

**Affirmed and Memorandum Opinion filed January 12, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00105-CR**

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**KEVIN DUANE WALTERS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 337th District Court  
Harris County, Texas  
Trial Court Cause No. 1462439**

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**MEMORANDUM OPINION**

Appellant was convicted of indecency with a child, based on evidence that he had fondled his prepubescent daughter. He raises two issues in this appeal. The first issue arises out of the admission of expert testimony concerning pedophilia, and the second issue arises out of an improper closing argument that commented on his in-court remorselessness. Finding no reversible error with either issue, we affirm the trial court's judgment.

## EXPERT TESTIMONY

During the punishment stage of trial, the prosecutor elicited testimony about pedophilia from a clinical psychologist. The questions were about pedophilia in general—such as, whether a cure exists for pedophilia, and whether an adult who is attracted to children may also be attracted to other adults. Responding in general terms and without reference to appellant specifically, the psychologist explained that there was no cure for pedophilia and that there are two main types of pedophiles: those attracted exclusively to children, and those who have attractions to both children and adults.

Defense counsel interrupted the psychologist's testimony. In a bench conference, counsel argued as follows:

I'm going to object to this. This is talking about facts not in evidence. There [are] no facts that [appellant] is a pedophile. He hasn't been diagnosed a pedophile and a pedophile is a very specific type of person. He's not somebody who has—and all child molesters are not pedophiles.

The prosecutor responded that the psychologist was simply giving the definition of a pedophile. Defense counsel disagreed with that characterization: “That's not the definition of a pedophile.”

The trial court determined that the psychologist's testimony was “relevant in a hypothetical sense.” The court overruled counsel's objection, but the court said that it would “entertain any further objection.” The psychologist then continued his testimony—without further objections from defense counsel, however. The psychologist repeated his statements that there are two types of pedophiles and that there is no cure for pedophilia. He also added that incarceration is the only guarantee that a pedophile would not act on his attraction to children.

In his first issue, appellant argues that the trial court should have excluded the psychologist's testimony because it was offered for an inadmissible purpose—namely, to show that appellant had acted in conformity with a pedophilia diagnosis or that he would reoffend in the future if he were ever released. The State counters that this complaint has not been preserved. We agree with the State.

To preserve a complaint for appellate review, the complaining party must make a timely and specific objection in the trial court. *See* Tex. R. App. P. 33.1. Error preservation does not require a hyper-technical or formalistic use of words or phrases, but at the very least, the complaining party must “let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.” *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). A timely and specific objection gives the trial judge and the opposing party an opportunity to correct the error. *Id.*

Whether a party's particular complaint is preserved also depends on whether the complaint on appeal comports with the complaint made at trial. *Id.* In making this determination, we consider the context in which the complaint was made and the parties' shared understanding at that time. *Id.*

In this case, the complaint on appeal is that the challenged testimony should have been excluded because it was used to show appellant's character conformity or propensity to molest children. This complaint does not comport with the objection made at trial, where defense counsel complained about the definition of a pedophile and the false impression that appellant had been professionally diagnosed as a pedophile. There is no contextual clue in the discussion between defense counsel, the prosecutor, and the trial court to suggest that any of those parties understood the objection to relate to character conformity or propensity

purposes. Because appellant’s specific complaint on appeal was not made during the trial, we conclude that it has not been preserved for appellate review.

Our resolution of this issue would be the same even if the appellate complaint comported with the objection made at trial. In addition to the basic rules of error preservation, the complaining party must object each time the challenged evidence is offered or obtain a running objection. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). If the complaining party does not object when the challenged evidence is offered a second time, any error in the admission of that evidence is considered “cured.” *Id.*

Defense counsel objected when the psychologist first began to testify about pedophilia in general, but counsel did not obtain a running objection and counsel did not object when the psychologist repeated his original testimony. Because the challenged testimony was admitted elsewhere without objection, any error in the admission of that testimony cannot provide a basis for reversing the trial court’s judgment. *Id.*

### **IMPROPER CLOSING ARGUMENT**

Appellant’s second issue also arises out of the punishment stage of trial. During closing arguments, the prosecutor said that appellant had forever changed the relationship he had with his daughter “into something disgusting, into something embarrassing.” The prosecutor then referred to appellant’s in-court demeanor: “I mean, it just doesn’t—you see it right there. Nothing changes about the man. Nothing.”

Appellant argues that the prosecutor’s statements can only be construed as a comment on his in-court remorselessness. Appellant then argues that this comment

was improper because appellant did not testify during the trial, meaning a comment on his in-court demeanor infringed on his right to not testify.

Appellant acknowledges that his defense counsel did not object to the prosecutor's improper closing argument, but appellant contends that the prosecutor's argument was so prejudicial that a contemporaneous objection was not required. For this purported exception to the objection requirement, appellant relies on *Briddle v. State*, 742 S.W.2d 379 (Tex. Crim. App. 1987) and *Romo v. State*, 631 S.W.2d 504 (Tex. Crim. App. 1982). Those cases are no longer authoritative, however. See *Valencia v. State*, 946 S.W.2d 81, 82 (Tex. Crim. App. 1997) (overruling *Briddle*); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (overruling *Romo*). The Court of Criminal Appeals has plainly held that a defendant forfeits a complaint about an improper closing argument if he does not object to the argument in the trial court. See *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004); *Simpson v. State*, 119 S.W.3d 262, 268 (Tex. Crim. App. 2003).

Because appellant did not object to the challenged portion of the prosecutor's closing argument, appellant forfeited any complaint associated with that argument. See *Wright v. State*, 374 S.W.3d 564, 583 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

## CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher  
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.  
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