Opinion issued March 31, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00796-CR

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GARRY FULLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1379141, 1413756

MEMORANDUM OPINION

A jury found Garry Fuller guilty of two separate offenses of sexual assault of a child, found enhancement allegations that he previously was convicted of two other

felonies to be true, and assessed his punishment at confinement for life for each offense. On appeal, Fuller argues that the trial court committed reversible error by:

(1) allowing the State to ask prospective jurors a commitment question about how likely a child would be to lie about sexual abuse;

(2) allowing improper and inflammatory opening and closing statements by the prosecution;

(3) admitting testimony about the emotional state of the complainant after the alleged sexual abuse occurred;

(4) excluding proof that the complainant's prior accusation of sexual abuse was unfounded;

(5) excluding proof of the complainant's past sexual activity;

(6) admitting testimony regarding the general symptoms exhibited by sexually abused children;

(7) admitting expert testimony regarding the lack of viable treatments for pedophilia; and

(8) sustaining the State's objection to defense counsel's closing argument regarding parole.

Fuller also asserts that the cumulative effect of these errors deprived him of a fair trial and due process. We affirm.

Background

A grand jury indicted Fuller for two separate offenses of sexual assault of a child, one for performing oral sex on his then 16-year-old stepdaughter and the other for having intercourse with her. *See* TEX. PENAL CODE ANN. § 22.011(a)(2)(A), (C) (West 2011). He pleaded not guilty to both offenses.

Jury Selection

Over the objection that the question asked for an improper commitment, the trial court allowed the prosecutor to ask prospective jurors: "How likely do you think a child would be to lie about being sexually abused?" The prosecutor asked the members of the venire to answer this question on a scale of one to four, with one indicating "very likely," two "likely," three "unlikely," and four "very unlikely." Almost all of the prospective jurors answered "three" or "four."

Guilt/Innocence Phase of Trial

During her opening statement, the prosecutor told the jury that the proof would show that Fuller had sexually abused his stepdaughter for many years and that this prolonged abuse culminated in the complainant videotaping the two offenses for which Fuller was on trial. The prosecutor stated that she was "very sorry" that jurors were "going to have to see that video." Defense counsel objected to this remark, and the trial court sustained the objection. The trial court also instructed the jury to disregard the prosecutor's apology, but denied the defense's motion for a mistrial.

The prosecutor then resumed her opening statement, arguing that "the video is offensive and degrading" and would show that Fuller did not care about his stepdaughter or how she feels. Defense counsel again objected, and the trial court sustained the objection. Defense counsel did not request an instruction to disregard or move for a mistrial after this ruling.

During his opening statement, defense counsel conceded that the video was "going to be tough to watch." But he argued that the proof would show that the videotaped acts were consensual and "one isolated incident." He also told the jury that the complainant had falsely accused Fuller of sexually abusing her before and this accusation was investigated and discredited.

The complainant testified that Fuller began abusing her at the age of seven when they lived in California. She testified that he touched her vagina and chest both above and under her clothing in her room every other day. The complainant explained that, sometime before she began middle school, Fuller began taking her to motels, where he would show her pornographic videos, touch her vagina and chest, and try to have intercourse with her. She stated that Fuller told her that he was teaching her how to have sex. She testified that when she was in middle school Fuller began having sexual intercourse and engaging in oral sex with her. She stated that these encounters occurred in the living room of the family's home in the early morning hours before her mother or siblings were awake.

The complainant testified that she was scared, but eventually informed two counselors at her middle school about the abuse. She stated that child protective services and law enforcement authorities investigated her accusation. But when interviewed at a police station, the complainant testified that she did not tell authorities what was occurring because she was afraid. She stated she was removed from the home and placed in foster care for a year and a half, and then returned to her home because the authorities did not believe her accusation. She and her family subsequently moved to Houston, where Fuller's sexual abuse resumed.

The complainant testified that Fuller would enter her room when the rest of her family was asleep and have intercourse with her. She stated that she began feeling she no longer wished to live and testified about some social media postings in which she expressed these suicidal thoughts. Over a relevance objection, the trial court admitted three of these social media postings, in which the complainant said she was amazed at how little anyone cared, would kill herself if no pain or blood were involved and her family would not be hurt by her actions, and she had ceased caring.

The complainant testified that one night in Houston Fuller came into her room, touched her, and then left. She thought he might return, so she set up her laptop computer camera to record anything that might happen to obtain proof of the abuse. The complainant testified that Fuller did return. He came to her bed, took off her

pants, performed oral sex on her, and then put on a condom and had sexual intercourse with her. She stated that she sometimes fought his advances, but did not do so this time because she knew Fuller would not be able to deny the acts given that they were videotaped. The video itself was admitted into evidence and played for the jury.

The complainant testified that she was anxious about whether the video would be proof enough to substantiate her claims. But several weeks or as much as a month later she informed Lindsey Parrish, a counselor at her high school, about the abuse. The complainant testified that Parrish in turn informed child protective services.

On cross-examination, the defense sought to show that the complainant's testimony about the duration of the abuse was false. The complainant acknowledged that she told no one about the alleged sexual abuse for several years, until she was 13 years old and in middle school. She also conceded that her story was not consistent during the investigation in California. Specifically, she told some people that the sexual abuse happened but told others that it did not. She admitted that her own family thought she was lying about the abuse. The complainant likewise conceded that law enforcement authorities concluded that there was no concrete evidence that her accusation was true, closed the investigation as unfounded, and returned her to her family's home. She also agreed that she had never previously told anyone that Fuller took her to motels, could not identify any of these motels by

name, and could not say how Fuller explained these excursions to other family members. In addition, the complainant admitted that though she contended that the sexual abuse resumed once her family moved to Houston, she initially did not inform school authorities or law enforcement.

The defense also sought to show that the video-recorded sex acts were consensual. Defense counsel asked the complainant if she recalled going downstairs and sitting on Fuller's lap in her bra and panties earlier that evening, but she denied doing so. She agreed that when Fuller returned, she did not cry out for help or fight him. She testified that she was three or four months from her seventeenth birthday at the time of the videotaped sex acts.

The State called several other witnesses who testified about the complainant's outcry in Texas and the ensuing investigation. Parrish and Adrian Woods, an assistant principal at the high school the complainant attended, both testified about the complainant's outcry and disclosure of the videotaped sex acts. Woods contacted law enforcement after the complainant disclosed the video. Both Woods and Parrish testified about the complainant's emotional state. Woods described the complainant as "in crisis" or "in distress" and possibly suicidal. Woods testified that the complainant "seemed happier at first" after disclosing the sexual abuse, but then "seemed like she got sad again" and "said she felt like hurting herself again." Parrish testified that the complainant "seemed happier" but still anxious afterward.

On cross-examination, defense counsel asked Parrish and Woods about the complainant's prior accusation of sexual abuse in California. The trial court sustained some hearsay objections made by the prosecutor during defense counsel's interrogation of Woods as to whether the complainant's prior accusation of sexual abuse was determined to be unfounded, but Woods testified without objection that the complainant's mother told him that the complainant had made the prior accusation to get attention. Parrish testified that she too was aware of the California investigation and that child protective services had closed its investigation as unfounded.

The State also called the law enforcement officers who investigated the complainant's allegations. Deputy J. Vong testified that he made the "initial workup" of the case and then passed it on to the lead investigator, Deputy J. Cassidy. Cassidy arranged for the complainant and other witnesses to be interviewed. He also arranged for the complainant to have a medical examination. He personally interviewed her mother and Fuller. The audio recording of his interview with Fuller was played for the jury. In it, Fuller admitted to the videotaped acts.

On cross-examination, Cassidy acknowledged that the complainant's siblings—a 13-year-old sister and a 16-year-old brother—did not disclose any sexual abuse during their interviews. Cassidy also acknowledged that the complainant's mother informed him that her daughter had accused Fuller of sexually abusing her

in California and that this accusation was investigated and determined to be unfounded. Cassidy conceded that he obtained child protective services records from California that memorialized this determination. The trial court sustained some hearsay objections made by the prosecutor during defense counsel's questioning of Cassidy about these records. But Cassidy testified that this prior investigation was closed as unfounded and that the records reflect this fact. With respect to Fuller's recorded interview, Cassidy agreed that Fuller stated he had made a mistake, but denied molesting the complainant since the age of seven. He also agreed that Fuller claimed that the complainant had set him up, initiating the sexual encounter by approaching him downstairs clothed only in her bra and panties.

Finally, the State called Dr. Rohit Shenoi, the physician who interviewed and examined the complainant. Shenoi testified that the complainant reported "that she was depressed," "had frequent nightmares," and "was often sad and sometimes angry." Shenoi further testified that the complainant reported having "considered committing suicide and taken multiple pills two-days prior" and indicated that she had been cutting herself. According to Shenoi, the complainant also told her about Fuller's sexual abuse of her beginning at seven or eight years of age and stated that the abuse occurred many times. Shenoi stated that the complainant "seemed anxious" during the examination, and that his exam confirmed that the complainant had been cutting herself.

On cross-examination, Shenoi conceded that he did not know whether the complainant's allegations of sexual abuse were true. He also conceded that the findings of the medical exam were normal. Shenoi agreed that he could not draw any medical conclusion as to whether the complainant had sex; he could only say that she did not have injuries resulting from sex.

In closing arguments, the prosecutor told the jury that "the evidence in this case is very overwhelming" and, without objection, that she was "sorry" the jury had to watch the video. The jury found Fuller guilty of both charged offenses.

Punishment Phase of Trial

Dr. Lawrence Thompson, a psychologist who counsels victims of sexual abuse, testified as an expert for the State. Over objection, Thompson testified that victims of sexual abuse often experience depression, anxiety, interpersonal difficulties, and sexual acting out. He testified that these symptoms are a response to trauma, and that suicidal thoughts also are a common response. Thompson also noted that it can be more difficult for children to cope with the trauma when the abuser is someone they know and trust, rather than a stranger. He also testified over objection that it "can be a lifelong process of working through their emotional fallout" for children abused by people they know. Thompson testified that it is common for victims of sexual abuse to delay in disclosing their abuse due to feelings of shame, fear, or guilt.

The prosecutor also tried to elicit testimony from Thompson about potential treatment options for sex offenders. Defense counsel objected that this subject was irrelevant. The trial court initially overruled the objection, and the following exchange occurred:

> [Prosecutor]: Are there any psychopharmocological means of intervention for somebody who's a sex offender?
>
> [Defense Counsel]: Objection, relevance.
>
> [Court]: Overruled.
>
> [Thompson]: There is nothing that we have in the way of psychopharmacologic intervention in the way of therapy and in the way of any other type of intervention that can cure someone of pedophilia.
>
> [Defense Counsel]: Objection. That is outside the parameters of that question. It's nonresponsive.
>
> [Court]: Sustained.

Defense counsel requested that the trial court instruct the jury to disregard Thompson's answer, and the trial court did so. Defense counsel moved for a mistrial, but the trial court denied the motion.

The prosecutor then sought to ask Thompson other questions about the curability or treatment of sex offenders, but the trial court sustained defense counsel's objections to these inquiries.

On cross-examination, Thompson agreed that his testimony was confined to

"general principles." He acknowledged that he has not met or counseled the complainant, did not know whether she had experienced or exhibited any of the general behaviors that he had discussed in his testimony, and was unfamiliar with her medical history. He conceded that he did not know whether the complainant suffered from depression or anxiety, was acting out, or would suffer any long-term effects from sexual abuse.

Karen Parker, an employee of the sexual abuse unit of child protective services, also testified for the prosecution. Parker testified that the complainant was assigned as part of her caseload about a month after the complainant's outcry in Houston. Parker testified that the complainant had been placed in a mental hospital more than once due to severe depression and suicidal ideation. Parker stated that afterward the complainant remained "very sad" and still "came across as being very depressed." Parker testified that the complainant has been separated from her siblings and mother, that her mother has taken Fuller's side, and that the complainant was alone.

On cross-examination, Parker conceded that she was not a psychiatrist or medical doctor and agreed that being sympathetic to alleged victims of sexual abuse was part of her job. Parker also agreed that the complainant and her siblings were not completely cut off from one another and have had visits and contact. Parker did not dispute that child protective services in California concluded that there was no

concrete evidence to support the accusation against Fuller and that the case was unfounded.

The State also put on proof that Fuller previously had been convicted of two felonies in California, one for possession of cocaine and another for possession for sale of cocaine base. The State then reoffered the proof introduced during the guilt/innocence phase of trial and rested.

The defense called both of the complainant's siblings as witnesses. The siblings both testified that Fuller was a good father and did not abuse them. Both siblings testified that the complainant did not have a good reputation for honesty. Both also testified that they informed the California authorities that they did not believe the complainant's prior accusation of sexual abuse against Fuller. Both asked the jury to exercise mercy or leniency in punishing Fuller.

The defense also called the complainant's mother as a witness. She testified that Fuller was a good father. She also testified that the complainant did not have a good reputation for honesty, that she informed the California authorities that she did not believe her daughter's prior accusation of sexual abuse, and that child protective services and other authorities in California concluded the accusation was unfounded. She asked the jury to have leniency despite the nature of the offense and stated that she believed that Fuller only had sex with her daughter on the one occasion on which it was videotaped.

In closing, the prosecutor argued for life imprisonment in part based on the impact of the offenses on the complainant. In addition to the prolonged duration of abuse and its adverse impact on the complainant's well-being, the prosecutor argued that the complainant's mother and siblings had sided with Fuller and left her "all alone." She noted that "this year is her senior year" and that "there's going to be nobody to take her out to dinner to celebrate" when she is accepted into college. Defense counsel objected that this was speculation, and the trial court sustained the objection. The trial court also instructed the jury to disregard "the last comment by the prosecutor," but denied the defense's motion for a mistrial. The prosecutor then resumed her argument by stating, "Make no mistake about it. She is alone because of him."

During his closing, defense counsel asserted that this "trial has all been about what is going to be a fair sentence" and argued that life imprisonment was unfair given the discredited nature of the complainant's prior accusation and the isolated nature of the videotaped offenses. He also remarked on the law of parole in general and its application to Fuller in particular. He noted that the law mandates that a defendant serve at least half of any term of imprisonment imposed before becoming eligible for parole and argued that Fuller could serve "a lot more than half. He can do two-thirds, three-quarters or all of it." The prosecutor objected that defense counsel's argument about how long Fuller might be imprisoned before being paroled

was improper, and the trial court sustained the objection. Defense counsel then argued that Fuller "can do whatever the parole board thinks fair. It's up to them, but for sure he's going to do one-half." The prosecutor again objected, and the trial court ruled that the "second part he just spoke of, it's overruled." Afterward defense counsel concluded without objection by arguing: "That's the law, one-half. So you can take that into consideration and you should absolutely."

After deliberating, the jury found it was true that Fuller previously was convicted of two felonies in California. It assessed Fuller's punishment at confinement for life, and the trial court entered judgment on the verdicts.

Discussion

A. No commitment question

In his first issue, Fuller contends that the prosecutor sought an improper commitment from prospective jurors when she asked them to rate on a scale of one to four how likely they thought it would be for a child to lie about being sexually abused. The State disagrees, arguing that the question sought to discover preexisting biases and prejudices, not to commit prospective jurors to any particular position.

1. Applicable law

We review a trial court's ruling on an improper commitment question during jury selection for an abuse of discretion. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002); *Bravo v. State*, 471 S.W.3d 860, 871 (Tex. App.—Houston [1st

Dist.] 2015, pet. ref'd).

A defendant has a constitutional right to a trial by an impartial jury. *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005). To safeguard this right, counsel are forbidden to ask prospective jurors questions that solicit an improper commitment to return a verdict based on some specific set of facts before they have heard the evidence. *Id.* The Court of Criminal Appeals has stated a three-part test for ascertaining whether a question seeks an improper commitment. *Bravo*, 471 S.W.3d at 872 (citing *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2015)).

First, we assess whether the question seeks a commitment. *Id.* A question does so if "'one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question.'" *Id.* (quoting *Standefer*, 59 S.W.3d at 180); *compare Braxton v. State*, 226 S.W.3d 602, 605 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd) (question asking if prospective jurors "would resolve the issue of self-defense more favorably to the defendant based on the knowledge that the defendant was a woman" held to be a commitment question), *with McDonald v. State*, 186 S.W.3d 86, 90 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (question asking prospective jurors "whether they think it is likely or unlikely that children generally will fabricate allegations of sexual abuse" held not to be a commitment

question).

Second, if we determine that the question seeks a commitment, then we must assess whether the commitment sought is an improper one, for not all commitments are improper. *Bravo*, 471 S.W.3d at 872. A commitment question is proper if one of the possible answers would give rise to a valid challenge for cause. *Id.* Hence, if "the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Id.* (quoting *Standefer*, 59 S.W.3d at 181). But if a commitment question could not give rise to a challenge for cause, then the commitment question is an improper one. *Id.*

Finally, even if the question may give rise to a valid challenge for cause, we must ascertain whether the question includes "only those facts necessary to test whether a prospective juror is challengeable for cause." *Id.* (quoting *Standefer*, 59 S.W.3d at 182). Facts beyond those necessary to sustain a challenge for cause may render an otherwise proper commitment question an improper one. *Id.*

2. Analysis

Our court has considered an issue nearly identical to the one Fuller raises. In *McDonald*, the prosecutor was permitted over objection to pose the following question to the jury panel: "Do you feel that children likely will make up sexual abuse or unlikely?" 186 S.W.3d at 90. We rejected the contention that this was a commitment question, reasoning that the question sought "to discover whether any

of the prospective jurors harbor a pre-existing bias or prejudice concerning the likelihood of children in general fabricating sexual abuse allegations" and did not ask them commit to any particular set of facts. *Id.*

The question the prosecutor posed to the jury panel in this case—"How likely do you think a child would be to lie about being sexually abused?"—is indistinguishable from the one asked in *McDonald*. The prosecutor's question sought to discover any biases or prejudices rather than commit prospective jurors to resolve or refrain from resolving any issue in the case on the basis of facts contained in the question. The question therefore is not a commitment question. *Bravo*, 471 S.W.3d at 872 (citing *Standefer*, 59 S.W.3d at 180). Accordingly, we hold that the trial court did not abuse its discretion by permitting the question.

We overrule Fuller's first issue.

B. No reversible error arising from prosecutor's comments in opening statement and closing argument

In his second issue, Fuller contends that the prosecutor's remarks during her opening statement in the guilt/innocence phase that she was "very sorry" that the jury would have to view the "offensive and degrading" video and that the video would show that Fuller did not care about his stepdaughter or her feelings was improper and inflammatory. Fuller also contends that the prosecutor's comments during her closing argument in the punishment phase that the complainant was "all alone" and would have no one with whom she could celebrate admission into college

were improper and inflammatory. The State responds that these remarks were not improper or inflammatory and that, even if her remarks were objectionable on some basis, any error was harmless, given the trial court's instruction to disregard and the overwhelming proof of Fuller's guilt.

1. Applicable law

Most appellate complaints must be preserved by a timely request for relief in the trial court. *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013). The preferred procedure for preservation of error relating to improper or inflammatory comments consists of a three-step process: an objection, followed by a request for instruction to disregard, and finally a motion for mistrial when an instruction to disregard will not cure the prejudice. *Id.*; *McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998). A party may dispense with the first two steps and immediately move for a mistrial, but is entitled to one only if an objection or instruction respectively would not have prevented or cured the harm resulting from the error. *Unkart*, 400 S.W.3d at 99; *McGinn*, 961 S.W.2d at 165. When a party seeks and receives relief in response to an objection or request for an instruction to disregard and does not thereafter move for mistrial, he preserves nothing for review. *Mathis v. State*, 67 S.W.3d 918, 926–27 (Tex. Crim. App. 2002).

When the only adverse ruling is the trial court's denial of a motion for mistrial, "the proper issue is whether the refusal to grant a mistrial was an abuse of

discretion." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Williams v. State*, 417 S.W.3d 162, 175 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). We must affirm the trial court's denial of a motion for mistrial if its ruling was within the zone of reasonable disagreement. *Williams*, 417 S.W.3d at 175. If the trial court promptly instructs the jury to disregard an improper argument, this usually cures any error. *Id.*; *Baker v. State*, 177 S.W.3d 113, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (instruction generally cures error and we may presume the jury obeys an instruction to disregard). A mistrial is an extreme remedy that is required only when the impropriety of the argument "is clearly calculated to emotionally inflame the juror's minds and is of such a character as to suggest the impossibility of withdrawing the impression produced on the jurors' minds" or the improper argument is so prejudicial that further proceedings would be wasteful and futile. *Williams*, 417 S.W.3d at 175.

Proper opening statements are confined to a description of the nature of the accusations and defenses and the facts that each side expects to prove in support. TEX. CODE CRIM. PROC. ANN. art. 36.01 (West 2007); *Robles v. State*, 104 S.W.3d 649, 652 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Proper closing arguments are confined to four general categories: "(1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Guidry v. State*, 9 S.W.3d 133, 154

(Tex. Crim. App. 1999); *Delacerda v. State*, 425 S.W.3d 367, 398 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Speculative statements about the consequences of the crime do not fall within these four categories. *E.g.*, *Palermo v. State*, 992 S.W.2d 691, 696–97 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (argument that family would be placing wreath on grave rather than celebrating Christmas in future owing to timeframe in which murder was committed held improper). Apologies for the disagreeable nature of the proof or expressions of sympathy for having to view the proof also may fall outside of the proper description of the expected proof or evidence admitted at trial. *See Giesen v. State*, 688 S.W.2d 176, 179 (Tex. App.—Dallas 1985, no pet.) (discussing improper apologies made to jury for "the kind of testimony" and "perverted facts" it had to hear relating to sexual assault in case in which defendant argued that prosecutor was attacking him through his defense counsel via argument about nature of proof necessitated by the defense). But the prosecution is entitled to characterize the proof so long as those characterizations are the product of reasonable deduction about what the expected proof will show or the evidence admitted has shown. *See, e.g., Ledesma v. State*, 828 S.W.2d 560, 563–64 (Tex. App.—El Paso 1992, no pet.) (no error when prosecutor argued in closing that complainants who were sexually assaulted were "'treated like animals'" and that their "vicious" assailants' conduct "gave a whole new meaning to the word degrading," given the "severe and extreme facts in

evidence").

Even if counsels' statements or arguments to the jury are improper, they do "not result in reversible error that warrants a mistrial unless the trial court's instruction to disregard would not cure any resulting harm." *Bryant v. State*, 340 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). When assessing whether an improper jury argument is incurable, we consider the following three factors: "(1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of evidence supporting the conviction)." *Id.* (citing *Berry v. State*, 233 S.W.3d 847, 858–59 (Tex. Crim. App. 2007)); *see also Norton v. State*, 930 S.W.2d 101, 104 (Tex. App.—Amarillo 1996, pet. ref'd) (indicating that whether harm or prejudice of remarks made in opening statement require reversal should be evaluated under same general standard as closing argument).

2. Analysis

During her opening statement, the prosecutor apologized to the jurors in advance for the video, and she characterized its contents as "offensive and degrading." The defense objected to both remarks, but only sought a mistrial in connection with the apology. The trial court sustained defense counsel's objection to the characterization of the video as "offensive and degrading," and defense

counsel sought no further relief. Having received all of the relief he requested, Fuller has not preserved any error associated with the prosecution's characterization of the video as "offensive and degrading." *Mathis*, 67 S.W.3d at 926–27.

Fuller did preserve error with respect to the apology by obtaining an instruction to disregard and moving for a mistrial. Assuming that the prosecutor's apology for the nature of the evidence was improper, as the trial court ruled, we conclude that it was not an abuse of discretion to deny Fuller's motion for a mistrial because the comment's prejudicial effect was minimal or nonexistent. The prosecutor's apology was brief, and jurors viewed the video for themselves. Given the graphic contents of the video, the prosecutor's expression of regret was highly unlikely to influence the jury's reception of the evidence. Indeed, Fuller's own counsel described its contents to jurors as "tough to watch," and elicited testimony from the complainant's mother that she found the video very difficult to watch and could not watch it in its entirety. Finally, the proof of Fuller's guilt, including the video itself, was overwhelming. Under the circumstances, we conclude that the trial court's instruction to disregard cured the improper apology and that the trial court did not err in refusing to grant a mistrial on the basis of the prosecutor's statement that she was sorry that jurors would have to watch the video. *See Bryant*, 340 S.W.3d at 13.

Fuller also complains about a third improper comment by the State. During

her closing argument, the prosecutor argued that Fuller's sexual abuse of the complainant resulted in her being "all alone" and deprived her of anyone with whom she could celebrate admission into college. The prosecutor's comment regarding graduation celebrations has no basis in the proof and was therefore improper. *See Palermo*, 992 S.W.2d at 696 (holding that argument that family's Christmas would be marred forever by murder and that family would be laying wreath on victim's grave rather than composing Christmas lists improper given the proof in the record). But the magnitude of any prejudice associated with these remarks was minimal. The prosecutor made these remarks during the punishment phase of the trial, and the remarks were brief and did not comprise a significant portion of her closing argument on punishment. The trial judge gave an oral instruction to disregard and the jury had already heard evidence that Fuller began sexually abusing the complainant at the age of seven and continued to do so for many years. Given this proof which the jury was entitled to credit, the prosecutor's jury argument about the complainant's isolation and hypothetical college admission was not so inflammatory that an instruction to disregard could not have cured any harm. *See id.* Therefore, we conclude that the trial court did not err in refusing to grant a mistrial on the basis of the prosecutor's closing argument during punishment. *See Bryant*, 340 S.W.3d at 13.

We overrule Fuller's second issue.

C. No reversible error in admission or exclusion of evidence

In his third, fourth, fifth, sixth, and seventh issues, Fuller asserts that the trial court erred either in admitting or excluding evidence.

1. Standard of review

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Robbins v. State*, 88 S.W.3d 256, 259–60 (Tex. Crim. App. 2002). Under this standard, we must uphold the trial court's ruling so long as it is within the zone of reasonable disagreement and may not reverse solely because we would have decided otherwise. *Tillman*, 354 S.W.3d at 435; *Robbins*, 88 S.W.3d at 260. Even if the trial court articulates an invalid basis for its ruling, we must uphold the ruling if it is correct on any theory applicable to the case. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

To be admissible, evidence must be relevant. TEX. R. EVID. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and that fact "is of consequence in determining the action." TEX. R. EVID. 401. Hence, when assessing the relevance of particular evidence, courts must consider the purpose for which the proof is being introduced. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). It is essential that there be a direct or logical connection between the proof and the proposition sought to be

proven. *Id.*

2. No error in admission of evidence regarding the complainant's emotional state

In his third issue, Fuller contends that the trial erred by permitting the prosecutor to elicit testimony about the complainant's emotional state and demeanor after the alleged abuse occurred. He argues that teens experience and display negative moods for many reasons and that proof of depression or its symptoms therefore is irrelevant, as it does not make the occurrence of any element of the charged offenses more or less likely. The State responds that this evidence in relevant and admissible.

a. Applicable law

A complainant's change in behavior is relevant to allegations of sexual abuse or assault if either occurrence or consent are disputed, because the change in behavior makes it more probable that the alleged abuse or assault took place. *See, e.g.*, *Gonzalez v. State*, 455 S.W.3d 198, 203–04 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (evidence of child's post-traumatic stress disorder held admissible in case in which source of trauma—sexual assault by defendant or physical abuse by mother—was disputed); *Yatalese v. State*, 991 S.W.2d 509, 511 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (teenager's transformation from "normal, regular little girl" to having "very bad attitude" and "a lot of anger" since alleged sexual assault held admissible in case in which the defendant disputed that the

assault occurred). If neither the occurrence of the abuse or assault nor consent are disputed, however, a complaint's emotional state or demeanor generally is not relevant to guilt or innocence. *E.g.*, *Brown v. State*, 757 S.W.2d 739, 740–41 (Tex. Crim. App. 1988) ("suicide attempts, weight gain, job loss, fear of being outside and loss of confidence" not relevant in case in which defendant disputed that he was the rapist, not that complainant had been raped).

b. Analysis

Fuller does not identify by citation to the record the testimony regarding the complainant's emotional state or demeanor about which he complains. But the complainant testified that she did not want to have sex with Fuller and that she was scared during the period of her alleged abuse. She also testified that she felt that she did not want to go on living, and that she said so on social media. The trial court admitted three of her social media postings, in which the complainant stated that she was amazed at how little anyone cared, would kill herself if no pain or blood were involved and her family would not be hurt by her actions, and that she had ceased caring. Other witnesses also testified about the complainant's demeanor.

The defense disputed the occurrence of all of the alleged sexual abuse other than the acts captured on video and maintained that the videotaped sex acts were consensual. Given the defense theory, proof concerning the complainant's emotional state or demeanor was relevant and admissible to show that the

complainant did not consent. *Gonzalez*, 455 S.W.3d at 203–04; *Yatalese*, 991 S.W.2d at 511. Thus, the trial court did not abuse its discretion by admitting this evidence.

We overrule Fuller's third issue.

3. No error regarding proof of complainant's prior accusation

In his fourth issue, Fuller contends that the trial court erred by disallowing defense counsel from inquiring whether the complainant's prior accusation of sexual abuse against him was unfounded. The State responds that the trial court did admit proof that the complainant's prior accusation of sexual abuse was deemed unfounded.

a. Applicable law

The credibility of the State's witnesses is always relevant at trial. *See McDuff v. State*, 939 S.W.2d 607, 617 (Tex. Crim. App. 1997) ("Of course, within reason, the trial judge should allow the accused great latitude to show any relevant fact that might affect the witness's credibility."). Thus, in cases of sexual abuse or assault, evidence of false accusations may be admissible if offered as proof of something other than dishonest character, such as motive or bias. *Hammer v. State*, 296 S.W.3d 555, 564–66 (Tex. Crim. App. 2009) (discussing limitations imposed on admissibility of prior false accusations by TEX. R. EVID. 404(b), 608(b), 612); *e.g.*, *Billodeau v. State*, 277 S.W.3d 34, 40–43 (Tex. Crim. App. 2009) (complainant's

threats to make false accusations of molestation against others held admissible); *Thomas v. State*, 669 S.W.2d 420, 421–23 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) (complainant's false accusations of rape by other persons held admissible).

b. Analysis

Contrary to Fuller's contention, the trial court did not prohibit him from adducing evidence that the complainant's prior accusation of sexual abuse was deemed unfounded. Fuller's counsel elicited testimony from the complainant that law enforcement authorities and child protective services investigated her prior accusation, that her statements about the abuse were inconsistent, and that law enforcement authorities and child protective services concluded that her accusation was unfounded. Moreover, Fuller's counsel questioned five other witnesses—Cassidy, Parker, Parrish, Woods, and the complainant's mother—about the ostensibly unfounded nature of the complainant's prior accusation. The trial court did sustain objections to several questions that Fuller's counsel posed on this subject based on hearsay or the witnesses' lack of personal knowledge. *See* TEX. R. EVID. 602, 801–02. But Fuller does not complain on appeal that the trial court misapplied these evidentiary rules. In sum, Fuller repeatedly introduced proof that the complainant's prior accusation of sexual abuse was deemed unfounded, and his appellate argument that he was prohibited from doing so therefore does not support

reversal.

We overrule Fuller's fourth issue.

4. No error in exclusion of complainant's past sexual behavior

In his fifth issue, Fuller contends that medical or other evidence introduced by the prosecution rendered the complainant's past sexual behavior relevant and that the trial court therefore erred by excluding evidence on this subject. The State contends that the trial court properly excluded evidence of the complainant's past sexual behavior.

a. Applicable law

Evidence of a complainant's sexual reputation or specific instances of her past sexual behavior generally is inadmissible. TEX. R. EVID. 412(a). But there are several exceptions to the general rule excluding specific instances of sexual behavior. TEX. R. EVID. 412(b); *Hammer*, 296 S.W.3d at 566. For example, specific instances of past sexual behavior are admissible if "necessary to rebut or explain scientific or medical evidence offered by the prosecutor." TEX. R. EVID. 412(b)(2)(A); *e.g.*, *Miles v. State*, 61 S.W.3d 682, 686–87 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (trial court should have allowed defendant to introduce proof that complainant had sex with someone other than him to rebut medical report showing sexual activity that was offered as proof of rape). But proof of past sexual behavior that is relevant for a proper purpose remains inadmissible if it runs afoul of

other evidentiary rules. *E.g.*, *Miles*, 61 S.W.3d at 686–87 (distinguishing between evidence admissible under Rule 412(b)(2)(A)'s medical rebuttal exception and evidence that was not because it was hearsay).

b. Analysis

Fuller's counsel sought to ask Parrish about medical records reflecting that the complainant was sexually active. The trial court excluded this proof under Rule 412 of the Texas Rules of Evidence, which entirely bars sexual reputation evidence and bars evidence of specific instances of sexual behavior unless one of several exceptions applies. TEX. R. EVID. 412(a)–(b). Fuller contends that "a complainant's past sexual activity may be used to rebut medical evidence put on by the State." *See* TEX. R. EVID. 412(b)(2)(A) (exception permitting evidence of specific instances of complainant's past sexual behavior if it "is necessary to rebut or explain scientific or medical evidence offered by the prosecutor"). But he does not explain what particular medical or scientific evidence required rebuttal or how proof of the complainant's sexual activity would rebut any such evidence. Nor does the record disclose any medical or scientific proof that could be rebutted by proof of specific instances of the complainant's past sexual behavior. Under the circumstances, we hold that the trial court did not abuse its discretion by refusing to permit Fuller to introduce evidence about the complainant's past sexual behavior.

We overrule Fuller's fifth issue.

5. No error in admission of expert testimony on symptoms of sexual abuse

In his sixth issue, Fuller contends that the trial court erred in admitting certain expert testimony during the punishment phase of the trial. He argues that Thompson's general testimony about trauma experienced by victims of sexual abuse should have been excluded, because there was no proof that the complainant suffered from these particular symptoms. The State responds that the complainant testified that she experienced some of symptoms of trauma identified by Thompson, and that the jury was entitled to know all of the effects that the complainant might suffer in the future.

a. Applicable law

Expert testimony must not only be relevant to the issues in the case, it must rest on a reliable scientific foundation. *Tillman*, 354 S.W.3d at 435. In the context of expert testimony, relevance requires both that testimony on the subject will assist the jury and is sufficiently tied to the facts of the case to do so. *Id.* at 438.

A qualified expert may testify about the behaviors one would expect children who have been sexually abused to exhibit. *Cohn v. State*, 849 S.W.2d 817, 818–19 (Tex. Crim. App. 1993) (psychiatrist); *see also Mulvihill v. State*, 177 S.W.3d 409, 412–14 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (counselor who was neither a psychologist or psychiatrist). Under *Cohn*, such testimony may be relevant and admissible even if the behavior at issue is merely consistent with sexual abuse

rather than of a sort that would only be exhibited as a result of sexual abuse. *Frohne v. State*, 928 S.W.2d 570, 575 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Conner v. State*, 891 S.W.2d 668, 669–70 (Tex. App.—Houston [1st Dist.] 1994, no pet.). This sort of behavioral testimony must be tied to the facts of the case either through the expert's own testimony or the testimony of other witnesses regarding the behavior actually exhibited by the child. *Tillman*, 354 S.W.3d at 439–40 (discussing *Cohn*). But the fit between the expert testimony and the facts of the case need not be perfect; it suffices if the child displayed some of the symptoms or behaviors discussed by the expert. *Williams v. State*, 895 S.W.2d 363, 365–66 (Tex. Crim. App. 1994) (discussing *Cohn*).

b. Analysis

Thompson testified that children who have been sexually abused often experience depression, anxiety, interpersonal difficulties, sexual acting out, and suicidal tendencies. He also testified that working through "the emotional fallout" of sexual abuse "can be a lifelong process." He agreed on cross-examination that he had not counseled the complainant, was unfamiliar with her medical history, and did not know whether she had experienced any of the general symptoms of sexual trauma. But the complainant testified that she had suicidal feelings and anxiety about whether the videotaped sex acts would be enough to prove Fuller abused her. She also testified that she had problems in school.

Multiple other witnesses also testified about the complainant's behavior. Woods described her as being "in crisis" or "in distress" and possibly suicidal before the existence of the video was discovered. Woods testified that the complainant expressed sadness and a desire to hurt herself after the discovery of the video. Parrish testified that the complainant had anxiety. Shenoi testified that the complainant reported depression, frequent nightmares, sadness, anger, and suicidal thoughts. Shenoi also testified that the complainant "seemed anxious." Finally, Parker testified that the complainant had been placed in a mental hospital more than once due to severe depression and suicidal ideation and that she remained "very sad" and still "came across as being very depressed" after being discharged. Because the record contains evidence that the complainant exhibited some of the behaviors about which Thompson testified, the trial court did not error by admitting his testimony on this subject. *Tillman*, 354 S.W.3d at 439–40; *Williams*, 895 S.W.2d at 365–66.

We overrule Fuller's sixth issue.

6. No appellate issue preserved for review regarding expert's testimony on pedophilia

In his seventh issue, Fuller argues that Thompson's testimony about the absence of medical treatments for pedophilia is irrelevant, because there was no proof that Fuller was diagnosed as a pedophile. The State contends that any conceivable error associated with Thompson's lone reference to the subject was cured by the trial court's instruction to disregard.

a. Applicable law

Evidence that the defendant is a pedophile is barred if offered to show his "propensity to molest children and that he acted in conformity therewith when he committed the charged offense." *Brewington v. State*, 802 S.W.2d 691, 692 (Tex. Crim. App. 1991). But such evidence may be relevant and admissible at the punishment stage of the proceedings on the issue of future dangerousness. *Nenno v. State*, 970 S.W.2d 549, 552, 559–62 (Tex. Crim. App. 1998) (expert testified that defendant was a pedophile, pedophiles are difficult to rehabilitate, and that defendant therefore posed an extreme threat to society), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999); *see also Lane v. State*, 933 S.W.2d 504, 508 (Tex. Crim. App. 1996) (psychiatrist testified about defendant's pervasive/chronic pedophilia in connection with future dangerousness).

When counsel objects and requests an instruction to disregard and the trial court sustains the objection and issues the requested instruction, the only source of potential error is the trial court's failure to grant a corresponding motion for mistrial. *Hawkins*, 135 S.W.3d at 77. An instruction to disregard generally cures any error and we presume that the jury obeys such an instruction. *Baker*, 177 S.W.3d at 126.

b. Analysis

The prosecutor asked Thompson whether there are any potential treatment options for sex offenders. During his testimony on this subject, Thompson opined

that there is not any "type of intervention that can cure someone of pedophilia." Fuller's counsel objected that this response was non-responsive, requested that the trial court instruct the jury to disregard this testimony, and moved for a mistrial. The trial court sustained the objection and instructed the jury to disregard, but denied the motion for a mistrial. The State then sought to question Thompson further on the subject of the curability of sex offenders, but the trial court sustained Fuller's repeated objections to this testimony.

Thus, the only testimony that the trial court allowed Thompson to provide on the subject of the treatment of sex offenders was that he was familiar with the literature on sex offenders, had experience with sex offender treatment programs in the Texas penal system, and that the goal of these programs is the "management of inappropriate sexual impulses"—all of which was admitted into evidence without objection. The trial court excluded all evidence of the lack of viable treatments for pedophilia that the State sought to introduce and instructed the jury to disregard Thompson's lone reference to pedophilia. Fuller does not complain on appeal that the trial court erred in not granting his corresponding motion for mistrial. In sum, because the trial court instructed the jury to disregard the sole mention of pedophilia and Fuller does not challenge the denial of a mistrial on the basis of that sole utterance of the word, we overrule Fuller's issue. *See Hawkins*, 135 S.W.3d at 77 (when objection sustained and instruction to disregard granted, only source of

potential error is failure to grant a motion for mistrial); *Baker*, 177 S.W.3d at 126 (instruction generally cures error and we may presume the jury obeys an instruction to disregard).

We overrule Fuller's seventh issue.

D. No error regarding argument on parole

Fuller contends that the trial court erred by preventing the defense from presenting jury argument about the application of parole law and argues that the jury's assessment of punishment at life imprisonment shows that the ruling prejudiced him. The State argues that the trial court correctly sustained its objection, because defense counsel's argument impermissibly addressed the application of parole law to Fuller's situation in particular, as opposed to parole law in the abstract.

1. Applicable law

In cases in which a defendant is charged with sexual assault, the trial court must instruct jurors that, "if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time the defendant may earn." TEX. CODE CRIM. PROC. ANN. art. 37.07(4)(a) (West Supp. 2015). The trial court also must instruct jurors that it is not possible to accurately predict "how the parole law and good conduct time might be applied to this defendant if sentenced to a term of

imprisonment" and that, while the jury may "consider the existence of the parole law," it is "not to consider the manner in which the parole law may be applied to this particular defendant." *Id.* In accord with these instructions, counsel may inform jurors about the law of parole in the abstract and ask them to take it into account in assessing punishment, but cannot make arguments regarding the manner in which parole law will operate with respect to the defendant in particular. *Taylor v. State*, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007); *Hawkins*, 135 S.W.3d at 84; *Facundo v. State*, 971 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); *Valencia v. State*, 966 S.W.2d 188, 190 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

2. Analysis

During his closing statement, defense counsel argued both about the law of parole in general and its application to Fuller in particular. He argued that the law mandates that a defendant serve at least half of any term of imprisonment imposed before becoming eligible for parole and that Fuller could serve "a lot more than half. He can do two-thirds, three-quarters or all of it." The prosecutor objected that defense counsel's argument about how long Fuller might be imprisoned before being paroled was improper, and the trial court sustained the objection.

Defense counsel then argued that Fuller "can do whatever the parole board thinks is fair. It's up to them, but for sure he's going to do one-half." The prosecutor

again objected, and the trial court ruled that the "second part he just spoke of, it's overruled." Afterward defense counsel concluded without objection by arguing: "That's the law, one-half. So you can take that into consideration and you should absolutely." In other words, the trial court allowed defense counsel to explain parole law in the abstract and urge the jury to take it into consideration, but did not permit defense counsel to argue to the jury how parole law would affect Fuller in particular. Thus, the trial court did not err. *Taylor*, 233 S.W.3d at 359; *Hawkins*, 135 S.W.3d at 84; *Facundo*, 971 S.W.2d at 136; *Valencia*, 966 S.W.2d at 190.

We overrule Fuller's eighth issue.

E. No cumulative error

In his ninth and tenth issues, Fuller argues that, even if none of the individual errors he asserts requires reversal, the cumulative effect of these errors deprived him of a fair trial and due process of law. The State argues that each error Fuller asserts is without merit and that this defeats his claim of cumulative error.

1. Applicable law

Multiple errors may be harmful in their cumulative effect on the defense even if each error would be harmless standing on its own. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *Ryser v. State*, 453 S.W.3d 17, 43 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The mere existence of multiple errors does not warrant reversal unless they operated in concert to undermine the

fundamental fairness of the proceedings. *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010); *see also Murphy v. State*, 112 S.W.3d 592, 607 (Tex. Crim. App. 2003) ("Because we have found little or no error in the above-alleged points, there is no harm or not enough harm to accumulate.") And if a defendant's individual claims of error lack merit, then there is no possibility of cumulative error. *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009); *Chamberlain*, 998 S.W.2d at 238.

2. Analysis

We have concluded that the trial court did not err with respect to Fuller's first, third, fourth, fifth, sixth, and eighth issues, and that Fuller's seventh issue presents nothing for review. These non-errors cannot support a claim of cumulative error. *Gamboa*, 296 S.W.3d at 585; *Chamberlain*, 998 S.W.2d at 238. Thus, the only remaining source of cumulative error consists of Fuller's second issue, which concerns the prosecutor's expression of regret during her opening statement that jurors would have to view a video showing Fuller sexually abusing his stepdaughter and the prosecutor's reference to the absence of persons with whom the complainant would be able to celebrate admission into college during closing argument in the punishment phase of the trial. We conclude that any error associated with these remarks was harmless or else not harmful enough to accumulate. *Murphy*, 112 S.W.3d at 607. The essence of a claim of cumulative error is that the whole is greater

than the sum of its parts. Taken together, the prosecutor's two brief and isolated comments, which were separated from one another by the remainder of a trial during which substantial proof of Fuller's guilt and culpability were presented, did not combine to deprive him of a fair trial or due process of law. Accordingly, we reject Fuller's claim of cumulative error.

We overrule Fuller's ninth and tenth issues.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).