's a very high burden. You heard about it yesterday. Beyond a reasonable doubt. And it is not to be trivialized. It's not the same thing to say, oh, my birthday is in

> June or July. That means nothing in the grand scheme of things. It affects none of your liberty interest. . . . And, therefore, it's a much higher standard that that [sic] of proving a divorce. The Supreme Court in 1970 actually looked at that. They gave us some guidance. They talked about what the level is. It's reaching a level of near certainty that what they tell you is true near certainty.

The State objected, stating there "is no definition of beyond a reasonable doubt," to which the trial court responded, "Sustained. You're arguing a case." Fletcher's counsel replied that he was not giving the jury a definition but "trying to tell them about the standard of proof," and "the level that they said needed to be reached." The trial court next instructed the jury and counsel as follows:

> Ladies and gentlemen, the standard of proof in this case is proof beyond a reasonable doubt. You get to determine what that is. Whatever you think it is, that's what it is. That is the standard of proof. Don't argue your case now. Give an opening statement of what you think your evidence is going to show.

Fletcher's counsel replied, "Thank you, [y]our Honor." He continued with his opening statement, discussing his theory of the case—namely, that the evidence would show Fletcher was sufficiently reformed to no longer pose the kind of threat that would qualify him as a sexually violent predator.

**3. The testimonial evidence**

***a. Dr. Randall Price's testimony***

As its first witness, the State called Dr. Randall Price, a board-certified forensic psychologist. After detailing his training and experience as a specialist in sex-offender risk assessment, Dr. Price testified he met with and conducted an evaluation of Fletcher for the purpose of determining whether he suffered from a behavioral abnormality that subjected him to civil commitment under the SVP Act. As a forensic psychologist applying clinical principles to legal questions, Dr. Price testified he was familiar with the statutory definition of "behavioral abnormality," a legal term defined by the SVP Act. As explained by Dr. Price, a behavioral abnormality is a congenital or acquired condition (i.e., a condition one is either born with through

genetic transmission of traits or prenatal events, or acquires in life via learning, observing, and experiencing behavioral consequences) that affects a person's emotional or volitional capacity (i.e., the person's ability to control their emotions and behavior), predisposing him or her to commit a predatory act of sexual violence. Dr. Price testified that "likely" is not defined by the SVP Act, and he considered the term to mean "more than just possible." As to the nature of his assessment, Dr. Price explained that he could not predict the future to say for certain whether Fletcher would commit another sexually violent offense; rather, his assessment was more akin to a "forecast" of whether Fletcher would commit another such offense. Dr. Price had been conducting behavioral-abnormality evaluations for the past twenty years.

*i. Fletcher's criminal history*

Through Dr. Price's testimony (regarding his review of various documents relevant to Fletcher's medical and criminal history, to include Fletcher's pretrial deposition, as well as his own interview with Fletcher), the jury was presented with information about Fletcher's criminal history. In 1983, a mere eight days after being released on mandatory supervision for a previous crime, then-twenty-four-year-old Fletcher attacked a woman (a stranger) who was walking along the street. Fletcher grabbed the woman from behind, pulled her to the back of a church, raped her, and told her he had a gun and would kill her if she resisted. He then took her to a vacant apartment and raped her a second time. When Fletcher fell asleep, the woman escaped and Fletcher was subsequently arrested, convicted, and sent to prison.

In discussing the offense with Dr. Price, Fletcher stated the woman was a prostitute, whom he had met at a club. He claimed he slapped the woman after she put her hand in his pocket. She then took him to an apartment. There, she robbed him while he slept and then called the police. During his deposition, however, Fletcher stated he took the woman behind the church and "made

love." Dr. Price testified that Fletcher, who was by then receiving sex-offender treatment, minimized the offense by characterizing it as being consensual, demonstrating he refused to take responsibility for his criminal, sexually violent conduct.

While serving time in prison for that offense, Fletcher was disciplined for exposing himself to a female correctional officer. Five days after his release from prison, he was again arrested (and subsequently convicted) for aggravated sexual assault after raping a woman he had become acquainted with at a nightclub. Fletcher had asked the woman for a ride; at some point, he asked her to stop the car, grabbed her and twisted her arm behind her (to the point where he either broke her arm or dislocated her elbow), choked her until she lost consciousness, and raped her while she was unconscious.

Again, Fletcher described his interaction with the woman as consensual, stating during his deposition that the woman had let him kiss her, took off her own clothes, and had sex with him in the car.

While serving a twenty five-year sentence for this second rape, Fletcher (then fifty-five years old) raped a male inmate, threatening him with a ballpoint pen to facilitate the assault. Fletcher denied having committed this offense and claimed that the victim and witnesses all "lied on him." Fletcher was convicted for the rape of his fellow inmate and was sentenced to an additional ten years' confinement.

Thereafter, Fletcher was again disciplined for exposing himself to a correctional officer and masturbating, which he denied having done at trial; he was also disciplined on more-than thirty occasions for various prison-rule violations, including fighting, possessing a weapon, and possessing other contraband. The most recent disciplinary action for fighting occurred after the

State filed its petition to commit Fletcher as an SVP. Nearly forty years after his first sexually violent offense, Fletcher continued to deny or minimize his crimes.

Fletcher's other criminal history, beginning at adolescence, included crimes such as burglary, robbery, unauthorized use of a motor vehicle, and unlawful possession of a firearm.

*ii. Dr. Price's opinion*

Based on his evaluation and application of the various assessment tools, risk factors, and protective factors, as discussed below, Dr. Price opined that Fletcher suffered from a behavioral abnormality under the SVP Act. He also testified he additionally considered the opinion of Dr. Turner, the Texas Department of Criminal Justice (TDCJ) multidisciplinary team doctor, who pre-screened Fletcher for possible commitment, who determined that Fletcher suffered from a behavioral abnormality.

In arriving at his opinion about Fletcher's behavioral abnormality, Dr. Price interviewed Fletcher and reviewed extensive documents concerning Fletcher's criminal and medical history, his deposition, and prior psychological evaluations, as well as progress notes from his sex-offender-treatment while in prison. In addition to conducting a clinical interview of Fletcher and a mental-status exam, Dr. Price also employed two testing instruments commonly used by experts in evaluating sex offenders for potential behavioral abnormalities under the SVP Act: (1) the Static-99R, which assesses an offender's risk for being re-convicted of a sex offense; and (2) the Psychopathy Checklist Revised (PCLR), which measures a person's psychopathy along a continuum.

Dr. Price diagnosed Fletcher with unspecified paraphilia and antisocial personality disorder, both congenital or acquired conditions affecting Fletcher's volitional and emotional capacity and which were manifested in the following, respectively: (1) Fletcher's history of sexual

assault on both genders, both in an institutional setting and in the free world, and (2) Fletcher's history of his inability to follow the rules of society, which persisted even after his institutionalization. Fletcher's exhibited sexual deviance, his use of physical violence or coercion to carry out his attacks against his victims, his propensity for choosing strangers or mere acquaintances as his victims (thus expanding the pool of potential victims), and his refusal to control his behavior during and following the imposition of punishment all demonstrated an elevated risk of sexual recidivism. Fletcher's inability or refusal to admit his offenses (or his minimization of them) evinced his lack of amenability to treatment, further increasing his risk, for if, Dr. Price explained, the offender does not admit their behavior was wrong in the first place, there will be nothing for them to change. Fletcher's abuse of alcohol at the time of the offenses was also a risk factor because it helped disinhibit him from his impulses. The especially short period of time between his release from prison and his next attack on a victim was further indicative of Fletcher's lack of volitional capacity.

Fletcher's measure of psychopathy under the PCL-R (a score of thirty-one) indicated a presence of psychopathic traits in the 88th percentile; his Static-99 score of four (adjusted downward by three points due to his more-advanced age of sixty-two), indicated an at least above-average risk for sexual recidivism when compared to other sex offenders. Still, other risk factors, such as Fletcher's lack of self-awareness, difficulties in progressing through sex-offender treatment, failure to form a significant bond with an inmate, lack of empathy for his victims, limited employment history, and alcohol dependance all operated to further increase his risk of committing another sexually violent offense. After accounting for Fletcher's relatively advanced age, lack of mental illness, and completion of sex-offender treatment, Dr. Price concluded that Fletcher's risk factors still "far exceed[ed]" any protective factors that could reduce his risk.

***b. Fletcher's trial testimony.***

Following Dr. Price's testimony, the State called Fletcher to the stand. Among other things, Fletcher testified about his criminal history. Fletcher testified he was "bad" growing up and had been to prison a total of six times. When asked about his sexual criminal history, Fletcher denied having committed the second rape, explaining that he hit the victim in the face so hard she started foaming at the mouth, and consequently, he "never penetrated" because he thought there was "no use." Fletcher vacillated about the injuries he inflicted on this second victim—he first stated he "actually broke" the woman's arm, but then denied having done so, maintaining he was convicted only because he grabbed her by the neck, pushed her, and pulled her arm. Although Fletcher testified that this woman was in "tremendous pain" as a result of the injuries he inflicted on her, he admitted that, at that moment, he thought only of "making love to her without consent." Fletcher testified he never committed a sexual assault again, claiming the third, male victim falsely accused him of rape.

When asked if he had a problem controlling his temper and sexual impulses, Fletcher responded that he did not. And despite his denials about having committed the second and third sexual offenses, Fletcher insisted he had taken responsibility for them, that he would not re-offend, and that he deserved a chance to prove he was not a sexually violent predator.

***c. The jury verdict***

After the close of evidence, the State moved for a directed verdict on the first element, that is, whether Fletcher was a repeat sexually violent offender. The State pointed out that evidence had been admitted, in the form of penitentiary packets, establishing that Fletcher had been convicted of three sexually violent offenses. As well, the State argued that Fletcher testified to his conviction history and sentencing history during his testimony. Appellant objected on the grounds

that the SVP Act required a jury decision on both elements. Eventually, the trial court read the court's charge to the jury. Among other instructions, the trial court informed the jury it had found as a matter of law that Fletcher was a repeat, sexually violent offender, and the jury was instructed that the State had satisfied the first required element. Next, both sides presented their closing arguments. Fletcher's counsel did not address the applicable burden of proof during its argument. Following deliberations, the jury returned a unanimous verdict, finding beyond a reasonable doubt that Fletcher was a sexually violent predator.

The trial court subsequently entered a final judgment and order civilly committing Fletcher under the SVP Act. This appeal followed.

## II. LIMITATIONS IMPOSED ON VOIR DIRE

In his first issue, Fletcher contends the trial court impermissibly foreclosed a proper line of questioning when it prevented him from discussing with the venire panel the applicable, beyond-a-reasonable-doubt burden of proof. The State counters that the trial court did not foreclose questioning on the topic, nor did Fletcher preserve error by objecting or presenting his proposed questions to the trial court. For the reasons below, we overrule Fletcher's first issue.

### A. Standard of review and applicable law

"Litigants have the right to question potential jurors to discover biases and to properly use peremptory challenges." *In re Commitment of Hill*, 334 S.W.3d 226, 228 (Tex. 2011) (citing *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749-50 (Tex. 2006)). This right is "constrained by reasonable trial court control," and as such, we review voir dire limitation issues for abuse of discretion. *Id* at 753. "A party preserves error by a timely request that makes clear—by words or context—the grounds for the request and by obtaining a ruling on that request, whether express or implicit." *Hill*, 334 S.W.3d at 229 (citing TEX. R. APP. P. 33.1).

**B. Error preservation**

A party who asks a specific and proper question, stating the basis on which he seeks to ask that question, and obtains an adverse ruling from the trial court properly preserves error on an improper limitation of his voir dire examination of the venire. *See Id.* (citing *Babcock v. Nw. Mem'l Hosp*., 767 S.W.2d 705, 709 (Tex. 1989)). Here, Fletcher failed to present to the trial court a specific question for the trial court's consideration. Nor does he now identify on appeal what question(s) he was prevented from posing to the venire. Instead, when the trial court informed Fletcher that the manner in which he attempted to define "preponderance of the evidence" was defective because it was tied to a specific percentage, Fletcher, without objection to the trial court's delineation of permissible discussion, continued with his presentation on the beyond-a-reasonable-doubt standard. If there was a specific question Fletcher was disallowed from asking, it does not appear on the record, nor is it otherwise presented on appeal.

Moreover, "[w]hen the trial court places no absolute limitation on the underlying substance of a [party's] voir dire question, counsel must rephrase his improperly phrased query or waive the voir dire restriction." *Garcia v. State*, No. 08-99-00175-CR, 2000 WL 1514109, at *1 (Tex. App.— El Paso, Oct. 12, 2000, no pet.) (not designated for publication) (citing *Howard v. State,* 941 S.W.2d 102, 108-11 (Tex.Crim.App.1996) (where defense counsel was allowed to, but did not, rephrase questions regarding special issues in a death-penalty case, no error was preserved for review)); *Soria v. State,* 933 S.W.2d 46, 65 (Tex. Crim. App.1996), *cert. denied,* 520 U.S. 1253 (1997); *Osorio v. State,* 994 S.W.2d 249, 251-52 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (where, in drug prosecution, defense counsel sought to ask jury panel if they thought defendant was guilty because defendant was Columbian and cocaine was involved, error was not preserved because defense counsel was allowed to but did not rephrase in order to test any jury

member's bias).

As the State points out, the trial court did not foreclose the discussion on the topic of "beyond a reasonable doubt." The trial court simply disallowed the specific phrasing of Fletcher's discussions regarding a different standard of proof (preponderance of the evidence) attendant to his discussion on the applicable burden of proof in an SVP case. And it is at least within the zone of reasonable disagreement that, in an effort to define "beyond a reasonable doubt," Fletcher's attempted characterization of the standards of proof as corresponding with a specific percentage was misleading or incorrect. *See Paulson v. State,* 28 S.W.3d 570, 573 (Tex. Crim. App. 2000) (overruling *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) and holding, "It is ill-advised for us to require trial courts to provide the jury with a redundant, confusing, and logically-flawed definition when the Constitution does not require it, no Texas statute mandates it, and over a hundred years of pre-*Geesa* Texas precedent discourages it."). As the trial court noted, it is the jury's *degree of confidence* in the outcome, based on its assessment of the credibility and weight of the evidence, that determines whether "preponderance of the evidence" or "beyond a reasonable doubt" has been met. *See State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam) (adopting "clear and convincing evidence" as the standard of proof in civil-commitment proceedings to require evidence weighing "heavier than" the preponderance-of-the-evidence standard requiring "merely the greater weight of the credible evidence"). The trial court thus did not abuse its discretion in asking Fletcher to confine his discussion on the applicable burden of proof to the comparing and contrasting of different standards of proof in terms exclusive of specific percentages.

As such, it was incumbent on Fletcher to rephrase either his presentation or questions, in compliance with the trial court's delineations, or otherwise waive his complaint. *See Garcia*, 2000

WL 1514109, at *2 (holding Appellant waived voir dire complaint by failing to rephrase his question after the trial court defined the parameters of an appropriate inquiry).

**C. Any error in limiting Fletcher's voir dire was harmless**

Even if Fletcher had not waived his claim, the record does not demonstrate that he was harmed, or sufficiently harmed, to require reversal. *See Rich v. State*, 160 S.W.3d 575, 577–78 (Tex. Crim. App. 2005) (holding that applicable harm standard for disallowance of proper voir dire question to entire venire is whether the error had a substantial and injurious effect or influence in determining the jury's verdict, in light of everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, the jury instructions, the State's theory and any defensive theories, closing arguments, and whether the State emphasized the error).

While Fletcher asserts that he was harmed because the evidence was not "so one-sided that the jury could not have reasonably found that the State failed to prove its case beyond a reasonable doubt," he does not articulate anything in the law or record that supports this assertion. Our review of the record shows that the State's case was strong—Fletcher had an extensive criminal history comprised of non-petty crimes, which inception occurred when Fletcher was a juvenile; demonstrative of his antisocial personality disorder, even at sixty two years of age, Fletcher continued to fail to confine his behavior to comply with prison rules, even incurring a disciplinary citation for fighting after the State filed its petition for his commitment as an SVP ; several decades after his first sexually violent offense, Fletcher continued to deny or minimize his crimes; and Fletcher's sexual criminal history was particularly callous, violent, and dangerous where, as Dr. Price explained, Fletcher cast a wide net of potential victims, to include strangers, and established

a pattern of using physical violence and coercion to carry out his sexual assault of men and women alike.

Importantly, the record shows that Fletcher was not barred from generally discussing "beyond a reasonable doubt" or pointing out the standard's onerous requirements relative to lower standards of proof. Indeed, after the trial court itself explained to the jury that it could decide the State failed to meets its burden even if it presented twenty or thirty witnesses, and that "beyond a reasonable doubt" was the "highest standard of proof" in existence in our jurisprudence, Fletcher essentially defined the standard as prohibiting *any* doubt when he told the jury the standard required that the jury "can't have a question about whether the evidence is true or not." And while Fletcher cites to *Fuller v. State*, 363 S.W.3d 583, 584-87 (Tex. Crim. App. 2012), in support of his claim that the trial court impermissibly restricted his line of questioning on the issue, we are not convinced that it goes as far as Fletcher contends. *Fuller* simply stands for the proposition that: (1) the topic of "beyond a reasonable doubt" is a proper area of inquiry; and (2) discussion of the different standards' requirements relative to each other is proper, thus allowing a party to explore the jury's understanding of the standard as being "*at least* [] a more onerous standard of proof than preponderance of the evidence and clear and convincing evidence." *Fuller*, 363 S.W.3d 583, 587 (holding it was appropriate for defendant to explain that proof beyond a reasonable doubt constituted the *level of confidence* under a law that was higher than both preponderance of evidence and clear and convincing evidence). The record demonstrates that Fletcher was permitted to do this much when he asked the venire whether it understood that "beyond reasonable doubt is the highest level of proof that a prosecutor or petitioner would have against [a defendant]," explained that in "this serious type of case, beyond a reasonable doubt is the *highest* level of proof in which

a prosecutor is going to be put to," and reiterated that there is "no higher level" than beyond a reasonable doubt, which applied even in capital murder cases.

We overrule Fletcher's first issue.

## III. LIMITATIONS IMPOSED ON THE OPENING STATEMENT

In his second issue, Fletcher maintains the trial court committed reversible error by sustaining the State's objection during Fletcher's opening statement wherein he attempted to define "beyond a reasonable doubt." The State counters that Fletcher's appellate claim was waived because it does not comport with this objection at trial and that, even if the claim had been preserved, the trial court correctly sustained the State's objection. We overrule Fletcher's second issue.

### A. Standard of review and applicable law

The purpose of an opening statement is to briefly state the nature of the party's claim or defense, what the party expects to prove, and the relief sought. *See In re Commitment of Young*, 410 S.W.3d 542, 555 (Tex. App.—Beaumont 2013, no pet.); TEX. R. CIV. P. 265(a), (c).

A trial court has broad discretion to limit opening statements, and we review its exercise of discretion in this regard for abuse of discretion. *See Seliger v. Ethiopian Evangelical Church*, No. 03-14-00621-CV, 2016 WL 3677618, at *2 n.8 (Tex. App.—Austin, July 7, 2016, no pet.) (citing *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ. n.r.e.)).

### B. Error preservation

On appeal, Fletcher contends he was attempting to present a defensive theory during his opening statement, describing that "the State could not prove its case beyond a reasonable doubt." At trial, however, when the State objected that Fletcher was attempting to define during opening

statement a standard that had "no definition," Fletcher replied that he was "trying to tell [the jury] about the standard of proof" and "the level that [the State] said needed to be reached." And when the trial court sustained the objection and instructed Fletcher to make an opening statement (rather than a jury argument), Fletcher did not object to the trial court's ruling but simply responded, "Thank you, Your Honor," and proceeded to state his theory of case to the jury—namely, that the evidence would show he was sufficiently reformed to no longer pose the kind of threat that would qualify him as a sexually violent predator.

To preserve error on an opening-statement claim, a party must object and pursue his objection to an adverse ruling. *See Estrada v. State*, 313 S.W.3d 274, 303 (Tex. Crim. App. 2010) (preservation requirement applies to complaints concerning an opening statement). Further, error alleged on appeal must comport with the request, objection, or motion submitted to the trial court so as to apprise the trial judge of the precise nature of the error in time to do something about it. *See Pena v. State*, 285 S.W.3d 459, 463-64 (Tex. Crim. App. 2009); *see also Heidelberg v. State,* 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) (legal basis of complaint raised on appeal cannot vary from that raised at trial); TEX. R. APP. P. 33.1(a). Here, Fletcher failed to raise an objection or pursue it to an adverse ruling. Nor did he inform the court that he was attempting to present the theory of the case he now offers on appeal or otherwise explain how his discussions on the burden of proof did not exceed the bounds of a permissible opening statement. Thus, he failed to preserve error. *See Estrada*, 313 S.W.3d at 303 (appellant failed to preserve opening-statement-error claim where he neither objected nor asked for a mistrial); *In re Commitment of Camarillo*, No. 09- 12- 00304-CV, 2013 WL 2732662, at *2 (Tex. App.—Beaumont, June 13, 2013, no pet.) (mem. op.) (where trial court instructed appellant's counsel in SVP case to "save" for jury argument his theory on what "beyond a reasonable doubt" meant and not discuss it during opening

statement, appellant failed to preserve error by failing to object and instead replied, "Yes, [y]our Honor.").

**C. Any error in limiting Fletcher's opening statement was harmless**

Even if Fletcher had preserved his claim, assuming (without deciding) that the trial court abused its discretion in sustaining the State's objection during Fletcher's opening statement, Fletcher fails to articulate any basis for reversal.

First, we note that Fletcher, citing to *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000), *Culton v. State*, 95 S.W.3d 401, 404-46 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd), and *Billy v. State*, 77 S.W.3d 427, 429-31 (Tex. App.—Dallas 2002, pet. ref'd), rests his appellate claim solely on legal authority standing for the proposition that a trial court errs in disallowing a criminal defendant from arguing to the jury a non-misleading definition of "beyond a reasonable doubt" during *jury argument*. But here, reviewing the trial court's ruling in context, the trial court did not forbid Fletcher from arguing to the jury the burden of proof at *any* point of the trial; rather, the judge merely instructed him not to do so during *opening statement*.

In this regard, Fletcher does not explain how this limitation caused the rendition of an improper judgment or likely prevented him from properly presenting his case to this Court for appellate review. *See* TEX. R. APP. P. 44.1(a) (standard of reversible error in civil cases); *Camarillo*, 2013 WL 2732662 at *2 (error in limiting opening statement is reversible if calculated to cause and probably did cause rendition of improper judgment and preclusion of proper presentation of case on appeal). As noted above, following the trial court's ruling, Fletcher summarized his defense for the jury—i.e., that the State's evidence relied on events so stale that it could not prove he was sufficiently dangerous to subject him to civil commitment under the SVP Act—and thus, he was not deprived of an opportunity to properly present his opening statement.

Fletcher made no attempt to argue his theory on the burden of proof during jury argument, and he consequently cannot demonstrate that trial court would have improperly limited his discussion of the burden of proof at a more appropriate stage of the trial.

Moreover, as we have discussed with respect to Fletcher's first issue, the State presented a strong case, and Fletcher fails to explain or demonstrate how, considering the entire record, the trial court's limitation as to the *timing* of his argument on the State's meeting of the burden of proof caused the jury to render an improper judgment. On this point, we are unpersuaded by Fletcher's assertion that the trial court's limitation allowed the jury to apply the evidence against a definition of beyond a reasonable doubt that could mean "whatever each individual juror thinks it means except '100 percent proof'", which contention we address further in our discussion of Fletcher's third final issue below.

We overrule Fletcher's second issue.

## IV. THE JURY INSTRUCTION

In his third issue, Fletcher contends the trial court's comments, wherein it instructed the jury that the meaning of beyond a reasonable doubt was "whatever you think it is," was reversible error. The State responds that Fletcher failed to preserve his complaint by objecting to the trial court's comments, and that, alternatively, he fails to show harm sufficient to warrant reversal. We agree no harm was established.

### A. Standard of review and applicable law

We review a trial court's allegedly improper comments as a pure question of law and in the context of the entire record. *See In re Commitment of Winkle*, 434 S.W.3d 300, 313 (Tex. App.—Beaumont 2014, pet. denied).

**B. Error preservation**

"To preserve error with respect to complaints about a trial court's comments during a trial, [he or she] must object when the comment occurs and request an instruction, unless [a] proper instruction cannot render the comment harmless." *Winkle*, 434 S.W.3d at 313.

Acknowledging that he failed to object to the trial court's post-ruling comments during his opening statement—wherein the trial court instructed the jury that the burden of proof was beyond a reasonable doubt and that the jury was to construe the burden as "whatever you think it is"— Fletcher urges us to reach the merits of his claim by applying the doctrine of "fundamental error." As the State correctly points out, this doctrine is inapplicable to civil cases, and proceedings under the SVP Act are civil, rather than criminal or quasi-criminal, in nature. *See In re Commitment of Martinez*, 98 S.W.3d 373, 375 (Tex. App.—Beaumont 2003, pet. denied) ("Chapter 841 is a civil, not a criminal or quasi-criminal, statute."); *see also In re Commitment of Fisher*, 164 S.W.3d 637, 653-54 (Tex. 2005) (noting the SVP Act is civil in nature and does not trigger the same criminal procedural protections, such as the right to be competent at trial) "in light of the strong policy considerations favoring the preservation-of-error requirement, the Supreme Court of Texas has called the fundamental-error doctrine a 'discredited doctrine,"' subject only to limited, narrow exceptions (none of which are at issue here). *See Interest of T.B.*, 641 S.W.3d 535,537 (Tex. App.—Waco 2022, pet. denied*); In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). As such, intermediate courts have routinely refused to apply the doctrine in SVP cases. *See, e.g.*, *In re Commitment of Burd*, 612 S.W.3d 450, 464 (Tex. App.—Houston [1st Dist.] 2020, pet. denied); *In re Commitment of Shelton*, No. 02-19-00033-CV, 2020 WL 1887722, at *8 (Tex. App.—Fort Worth, Apr. 16, 2020, no pet.) (mem. op.). We decline Fletcher's invitation to hold that the fundamental-error doctrine applies in this case and thus exempts him from error-preservation rules.

As such, Fletcher has failed to preserve any claim that the trial court's instructions during his (Fletcher's) opening statement amounted to error.

Further, Fletcher could have, but chose to forego, asking the trial court to instruct the jury to correct whatever error or defect he perceived in the trial court's comments regarding the burden of proof. Instead, he replied, "Thank you, [y]our Honor," and moved on. Because we are of the opinion that the trial court could have remedied any alleged harm stemming from its comments, we conclude Fletcher failed to preserve error in this regard. *See Winkle*, 434 S.W.3d at 313-14 (where curative instructions could have remedied any harm caused by complained-of comments by trial court, appellant's failure to request such instructions waived error).

**C. Any error in the trial court's comment was harmless**

Even if Fletcher had not waived his appellate claim, and had we agreed that the trial court's comments were erroneous (which we assume but have not yet decided), we are unpersuaded by Fletcher's argument that the trial court's comments about the burden of proof made it reasonably likely or probable that the jury would misapply the burden of proof where, as he contends, the jury "could have reasonably found that the State did not prove its case beyond a reasonable doubt under a 'commonly accepted meaning'" of beyond a reasonable doubt. Fletcher fails to explain how a holistic review of the record demonstrates the trial court's comments to the jury regarding the burden of proof so irreparably permeated the proceedings so as to likely cause the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a).

For one, Fletcher does not explain how his assertion that the jury could have reasonably concluded the State failed to meet its burden is supported by the record. The record strongly backed the State's theory that Fletcher was unable, by reason of a congenital or acquired condition (his antisocial personality disorder and unspecified paraphilia), to sufficiently control his impulses

(even after the State filed its SVP commitment petition), predisposing him to commit a sexually violent offense such that he was a menace to the health and safety of others, *see* TEX. HEALTH & SAFETY CODE ANN. § 841.002(2); in turn, the evidence undercut Fletcher's "reformation" theory, especially where, even at trial, he continued to deny or minimize his sexually violent behavior while simultaneously contending he had taken responsibility for it.

Secondly, we reject Fletcher's characterization of the record as permitting the jury to construe the term "beyond a reasonable doubt" as *anything* "except 100 percent proof." Although Fletcher claims that the trial court's comments—"You get to determine what [beyond a reasonable doubt] is. Whatever you think it is, that's what it is."—constituted "the only meaning or definition of [the standard] that the jury received in this case," the record reveals this was not so. For instance, during voir dire, Fletcher himself provided a more-restrictive interpretation of the applicable burden of proof, submitting that the standard barred the jury from harboring *any* doubt as to the credibility of the State's evidence. By then, the trial court had instructed the jury that it could choose to disbelieve even thirty witnesses brought by the State if it was not convinced of the elements beyond a reasonable doubt. Similarly, the State explained to the venire that the standard entailed an evaluation of the quality of the evidence, not its quantity, defining for the jury only what the applicable burden of proof was *not* (100 percent proof). After the State had delineated this upper limit, Fletcher explained (as the trial court had) that "beyond a reasonable doubt" was the highest burden in the land, applicable in the most serious of cases, such as a charge of capital murder. Thus, the trial court set the parameter for the jury's understanding of the burden of proof standard, which was subsequently followed by the parties' presentations.

Based on our review of the record, we find that error, if any, in comments of the trial court was unlikely to cause the rendition of an improper verdict. *See* TEX. R. APP. P. 44.1(a). As such,

assuming Fletcher had preserved his claim, he would not be entitled to reversal, and we overrule his third issue on appeal.

## V. CONCLUSION

Having overruled Fletcher's three appellate claims, we affirm the trial court's judgment and order of commitment.

GINA M. PALAFOX, Justice

December 9, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.