COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE:	§	No. 08-21-00010-CV
	§	Appeal from the
THE COMMITMENT OF JOHN ERVIN CRISP	§	142nd District Court
Appellant.	§	of Midland County, Texas
	§	(TC# CV55793)

O P I N I O N

Texas law provides a civil commitment procedure for the long-term supervision and treatment of sexually violent predators. *In re Commitment of Stoddard*, 619 S.W.3d 665, 669 (Tex. 2020). The State filed a petition to civilly commit John Ervin Crisp as a sexually violent predator. TEX. HEALTH & SAFETY CODE ANN. § 841.081. Following a three-day trial, a jury returned a verdict finding that Crisp was a sexually violent predator. The trial court then signed a judgment and order of commitment. In a single point of error, Crisp argues the trial court committed reversible error by overruling his objection to the State's allegedly improper jury argument. Finding no reversible error, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 1993, a Midland County jury convicted John Ervin Crisp of attempted sexual assault. Because of his long prior history, he was sentenced to serve a term of 50 years. As Crisp was about to be released on parole, the State petitioned to have him committed for treatment and

supervision under Chapter 841 of the Health and Safety Code.

At trial, the State relied in part upon the testimony of Jason Dunham, Ph.D., a forensic psychologist. He diagnosed Crisp as suffering from an antisocial personality disorder, sexual deviancy involving both children and adults, and a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence. In part, Dunham relied upon a test called the Static-99R, an actuarial test assessing a person's risk for subsequent conviction of a sexual assault. Crisp's score placed him at an above average to high risk of reconviction. Of those with a score similar to Crisp's, roughly 11% were later reconvicted of a sexual offense. Dunham also testified to having reviewed prison disciplinary records which further established that his antisocial behavior continued while in prison.

Supporting Dr. Dunham's testimony, the State also presented testimony and records about Crisp's extensive criminal history. When questioned by the State, Crisp admitted to being arrested for breaking into a house when he was nine or ten years old. From age twelve to fourteen, he was arrested for theft and burglary. At seventeen years old, he was convicted of murder and sentenced to prison for ten years. Months after he was released on parole, he pleaded guilty to rape of a child and received a fifteen-year prison sentence. Months after his second parole, he was sentenced to serve eight years in prison after he pleaded guilty to injury of a child. After a third parole, a jury convicted him of the offense of attempted sexual assault of a child and he returned to prison. Months after his fourth parole, he committed the offense of attempted sexual assault in Midland County for which he received the fifty-year sentence. Crisp testified he had recently been granted parole and would be required to remain under supervision for a period of twenty-one more years.

During closing arguments, counsel for Crisp commented about the recidivism testing relied on by Dr. Dunham, which he anticipated the jury would be hearing more about from the State.

When the State responded to that comment during its final argument, Crisp's counsel objected based on "improper viewpoint." The trial court overruled the objection and argument concluded.

The jury unanimously found that Crisp was a sexually violent predator. The trial court rendered its judgment the same day. Crisp filed a motion for new trial which was overruled by operation of law. This appeal followed.

II. DISCUSSION

In his sole issue, Crisp contends the trial court committed reversible error in overruling his objection to argument from the State during its closing argument. Crisp contends the State made an improper argument.

A. Standard of Review

We review a trial court's ruling on an objection to closing argument under the abuse of discretion standard. *In re Commitment of Hill*, 621 S.W.3d 336, 344 (Tex. App.—Dallas 2021, no pet.); *In re Commitment of Shelton*, No. 02-19-00033-CV, 2020 WL 1887722, at *11 (Tex. App.—Fort Worth Apr. 16, 2020, no pet.) (mem. op.); *Sanchez v. Espinoza*, 60 S.W.3d 392, 395 (Tex. App.—Amarillo 2001, pet. denied). The Texas Rules of Civil Procedure require counsel in a jury trial "to confine the argument strictly to the evidence and to the arguments of opposing counsel." TEX. R. CIV. P. 269(e). The failure to do so may create grounds for appellate reversal.

Proper jury argument generally falls into the following areas: (1) the facts of the case; (2) any legitimate inferences, deductions, or conclusions drawn from the evidence; (3) the reasonableness of the evidence and its probative effect; and (4) responses to the arguments of opposing counsel. *See generally* TEX. R. CIV. P. 269(b), (e); *see also In re Commitment of White*, No. 11-20-00038-CV, 2021 WL 5934674, at *6 (Tex. App.—Eastland Dec. 16, 2021, no pet.) (mem. op.). Proper jury argument may also contain a plea for law enforcement. *In re Commitment*

of Sells, No. 09-15-00172-CV, 2016 WL 1469059, at *5 (Tex. App.—Beaumont Apr. 14, 2016, pet. denied) (mem. op.). As a general rule, however, asking the jury to consider a case from the viewpoint of one of the parties or to "place themselves in the shoes" of a party constitutes an improper argument. *Fambrough v. Wagley*, 169 S.W.2d 478, 481–82 (Tex. 1943); *White*, 2021 WL 5934674, at *6; *Press Energy Servs., LLC v. Ruiz,* No. 08-19-00179-CV, 2021 WL 3013313, at *21 (Tex. App.—El Paso July 16, 2021, no pet.); *Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695, 708 (Tex. App.—Dallas 2008, no pet.); *Sanchez*, 60 S.W.3d at 395.

To prevail on an improper jury argument claim, a party must show the argument was (1) improper, (2) not invited or provoked, (3) preserved by an objection or other proper trial predicate, and (4) not curable by an instruction, prompt withdrawal of the statement, or a reprimand by the judge. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 721 (Tex. App.—Dallas 2011, pet. denied). Even where the record establishes error, we may not reverse a verdict on jury argument grounds unless it is shown that the error was harmful—that is, that the error probably resulted in the rendition of an improper judgment. *Vickery v. Vickery*, 999 S.W.2d 342, 365 (Tex. 1999). We will find harm where "the probability that the improper argument caused harm is greater than the probability that the verdict was based on proper proceedings and evidence." *Id.* The reviewing court must evaluate the whole case from voir dire to closing argument, considering the state of the evidence, the strength and weakness of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008).

B. Applicable Law

In a sexually violent predator case, the State must prove beyond a reasonable doubt that a person is a sexually violent predator. TEX. HEALTH & SAFETY CODE ANN. § 841.062(a); *see also*

In re Commitment of Cordova, 618 S.W.3d 904, 908 (Tex. App.—El Paso 2021, no pet.). A person is a sexually violent predator if the person "(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). 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). "Behavioral abnormality" is defined as 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." *Id.* § 841.002(2). "Whether a person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence is a single, unified issue." *In re Commitment of Bohannan*, 388 S.W.3d 296, 303 (Tex. 2012)). *Bohannan* clarified that the behavioral abnormality definition might be more clearly stated as "a congenital or acquired predisposition, due to one's emotional or volitional capacity, to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." *Id.*

C. Analysis

During the trial's closing arguments, counsel for Crisp made the following comment about the recidivism testing relied on by Dr. Dunham:

> [Crisp's counsel]: Now the State might come up here and say, "Oh, would you get on an airplane if there was an 11 percent chance that it would crash?" Well, let me tell you the difference. No, we would not, right? Because we know what the consequences are. This case is not about what are the consequences if Mr. Crisp offends, that's not what this case is about, it's is he likely, okay? So do not let that play any part in your decision. It's about is he likely to re-offend.

Responding, the State retorted as follows during its final closing argument:

> [The State's counsel]: You were told that an 11 percent chance, based on his score

> of a Static, means that means that -- or for an 11 percent chance, and she mentioned the plane example. Can I ask you a question? If you thought there was an 11 percent chance that you or your child were going to be raped by this individual because they were left alone with him, would you take that chance?
>
> [Crisp's counsel]: Objection to an improper viewpoint.
>
> [The Court]: Overruled.

1. Argument not improper

Appellant claims the State's argument encouraged the jury to view the evidence from an "improper viewpoint." We disagree. Rather than asking the jury to view the case from the perspective of either of the parties, we believe the argument was a comment on the evidence concerning the Static-99R test result discussed by Dr. Dunham during his testimony before the jury. It also asked the jury to consider the risk of Crisp's reoffending, a subject at the heart of this case. We must analyze the challenged statement in the context of the entire argument, rather than simply examining a snippet or a stray sentence. *Sanchez*, 60 S.W.3d at 396.

Other courts have reached a similar conclusion. For example, the Dallas Court of Appeals considered a final argument in which the State suggested that the jury consider one of their loved ones in a counseling session with the respondent, a repeated sexual offender. *In re Commitment of Hill*, 621 S.W.3d at 344. The Dallas Court found no reversible error. *Id*. Similarly, the First Court of Appeals found that an argument constituted proper summation of the evidence when the State argued: "How many girls have to pay the price until somebody does something to take responsibility for Mr. Summers?" *In re Commitment of Summers*, No. 01-19-00738-CV, 2021 WL 3776751, at *16 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021, no pet.) (mem. op.).

We find the State's argument in this case similar to that advanced in *White*. In *White*, the State asked, "I want to ask you, if you saw [Appellant] in an apartment with little girls, would you think that these little girls are safe?" *White*, 2021 WL 5934674, at *7. Rather than finding an

improper argument asking the jury to place themselves in the shoes of a party, the court found the argument properly asked the jury to consider the risk to the community and other potential victims. *Id*. We find the same result attaches here.

2. Invited error

Even if we determined the argument was not proper, we would still hold that Crisp invited the error. As noted above, a party cannot complain on appeal of improper argument where the party has invited or provoked the improper argument. *Living Ctrs. of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (per curiam); *Reese*, 584 S.W.2d at 839; *Ruiz*, 2021 WL 3013313, at *21. Here, Crisp's counsel injected the application of an 11% risk to the juror's decision to board a plane well before the State's final summation. Crisp argues his counsel merely tried to preempt an anticipated argument from the State. While that may well be true, and could be a valid strategic decision, Crisp cannot now complain when the State merely responded to an argument he injected into the summations.

3. The Harmful error rule

Even if we were to find that the trial court erred in overruling Crisp's objection, that determination would not end our analysis. A reviewing court can reverse a judgment based upon errors in the final arguments only where the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence. *Reese*, 584 S.W.2d at 840.; *Ruiz*, 2021 WL 3013313, at 21; *White*, 2021 WL 5934674, at *7.

Crisp brings forward an issue with a single sentence included in the State's over twenty-five-page closing argument. Additionally, the jury heard sufficient evidence on which it could have based its verdict, including: (1) Crisp's multiple arrests and conviction of murder when he was 17;

(2) Crisp's conviction of a sexual assault of a 14 year-old girl in 1978 with evidence he threatened to kill the girl and later claimed the sex was consensual; (3) Crisp's subsequent conviction, while on parole for the first offense, of sexual assault of a child while in Nebraska; (4) Crisp's conviction of a sexual assault of a 20 year-old woman in 1993 with evidence he choked and struck the woman in the face repeatedly; (5) other allegations of sexual assault, including his daughter and fellow prison inmates; (6) his diagnosis of an antisocial personality disorder; (7) his prison record of 120 disciplinary cases; (8) his scores on the Static-99R test and the PCL-R test, indicating he has a high range of psychopathic traits; (9) the testimony of Dr. Dunham, the State's expert; and (10) Crisp's own testimony and demeanor before the jury. As a whole, we cannot say the sufficient evidence presented to the jury supporting the verdict was otherwise outweighed by any harm caused by the State's final argument. Error, if any, was harmless.

IV. CONCLUSION

For all the reasons set forth above, we find no reversible error in the trial court's ruling on the objection below and affirm the trial court's judgment.

GINA M. PALAFOX, Justice

April 14, 2022

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