COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00032-CR

OSWALDO AGUIRRE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1412036D

MEMORANDUM OPINION[1]

A jury convicted Appellant Oswaldo Aguirre of continuous sexual abuse of a child and indecency with a child, and he was sentenced to ninety-nine years' confinement and five years' confinement and a $10,000 fine, respectively.

In four issues, Aguirre complains about remarks in the prosecutor's opening and closing statements and that the State's use of the word "victim" after

[1]*See* Tex. R. App. P. 47.4.

the trial court denied his motion in limine to prohibit its use reduced the State's burden of proof. However, as pointed out by the State, Aguirre did not preserve these complaints.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 263 (Tex. Crim. App. 2013). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

It is well settled that motions in limine do not preserve error. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) ("A motion in limine . . . is a preliminary matter and normally preserves nothing for appellate review. For error to be preserved with regard to the subject of a motion in limine, an objection must be made at the time the subject is raised during trial."), *cert. denied*, 555 U.S. 1105 (2009); *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App.), *cert. denied*, 552 U.S. 920 (2007). This is true whether the motion is granted or, as here, denied. *See Griggs v. State*, 213 S.W.3d 923, 926 n.1 (Tex. Crim. App.),

cert. denied, 552 U.S. 864 (2007); *Swilley v. State*, 465 S.W.3d 789, 795 (Tex. App.—Fort Worth 2015, no pet.). And the record reflects that after the trial court denied his motion in limine, Aguirre raised no objection to the use of the word "victim" at any point thereafter.[2]

Likewise, Aguirre did not object to the prosecutor's remarks during opening and closing statements. *See Estrada v. State*, 313 S.W.3d 274, 302–03 (Tex. Crim. App. 2010) (requiring preservation of error regarding complaints about prosecutor's opening and closing arguments), *cert. denied*, 562 U.S. 1142

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[2]Contrary to Aguirre's argument that the State's use of the word "victim" constituted fundamental error not requiring preservation, most complaints, "whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Rule 33.1(a)." *Mendez v. State*, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004); *see Henderson v. United States*, 133 S. Ct. 1121, 1126 (2013); *Henson v. State*, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 934 (2014). And as stated by one of our sister courts,

> While use of the word "victim" assumes a crime has been committed, the fact that a prosecutor is of that view would not surprise a reasonable juror, nor would the prosecutor's use of the word in argument or voir dire generally be understood as anything other than the contention of the prosecution. . . . The word is not so inflammatory or prejudicial as to necessarily cause harm to the defendant when used occasionally in a lengthy trial by the attorneys or witnesses.

Weatherly v. State, 283 S.W.3d 481, 486 (Tex. App.—Beaumont 2009, pet. ref'd) (holding, in the context of an ineffective-assistance-of-counsel complaint, that appellant's counsel's failure to object to the use of the word "victim" by the prosecutor, under the circumstances of that case, did not constitute ineffective assistance); *see also Johnson v. State*, No. 14-04-00406-CR, 2005 WL 3065872, at *4 (Tex. App.—Houston [14th Dist.] Nov. 15, 2005, pet. ref'd) (mem. op., not designated for publication) (treating use of the term "victim" by the State as nonconstitutional error after assuming without deciding that the State's use of the term was improper).

(2011); *Qureshi v. State*, No. 02-15-00367-CR, 2016 WL 5957019, at *2 (Tex. App.—Fort Worth Oct. 13, 2016, no pet.) (mem. op., not designated for publication) ("Texas courts have repeatedly held that th[e] preservation requirement applies to a complaint concerning an opening statement; without an objection, the complaint is forfeited."). Therefore, he has failed to preserve his complaints for our review, and we overrule all of his issues.

Having overruled all of Aguirre's issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 1, 2016