COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LUIS FRANCISCO BENITEZ DOMINGUEZ,	§	No. 08-19-00237-CR
	§	Appeal from the
Appellant,	§	34th District Court
v.	§	of El Paso County, Texas
THE STATE OF TEXAS,	§	(TC# 20170D06118)
Appellee.		

O P I N I O N

Following a jury trial, Appellant Luis Francisco Benitez Dominguez was convicted of sexual assault, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.011(a)(1)(A), (f). In two issues, Dominguez asserts the trial court erred: (1) when it allowed the State—during its voir dire examination of prospective jurors—to play an education video on the meaning of "consent," claiming it contained a misstatement of the law, and (2) by permitting the State to make pervasive, improper statements in closing argument in violation of his constitutional rights.

Finding no reversible error, we affirm.

I. BACKGROUND[1]

On June 11, 2017, N.P.,[2] who was then seventeen years' old, attended a party with a group of friends at a friend's house. Alcoholic drinks were served including wine coolers and Tequila. Dominguez also attended the party. Before that evening, N.P. had never dated Dominguez and only knew him through other school friends.

At the party, Dominguez initiated conversation with N.P. while she played "beer pong" with her friend Ana. They played the game drinking wine coolers and N.P. had two drinks. Dominguez joined in and started joking around with N.P. and Ana. At one point, N.P. left the party to go with friends to retrieve more of the wine coolers from another friend's house. Upon her return, she found Dominguez and Ana waiting outside the house in the front yard. As items were being carried back into the house, Dominguez and N.P. stayed behind gathering a few of the wine coolers still left in the car. Dominguez continued joking with N.P. and soon told her he thought she was beautiful. He expressed he had liked her from the first day they met. When she smiled, he kissed her. As they reached into the car to get the last of the drinks, Dominguez again kissed her, which led to more kissing. When Dominguez pulled out a condom and showed it to her, N.P. told him she "did not want to sleep with him." He said it was fine and she did not have to do anything she did not want to do. At that point, another partygoer came looking for the remaining drinks and urged them to hurry up and bring them inside. N.P. and Dominguez then re-joined the party.

While inside, Dominguez continued talking and flirting with N.P. As they joined the others,

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[1] Dominguez does not challenge the sufficiency of the evidence to support his conviction. For this reason, we will relate only those facts necessary to the disposition of the issues raised on appeal. TEX. R. APP. P. 47.1.

[2] Since the complaining witness was under the age of majority, we refer to her by her initials. *See* TEX. R. APP. P. 9.10(a)(3); TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (the age of majority in Texas is eighteen years).

they both had a shot of tequila that everyone drank together. As they talked about school being over, Dominguez repeated to N.P. that he liked her and thought she was beautiful. While they talked, he held her hand. But when he kissed her on the lips in front of others, she told him she did not feel comfortable kissing in front of everyone. He then asked if she wanted to go somewhere more private. N.P. agreed, believing he understood her wishes. She did not believe he meant to go somewhere to have sex as she had already explained her limit.

They found the "maid's room" of the house, next to the kitchen, and went inside. Dominguez closed the door and they continued kissing. Although he had been gentle with her, he changed as he soon pushed her onto the bed. Even though the room was mostly dark, she could see that he started taking off his pants. She felt confused as she had already told him "no." In the light of the room, she could see he took out the condom a second time. Feeling scared, she asked him what he was doing. He told her, "Just shh. It doesn't matter. Let's just do this." She then responded that she had already told him "no," back in the car, and she still did not want to have sex with him. He responded, "Oh, it doesn't matter. Come on, let's just do it."

As N.P. tried getting up from the bed, Dominguez was on top of her and held her down by her neck with his hand. He was not squeezing her neck, but every time she tried getting up, she felt as though she almost choked herself with his hand. Dominguez had his entire body weight on top of her. He started grabbing her hands, putting them on top of her while he kissed her neck. But he was not being gentle. N.P. continued to tell him, "no," while begging him to stop and leave her alone. Despite her efforts, she could not move him away or push him off. She kept telling him to stop and she screamed at him to get off of her.

Suddenly, Dominguez pulled down her shorts and her underwear came off with them. He

then held her legs and began having intercourse that penetrated her with his sexual organ while she told him "No" and told him to stop. She repeated to him, "No, no, please stop." N.P. stretched her arms in an attempt to "push him, hit him, do whatever [she] could" to push him off. When she felt him move off her, she ran into the nearby restroom connected to the room. N.P. felt she was bleeding and her neck hurt. After checking her neck, she ran out. When her friend Alfredo saw she was crying, he gave her a hug. Although she could not talk and had trouble breathing, she managed to say Dominguez's name and that he had thrown himself at her. Alfredo stayed with her until her mother texted that she was waiting for her outside. N.P. got into her mother's car but she did not tell her anything. N.P. described she could not then process what had happened to her.

The next morning, N.P. eventually told her mother what happened, her mother told her father, and her father called the police. Initial investigations began and N.P. was taken by her family to a nearby hospital to be examined by a nurse trained as a Sexual Assault Nurse Examiner (SANE). A detective later obtained and executed a search warrant for buccal swabs of Dominguez. As the investigation closed, Dominguez was charged by indictment with one count of sexual assault.

At trial, the State called N.P. and multiple witnesses in its case-in-chief. Witnesses included investigating officers of the El Paso Police Department, the nurse who conducted the sexual assault exam, two forensic scientists with the Texas Department of Public Safety Crime Lab, her friend Alfredo, and her parents. The State also introduced twenty-six exhibits[3] into evidence including records of N.P.'s medical examination, clothes she was wearing that night, photographs of her bruising and clothing, and the lab reports from her sexual assault evidence collection kit and

[3] The State introduced Exhibits 1 through 27 but no Exhibit 18 was offered or admitted.

Dominguez's buccal swabs. In its case-in-chief, the defense called two officers to testify, one who was recalled after having testified earlier in the State's case, and his partner who had not previously testified. Dominguez's defensive theory focused on impeaching N.P.'s testimony by questioning her interactions and statements during the police investigation.

At the close of evidence in the guilt/innocence phase, the jury returned a verdict finding Dominguez guilty of sexual assault. Later, the jury returned a punishment verdict assessing ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice, but also found by that verdict, that the punishment assessed should be probated for a period of five years. No fine was assessed.

This appeal followed.

II. DISCUSSION

On appeal, Dominguez first asserts the trial court erred by allowing the State to play a video during voir dire that he asserts included a misstatement of the law. Second, Dominguez asserts his constitutional rights were violated by multiple arguments made by the State during closing arguments.

We address each issue in turn.

A. The Contested Video

Dominguez's first issue asserts the trial court erred when it allowed the State to play a video during its voir dire examination that he contends included a misstatement of the law with regard to the meaning of "without consent" relative to the offense at issue.

1. The Relevant Factual Background

During the voir dire of the jury panel, as the State described the offense at issue and the

State's obligation to prove "without consent" as an element of the charge, the prosecutor proposed to play a short video titled, "Consent – It's Simple as Tea." Defense counsel immediately requested a bench conference where he raised a concern about not having seen the video and whether it gave an accurate definition of the statutory element. The court viewed the video in chambers, outside the presence of the voir dire panel, then discussed its content at length with counsel.

With use of stick figures and a metaphor, the nearly three-minute narrated animation compares the offering of a cup of tea with the initiation of sex. A variety of scenarios are presented stressing that a person who does not want to drink a cup of tea should not be forced to have tea, even if they first agree and then change their mind.

As played in chambers and transcribed by the reporter, the complete narration of the video is presented as follows:

> [S]truggling with consent, just imagine instead of initiating sex, you are making them a cup of tea. If you say, "Hey, would you like a cup of tea?" and they go, "Oh, my God, I would love a cup of tea. Thank you," then you know they want a cup of tea.
>
> If you say, "Hey, would you like a cup of tea?" and they're like, "Uh, you know, I'm not really sure," then you can make them a cup of tea, or not, but be aware that they might not drink it.
>
> And if they don't drink it, then--and this is the important bit--don't make them drink it. Just because you made it doesn't mean you are entitled to watch them drink it.
>
> And if they say, "No, thank you," then don't make them tea at all. Just don't make them tea. Don't make them drink tea. Don't get annoyed at them for not wanting tea. They just don't want tea. Okay?
>
> They might say, "Yes, please, that's kind of you." And when the tea arrives, they actually don't want the tea at all.
>
> Sure, that's kind of annoying, as you've gone to all the effort of making the tea, but they remain under no obligation to drink the tea. They did want tea; now they don't. Some people change their mind in the time it takes to boil the kettle, brew the tea,

> and add the milk. And it's okay for people to change their mind, and you are still not entitled to watch them drink it.
>
> And if they are unconscious, don't make the tea. Unconscious people don't want tea and they can't answer the question, "Do you want tea?" because they are unconscious. Okay. Maybe they were conscious when you asked them if they wanted tea and they said, "Yes." But in the time it took you to boil the kettle, brew the tea, and add the milk, they are now unconscious. You should just put the tea down, make sure the unconscious person is safe and--this is the important part again--don't make them drink the tea. They said "yes" then, sure, but unconscious people don't want tea.
>
> If someone said "yes" to tea, started drinking it, and then passed out before they finished it, don't keep on pouring it down their throat. Take the tea away, make sure they are safe, because unconscious people don't want tea. Trust me on this.
>
> If someone said yes to tea around your house last Saturday, that doesn't mean they want you to make them tea all the time. They don't want you to come to their place unexpectedly and make them tea and force them to drink it going "But you wanted tea last week," or to wake up to find you pouring tea down their throat, going, "but you wanted tea last night."
>
> If you can understand how completely ludicrous it is to force people to have tea when they don't want tea and you are able to understand when people don't want tea, then how hard is it to understand when it comes to sex? Whether it's tea or sex, consent is everything.
>
> And on that note, I'm going to make myself a cup of tea.

The State proposed to play the video to illustrate the concept of consent. Defense counsel objected on several grounds. First, on a non-statutory basis, the defense objected by stating, "this is indoctrinating the jury to thinking what consent ought to be as opposed to eliciting their opinions on what they think consent means." Second, on a statutory basis, the defense asserted the State had to prove "without consent," that is, that the charged offense required proof of "penetration without consent." The defense further urged the exact wording of "without consent" was defined within Section 22.011 of the Texas Penal Code. Third, the defense argued the video was prejudicial in the sense that consent is presented in a one-sided manner.

Responding, the State urged the video merely showed an analogy to address the legal concept at issue. To that comment, the defense argued it confused the jury and strayed from the statutory definition. After a lengthy discussion, the trial court overruled the objections and allowed the video to be played in its entirety with one exception, that the ending declaring, "sex and tea are the same," would be redacted. Defense counsel further requested the video be preserved for appellate purposes only, which the court agreed.

Before the video played, the trial court first informed the voir dire panel it would provide the definition of consent, which it did, instructing that "sexual assault is without the consent of the other person if the actor--meaning the defendant--compels the other person to submit or participate by the use of physical force, violence, or coercion." Following the instruction, the State played the video for the panel. The screen the video stopped on read, "It's the same with SEX," but no audio was heard. Defense counsel asked to approach the bench and requested an instruction to disregard the final words that had lingered on the screen. The trial court agreed and did so.

Without objection, the prosecutor then interacted with the prospective jurors asking in general if everyone understood the video. After no response was elicited, the prosecutor asked, "[W]hat is the magic word to say that you are not giving consent? What is the magic word?" The venire responded, "No," as a group. When the prosecutor next asked, "After you say the magic word, what is the other person's responsibility?" The group responded, "Stop." Next, the prosecutor asked, "[I]s saying no enough to say--to show that 'No, I do not consent to this type of behavior[.]' Is that enough?" As one venire member responded, "Yes[,]" the prosecutor asked whether anyone disagreed, but received no response. When defense counsel spoke to the venire panel, counsel engaged in dialogue with several panelist over the meaning of without consent.

At the conclusion of the guilt/innocence phase of trial, the jury charge provided a written instruction on the issue of consent.[4]

2. Standard of Review

A trial court has wide discretion to control voir dire and the trial court's actions will be reviewed for an abuse of discretion. *Allridge v. State*, 762 S.W.2d 146, 163 (Tex. Crim. App. 1988); *Stewart v. State*, 162 S.W.3d 269, 277 (Tex. App.—San Antonio 2005, pet. ref'd). A trial court abuses its discretion in prohibiting a proper question about a proper area of inquiry. *Fuller v. State*, 363 S.W.3d 583, 585 (Tex. Crim. App. 2012); *McAfee v. State*, 467 S.W.3d 622, 640 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). Proper questions include seeking to discover a venire member's view on an issue applicable to the trial, ones not repetitious, and ones not in improper form. *Fuller*, 363 S.W.3d at 586; *McAfee*, 467 S.W.3d at 640. However, a voir dire question that misstates the law is improper. *McAfee*, 467 S.W.3d at 640. A misstatement of law during voir dire will require reversal when an appellant was harmed by the misstatement. *Stewart*, 162 S.W.3d at 278. We disregard the error unless the defendant's substantial rights were affected, or the error had a "substantial and injurious effect or influence in determining the jury's verdict." TEX. R. APP. P. 44.2(b); *Stewart*, 162 S.W.3d at 278.

3. Analysis

[4] The jury instruction provided:

> A person commits the offense of Sexual Assault if the person intentionally or knowingly causes the penetration of the anus or female sexual organ of another person by any means without the person's consent. …
> A sexual assault is without the consent of the other person if:
> (1) the actor compels the other person to submit or participate by the use of physical force, violence or coercion….

On appeal, Dominguez contends the trial court erred in allowing the State to play the video asserting it included a misstatement of the law.[5]

By terms of the relevant statute, a sexual act is deemed nonconsensual when "the actor compels the other person to submit or participate by the use of physical force, violence, or coercion[.]" TEX. PENAL CODE ANN. § 22.011(a)(1)(A),(b)(1); *Frias v. State*, No. 08-13-000325-CR, 2019 WL 101935, at *5 (Tex. App.—El Paso Jan. 4, 2019, pet. ref'd) (not designated for publication) (recognizing that the definition provided by Section 22.011(b)(1) of the Texas Penal Code did not defy the common-sense understanding of what it means to engage in a sex act "without consent"). Illustrating a lack of consent, the animated video depicted one stick figure forcing another stick figure to drink a cup of tea even when the tea was not wanted, or even when it was initially wanted and later refused. The narrator repeated statements such as, "don't make them drink the tea," and not to "force them to drink it."

Dominguez asserts the video contained a misstatement of the law in that it provided a reasonable explanation of appropriate behavior, but even still, it did not provide the correct legal standard of consent. He argues the message of the video promoted the idea that "if a person simply says no, then any further action by the other person is wrong; or, in the context of the case, illegal." Dominguez urges, "[w]hile it is certainly correct to stop a sexual overture if the other person says 'no,'; a failure to stop after the person says 'no' does not constitute sexual assault in the State of Texas." In other words, he argues the State of Texas is not an "affirmative-consent" state.

[5] Dominguez alternatively argues that even if the video stated a correct legal standard, the use of a narrated, educational video, during voir dire, allowed the State to present a purported opinion of a legal concept in the guise of an expert opinion that was not subject to cross-examination or any other requirement of admissibility. In briefing, Dominguez concedes no cases were found to support this aspect of his argument. Because no objection was raised at trial on this basis, this complaint is waived as it was not preserved for review. *See* TEX. R. APP. P. 33.1.

To illustrate, Dominguez points to a scene in the video when the narrator says, "If [after asking someone if they want a cup of tea] they say, 'No, thank you,' then don't make them tea at all. Just don't make them tea." Dominguez asserts the prosecutor emphasized this message from the video, that the lack of affirmative consent was the same as a lack of consent under Texas law. Dominguez argues the misstatement was worsened when the prosecutor called the venire to respond that "no" means "stop" in a "pep-rally-like" manner. Dominguez asserts the State continued to repeat misstatements of law, "from voir dire to closing," and it was the last thing the jury panel heard when the State's closing argument concluded with the comment,"[w]hen a person says no, you respect it and you stop."

Assuming without deciding that the trial court erred by permitting the prosecutor to use the video during voir dire to illustrate the concept of "without consent," where one stick figure forces another stick figure to drink a cup of tea, we cannot otherwise conclude the error had a substantial or injurious effect or influence on the verdict against Dominguez, or that his substantial rights were affected, as is required to demonstrate reversible error. *See* TEX. R. APP. P. 44.2(b) (any non-constitutional error that does not affect substantial rights must be disregarded); *see also Stewart*, 162 S.W.3d at 277. Here, regardless of the prosecutor's use of the video during its voir dire of the jury panel, Dominguez concedes, and the record supports that, before the video was played, the trial court provided proper instructions of the statutory requirements of the offense and also gave a proper jury instruction at the close of evidence. First, the trial court gave the correct, statutory definition of "without consent" immediately before the video played, and also told the panel a definition of the required term would be provided "later in the trial" and that definition would be the one they would have to follow. Second, the trial court gave an instruction to disregard the

screen that said, "sex and tea are the same," thereby informing the jury to disregard any suggestion implying the standards of the video and the legal standard were the same. Third, at the close of evidence, the court's charge properly instructed the jury on the statutory definition of without consent.

Additionally, as for the required elements of the offense, the evidentiary record includes evidence of forcible assault thereby ensuring that error, if any, regarding the prosecutor's use of the video during its voir dire examination was harmless. Challenging that evidence, Dominguez argues the bruises on N.P.'s neck could have been from consensual kisses; the trace of blood in her underwear could have been from her period; and there were inconsistencies in N.P.'s testimony. Specifically, Dominguez asserts the "evidence of physical force was so thin" that any misstatement of law was not harmless. We disagree.

With regard to the evidence of forcible assault, N.P. testified that, even though she had told Dominguez she did not want to engage in intercourse, he pushed her onto the bed, grabbed her by her neck in a manner causing her to chock when she tried moving, and held her down even after she repeatedly said "No." And, moreover, he kept his body weight on top of her while she struggled. N.P. also described that he took off her shorts and underwear and penetrated her without her consent while she begged him to stop. N.P.'s testimony of being held down forcibly is further corroborated by the testimony of the nurse examiner who described having viewed bruises on each side of her neck. N.P. testified at length on what happened to her that evening and to the investigation that occurred after she reported the incident, giving the jury a significant opportunity to see, hear, and judge her credibility from her testimony alone. The jury was also able to test N.P.'s credibility by comparing her testimony with the accounts she gave to investigating officers

and to the sexual assault nurse. Photographs and medical records were also admitted. Defense counsel subjected her testimony to a substantive and detailed cross-examination that probed into various inconsistencies in her statements. Because the jury had been properly instructed on the required elements of the offense and had ample opportunity to judge N.P.'s credibility, we conclude the use of the stick-figure video during voir dire did not have a substantial or injurious effect or influence in determining the jury's verdict. *Stewart*, 162 S.W.3d at 278; *see also Carrillo v. State*, No. 08-01-00471-CR, 2003 WL 1889943, at *7 (Tex. App.—El Paso Apr. 17, 2003, pet. ref'd) (not designated for publication) (holding no harm in possible misstatement of law during voir dire when the trial court correctly instructed the jury regarding the elements and the burden on the State both before and after the occurrence of the challenged statement).

Dominguez's first issue is overruled.

B. Improper Jury Arguments

In his second issue, Dominguez asserts his constitutional rights were violated by fifteen improper arguments made by the State during closing arguments. Dominguez asserts the arguments sought to arouse passion and prejudice from the jury, improperly commented on his right to trial, misstated the burden of proof, and improperly shifted the burden of proof. The State argues that Dominguez failed to preserve error for each complained-of argument because he either failed to object to arguments or failed to pursue his objections to an adverse ruling.

We address each complaint in turn.

1. Standard of Review

We review a trial court's ruling on objections regarding improper jury arguments under an abuse of discretion standard. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004); *Welch*

v. State, No. 01-18-00223-CR, 2019 WL 1940640, at *5 (Tex. App.—Houston [1st Dist.] May 2, 2019, no pet.) (mem. op., not designated for publication). Proper jury argument falls into four general categories: (1) summation of evidence; (2) reasonable deductions from the evidence; (3) a response to opposing counsel's arguments; or (4) a plea for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000); *Martinez v. State*, No. 08-15-00124-CR, 2018 WL 3084147, at *3 (Tex. App.—El Paso June 22, 2018, no pet.) (not designated for publication). We determine whether a prosecutor's statements were improper by considering the remarks in the context in which they appear. *Robbins v. State*, 145 S.W.3d 306, 314-15 (Tex. App.—El Paso 2004, pet. ref'd). In light of the record as a whole, reversible error does not exist unless the argument was extreme or manifestly improper or injects new, harmful facts into the trial proceedings. *Martinez*, 2018 WL 3084147, at *3 (citing *Jackson*, 17 S.W.3d at 673-74).

2. Analysis

In our review of Dominguez's complaints, we first determine whether error has been preserved for appellate review. "The right to a trial untainted by improper jury argument is forfeitable." *Hernandez v. State*, 538 S.W.3d 619, 622 (Tex. Crim. App. 2018). A party is required to preserve a complaint for appellate review by making a timely and specific objection. TEX. R. APP. P. 33.1. Even inflammatory jury arguments are forfeited when a defendant does not object and pursue his objection to an adverse ruling. *Estrada v. State*, 313 S.W.3d 274, 303 (Tex. Crim. App. 2010). An improper jury argument complaint is preserved when a defendant contemporaneously objects to the statement, requests an instruction that the jury disregard the statement if the objection is sustained, and moves for a mistrial if the instruction is granted. *Cooks v. State*, 844 S.W.2d 697, 727-28 (Tex. Crim. App. 1992); *Jimenez v. State*, No. 08-08-00347-CR,

2011 WL 192701, at *3 (Tex. App.—El Paso Jan. 12, 2011, pet. ref'd) (not designated for publication). Furthermore, the trial court must rule on the request, objection, or motion, "either expressly or implicitly[.]" TEX. R. APP. P. 33.1(a). The record must sufficiently reflect that the trial court ruled adversely on a motion. *Montanez v. State*, 195 S.W.3d 101, 104 (Tex. Crim. App. 2006).

Jury arguments with no objection

Five of Dominguez's complained-of arguments were not objected to. First, after discussing the credibility of N.P., the following dialogue occurred, in which we highlight with italics the challenged statements:

> [The State]: *And I would like to actually thank [N.P.] for taking this step, for coming over here and testifying.*
>
> [Defense counsel]: Objection, Your Honor. I hope this doesn't lead to--
>
> THE COURT: No. It's--
>
> [Defense counsel]: All right.
>
> THE COURT: Talking about her testifying only.
>
> [The State]: *I would like to thank her for that because there are many people in this world who never comes forward.* Maybe they come forward, but it dies down. They don't want to come to court. They don't want to tell unknown people about their personal business. It dies down, and they become a hashtag somewhere out in the world, likely.
>
> But [N.P.] is not here for your approval. She is not. It don't matter whether you have found him guilty or not guilty. She is here for closure, and she is here to tell her story of what happened to her. If you feel happy, sign the not guilty form, go home. It doesn't change a thing. She was here for closure, and that's what we tried to give her. These people are not here for revenge.
>
> From 2017 to 2019, she has moved on. She went to do better things in life. She is a good student, and she will do well in life. *And [N.P.] will always do better than her attacker, always, because, in her mind, she knows it happened to her. But the*

person who did it, in their mind, they know "I did it."

(Emphasis added.)

Concerning the last two statements of that portion dealing with thanking N.P. and stating she would always do better than her attacker, Dominguez began to object but did not pursue his objection after the trial court gave assurance the prosecutor was only talking about N.P.'s testimony. Dominguez did not comment or object thereafter and the prosecutor continued with its closing. Because Dominguez failed to articulate a specific, timely objection, his complaint as to the two statements was not preserved. *Hernandez*, 538 S.W.3d at 622. Furthermore, Dominguez's brief asserts no specific argument and no authority in support of his complaints as to these arguments. TEX. R. APP. P. 38.1(i). Accordingly, we find Dominguez's complaint as to these arguments are waived.

The next complained-of argument occurred when the prosecutor was commenting on the evidence as to the blood in N.P.'s underwear. The prosecutor argued that N.P. stated she was not on her period at the time and stated:

> *[T]hey are going to argue that that's from losing her virginity? Yes, we anticipated that. I don't get to look at their files. They get to look at my files*. (Emphasis added.)

Defense counsel did not object and the State continued with its argument. On appeal, Dominguez asserts the State's argument mentioned discovery issues and such were not proper to put before a jury. However, because defense counsel did not object at any point to the statement, Dominguez's complaint on such ground was not preserved. *Hernandez,* 538 S.W.3d at 622. Dominguez has also failed to properly brief his complaint as to this complaint without specific argument or any reference to authority. TEX. R. APP. P. 38.1(i). Dominguez's complaint as to this argument is waived.

Next, the prosecutor was reviewing the evidence concerning the exam N.P. underwent and stated:

> *And [the SANE], she can't--she can't--she will never give a conclusion that 100 percent this victim, this person, was sexually assaulted. But we know what she thinks when she used the word 'survivor' and how strongly she said it.* (Emphasis added.)

Defense counsel did not object to this statement and the State continued with its argument. For this reason, we find Dominguez did not preserve his complaint as to this statement. *Hernandez*, 538 S.W.3d at 622. Furthermore, Dominguez fails to assert a clear, concise argument as to this argument and does not provide any authority in support. *See* TEX. R. APP. P. 38.1(i). Accordingly, we find Dominguez's complaint as to this argument is waived.

Lastly, Dominguez complains that the prosecutor misstated the burden of proof when it told the jury their decision rested on N.P.'s credibility rather than the State's proof of each and every element of the offense beyond a reasonable doubt. Towards the end of its closing argument, the prosecutor stated:

> *Over an[d] over again, [N.P.] said, "I said, 'No.' I told him to stop. He did not stop. He didn't stop." And that part of her testimony, if you don't believe it, find not guilty. But if you do believe it, it has to be a guilty, it has to be a guilty.* (Emphasis added.)

Following the comment, the State continued arguing and finished its closing without further objection from defense counsel. Without a timely objection, Dominguez failed to preserve error as to this argument. *Hernandez*, 538 S.W.3d at 622.

Jury arguments with objection

The remainder of the complained-of arguments were timely objected to by Dominguez. However, the State asserts the complaints were not preserved as Dominguez did not pursue his

objections to an adverse ruling and in one instance did not preserve error following a sustained objection.

First, immediately after describing N.P.'s experiences and her doing "better" than her attacker, the State continued:

> [The State]: When [N.P.] was taking the stand, I saw you, some of you, when you see through her: "What is she thinking?" Right? "What is she thinking?" *And when I look behind someone's eyes, do I see anything? Is there fear? Is there anger?*
>
> [Defense counsel]: Judge, this is closing argument. The prosecutor is staring at my client….
>
> THE COURT: All right. Well, let's go ahead and direct your--
>
> [Defense counsel]: He hasn't mentioned evidence once.
>
> THE COURT: Well, proceed.

(Emphasis added.)

As previously stated, a trial court need not make an express ruling but a ruling can be implied from its actions or other statements demonstrating a ruling. *Montanez*, 195 S.W.3d at 104. However, a trial court's comments to "proceed" in response to a defense counsel's objection to improper jury argument does not constitute a ruling, either express or implied, on the objection and preserves no error for appellate review. *Murillo v. State*, 839 S.W.2d 485, 492-93 (Tex. App.—El Paso 1992, no pet.); *Grayson v. State*, 192 S.W.3d 790, 793 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Montanez*, 195 S.W.3d at 104. For this reason, Dominguez failed to preserve his complaint as to this argument. TEX. R. APP. P. 33.1(a)(2).

Dominguez's next complained-of argument occurred immediately following the State's comments on N.P.'s demeanor and credibility.

> [The State]: *And do I lower my seat from the people who are next to me so no one*

can see me, no one can see my face?

Because rapists, they are usually powerless. They get their power inside a dark room when the doors are closed. They are cowards. Outside there, they're weak. That's what they are. And [N.P.]'s attacker will always be weaker than her. Always.

He walks out not guilty, he doesn't win today. In his mind, he will always know "I am this guy."

[Defense counsel]: Judge, I still think this is improper argument. There is--it is not a summation of evidence, not an inference, not a call for law enforcement. I don't know what this is.

THE COURT: Well, the last comment may not be necessary. Proceed.

(Emphasis added.)

Again, a trial court's comment to "proceed" will not be considered an adverse ruling and such complaint will not be preserved for appellate review. *See Montanez*, 195 S.W.3d at 104; *Murillo*, 839 S.W.2d at 492-93; *Grayson*, 192 S.W.3d at 793. Additionally, the trial court's comments that the comment might not be necessary, if at all, constitutes a sustained objection. Dominguez did not request an instruction following the exchange and the State's argument continued. For these reasons, we find Dominguez's complaint as to this argument to be waived. TEX. R. APP. P. 33.1(a)(2).

Next, Dominguez complains an improper argument occurred when the prosecutor began explaining its reasons for prosecuting the case.

[The State]: The reason I prosecute this case, I am here--

[Defense counsel]: Objection. Improper argument, Judge.

THE COURT: What?

[Defense counsel]: He is getting into what his motives are for moving forward, his individual motives. How is that relevant?

> THE COURT: All right. Proceed.
>
> [The State]: The reason I am here, because I believe her, I trust her. A hundred percent. I am never going to prosecute, try a case….

Defense counsel objected again and there was a conference at the bench where the trial court instructed the prosecutor not to speak on its beliefs. Defense counsel then asked the trial court to give an instruction to the jury to disregard the statement, which the trial court provided.

An instruction to disregard improper jury arguments is generally sufficient to cure improper argument error. *Pace v. State*, 986 S.W.2d 740, 746 (Tex. App.—El Paso 1999, pet. ref'd). Following the instruction, Dominguez did not request a mistrial and therefore failed to preserve the issue for review. *Calderon v. State*, 950 S.W.2d 121, 139 (Tex. App.—El Paso 1997, no pet.). Because the trial court gave Dominguez the relief he requested, there is no complaint for us to review. Furthermore, Dominguez's brief fails to assert a specific argument or any authority to support his argument. TEX. R. APP. P. 38.1(i). Accordingly, we find Dominguez failed to preserve his complaint as to this argument.

Next, Dominguez asserts the State shifted the burden and commented on his right to testify when the prosecutor reviewed N.P.'s testimony of consensually kissing Dominguez while in a car with a laid-down backseat.

> [The State]: *Is there anybody here who can disprove her? Did they say, "No. It was straight up"? Nobody is here who could disprove her.*
>
> [Defense counsel]: Judge, he is shifting the burden. It's the [S]tate's responsibility to bring evidence, not defense. He is shifting as though I need to produce evidence, again.
>
> THE COURT: Well, the charge is clear on that point, so…[.]

(Emphasis added.)

Dominguez failed to request a ruling on his objection and did not object to the trial court's failure to rule. TEX. R. APP. P. 33.1(a)(2); *Thierry v. State*, 288 S.W.3d 80, 93 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding a judge's response that "the instruction was clear" and giving an admonishment to the State to "just be careful" was not an adverse ruling). For this reason, he failed to preserve any error as to this argument.

Next, the State referenced the defense trying to "reconstruct consistent statement/inconsistent" statements made by N.P. regarding when N.P. and Dominguez were in the maid's room and stated:

> [The State]: *I have covered the whole trial in my voir dire. I didn't tell you the facts, but I tried the whole case in jury selection*.
>
> [Defense counsel]: Judge, those are arguments. That's not evidence. Evidence is the exclusive things that they can use to make their decision.
>
> [The State]: Judge, he talked about it.
>
> [Defense counsel]: I said that's not what they base their decisions on. I said that was the result of their oath.
>
> THE COURT: Right. Okay. Well, he can explain it. So go ahead.

(Emphasis added.)

Here, we view the trial court's statement to "go ahead" equivalent to a statement to "proceed," therefore, no adverse ruling was obtained by Dominguez. *See Montanez*, 195 S.W.3d at 104; *Murillo*, 839 S.W.2d at 492-93; *Grayson*, 192 S.W.3d at 793. Moreover, Dominguez's brief is lacking any specific argument as to this argument by the State. Dominguez references the statement in his list of complained-of arguments but fails to develop a clear, concise argument as to any error. His brief also lacks any authority in support. Without such, we find Dominguez's complaint is waived. TEX. R. APP. P. 38.1(i).

The next argument followed the mention of the blood in the underwear and the State's argument that they do not get to view the defense's files.

> [The State]: *Now, defense counsel…they may know a lot about brown discharge and all that stuff, but I have to go by what [N.P.]*--
>
> [Defense counsel]: Objection. That evidence didn't come from us. That evidence came from [the SANE].
>
> THE COURT: Well, the jury will recall the evidence.

(Emphasis added.)

From our review of the record, Dominguez did not obtain an adverse ruling to his objection. *See Cavazos v. State*, 329 S.W.3d 838, 841 (Tex. App.—El Paso 2010), *aff'd*, 382 S.W.3d 377 (Tex. Crim. App. 2012); *see also Mayberry v. State*, 532 S.W.2d 80, 84 (Tex. Crim. App. 1975) (holding a trial court's response that the "[j]ury will recall the evidence" was not an adverse ruling). Dominguez failed to preserve error as to this complaint. TEX. R. APP. P. 33.1(a)(2).

Lastly, Dominguez asserts the State made an improper argument when it implied he would have to testify to disprove a point.

> [The State]: And this trace evidence; right? They kept saying "trace evidence," "trace evidence," we didn't do this, "trace evidence." Why does it matter? *Having sex--having a choice is not being challenged here in their opening statement and closing.*
>
> [Defense counsel]: Judge, that's not evidence. Opening statements are not evidence. And I don't even know what he's referring to, but if he is going to use it as--
>
> [The State]: I object to the defense counsel's speaking objections.
>
> THE COURT: All right. Well, I think both sides can comment on opening or closing statements, so go ahead.
>
> [The State]: Sex is not being challenged, or are they insinuating maybe--

[Defense counsel]: Judge, may we approach?

THE COURT: What about?

[Defense counsel]: It's just--he is saying that it's not being challenged. Reasonable doubt is the entire challenge. There is no affirmative defense of consent. This is not--this is not--

THE COURT: I think--I mean, he can comment on your argument and, you know --

[Defense counsel]: He can say we had--

THE COURT: He is responding to your argument. He can respond to your arguments, you know, within limits. And I assume that's what he is doing, is responding to your arguments. And your arguments are taken from a standpoint that you are saying to challenge all the evidence. He is saying maybe you didn't. I don't know.

[Defense counsel]: I just hope it's not an admission or, like, being used from--because it could be construed as violating a Fifth Amendment right or we're not challenging.

THE COURT: No, it's not being taken that way at all. I don't take it that way.

[Defense counsel]: Thank you.

THE COURT: And I ask the jury to not take it that way.

[Defense counsel]: Thank you, Judge.

(Emphasis added.)

Considering that Dominguez failed to obtain an adverse ruling and the trial court gave an instruction to the jury, we find there is no issue for us to review. *See Pace*, 986 S.W.2d at 746. Dominguez did not request a mistrial in order to preserve error. *See Calderon*, 950 S.W.2d at 139. Again, we must note that Dominguez does not provide any authority in support of this complaint. TEX. R. APP. P. 38.1(i). Without more, we find Dominguez waived his complaint as to this issue.

Jury arguments not objected to, but Dominguez argues the complaints are still reviewable as they rose to a level of implicating rights that are not forfeitable

Three of Dominguez's complaints of improper argument are all contained within the same portion of the State's argument.

> [The State]: It isn't easy; right? Like, a rape trial, right, where a victim comes to seek justice, to seek some kind of closure. Or whichever way it goes guilty, not guilty, they come here to seek closure. A rape trial. *But [victims] actually get raped again [at trial]. We raped her in this courtroom. We took off her clothes piece by piece. We took her back to that room. We pushed her down on that bed, and we placed her where she doesn't want to go. We made her remember.*
>
> . . .
>
> Not just that. We were not happy with that. That is not enough; right? So we put her underwear on display for people over here, all of you. She doesn't know any of you. Forgive me for showing it. Then we argued whether it's menstrual blood, whether it's actual blood, whether it's blood from losing virginity. Very happy experience, fun.
>
> Then we talk about…her experience with the SANE nurse. You get completely naked in front of a woman you have never seen. You are 17 years old. She wants to put an instrument inside your vagina and open it up to look inside. Fun experience. *We want to be here? [N.P.]? She wants to talk about it? She wants to tell you all about it because she loves this experience so much?*
>
> *And if that's your expectation, that she is going to be here, take the stand, and tell you each and every single detail of it, and if she fails to do so, you don't like her, you can sign the not guilty verdict form. Do that.*

(Emphasis added.)

It is clear from our review of the record that each of these arguments were not objected to. However, Dominguez asserts the jury arguments are still reviewable as they rise to the level of implicating rights that are not forfeitable.

First, Dominguez asserts the statements referring to N.P. being "raped again," and her not wanting to talk about it at trial, essentially, resulted in an attack by the State on his exercise of his

right to a trial by jury, which is a violation of his constitutional right. In support of his contention, Dominguez cites to *Villarreal* to assert that statements on a victim being "raped again" by having to testify were not permissible. *Villarreal v. State*, 860 S.W.2d 647, 649 (Tex. App.—Waco 1993, no pet.). In *Villarreal*, the prosecutor made a comment that the defendant "forced [the victim] to have to come into this courtroom" during the punishment phase of the trial. *Id*. There, the court stated they could not determine beyond a reasonable doubt that the error in denying defendant's motion for mistrial did not contribute to the punishment and remanded the case for a new trial on punishment. *Id*. The statements made by the State in this case are distinguishable from those in *Villarreal*.

Here, there was no mention that Dominguez "forced" N.P. to testify but rather the comments were referencing the continuing effects of the offense on N.P. as a complaining witness. With the absence of any reference to Dominguez as to these effects, we cannot conclude the arguments commented on Dominguez's free exercise of his right to trial by jury. *See Taylor v. State*, 987 S.W.2d 597, 598-99 (Tex. App.—Texarkana 1999, pet. ref'd) (holding statements by prosecutor that the victim was "raped here again on the stand" did not comment on defendant's right to a jury trial as no blame was placed on defendant in compelling the victim to testify but rather focused on the victim's continued experience). Dominguez has failed to show his absence of an objection to the complained-of arguments were otherwise excused. We overrule his complaint as to these arguments.

Dominguez also asserts the State's argument that the jury should sign the not guilty form if they did not like N.P. is reviewable even without objection. He asserts the argument violated his right to due process by misstating the burden of proof in arguing the jury's decision rested on

whether they believed N.P. rather than on whether the State proved each element beyond a reasonable doubt. In context, we cannot conclude the State's argument violated his rights by misstating the burden of proof given the statement is a direct comment on the credibility of a witness. *Abbott v. State*, 196 S.W.3d 334, 345 (Tex. App.—Waco 2006, pet. ref'd). Furthermore, the primary defensive strategy pursued by Dominguez focused on challenging N.P.'s credibility to which the State responded with its own argument. *Jackson*, 17 S.W.3d at 673. We conclude that Dominguez's rights were not violated by this argument as the State directly responded to opposing counsel's argument. *Id*. We overrule his complaint as to this argument.

Having overruled Dominguez's complaints as to certain statements made in closing argument, we overrule his second issue.

III. CONCLUSION

Finding no reversible error, we affirm.

GINA M. PALAFOX, Justice

September 30, 2021

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

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