Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01374-CR

RUDOLPH RESENDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 713,148

O P I N I O N

Appellant was charged by indictment with aggravated sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2001). A jury found him guilty and assessed punishment at life in prison. Because appellant has not demonstrated error in connection with the State's jury argument, we affirm.

In a single point of error, appellant argues that the trial court erred in overruling his objections to certain jury arguments. During closing argument, the prosecutor made the following argument:

> [STATE] If you think [complainant's mother is] a terrible mother,

that's okay, but understand that [complainant] was still raped by the animal seated at counsel table.

[DEFENSE]: Object to characterization of [appellant] as an animal.

THE COURT: It's overruled.

Later, the following exchange occurred:

[STATE]: Every shred of evidence in this trial points to the fact that that monster sitting at the table raped [the complainant].

[DEFENSE]: Objection to the characterization of the Defendant as a monster.

THE COURT: Overruled.

Courts allow four areas of jury argument: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) pleas for law enforcement. *See Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). Courts have on occasion disapproved of name-calling by the prosecution. *See State v. Tompkins*, 774 S.W.2d 195, 217 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (1989); *Grant v. State*, 472 S.W.2d 531, 534 (Tex. Crim. App. 1971); *Swilley v. State*, 114 Tex. Crim. 228, 230, 25 S.W.2d 1098, 1099 (1920). Where supported by the evidence, however, a certain amount of characterization is permitted in the nature of a reasonable deduction from the evidence or a summation of the evidence. *See Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977) (stating that reference to defendant as "animal" warranted); *Easley v. State*, 454 S.W.2d 758, 761 (Tex. Crim. App. 1970) (stating that use of "savage," while not to be commended, finds support in evidence). Whether such an argument will constitute reversible error must be decided on an ad hoc basis. *Tompkins*, 774 S.W.2d at 217. *See also* 42 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 37.26 (1995).

Appellant argues that while few if any cases have been reversed following similar arguments, usually the trial court sustains the objection to the name-calling, gives the jury

an instruction to disregard, and simply fails to grant a mistrial. Here, appellant argues, the trial court overruled the objection and thus failed to give an instruction to the jurors to disregard the epithets. Appellant argues that the trial court's failure to find the statements objectionable gave the court's tacit approval to the prosecutor's statements. Although appellant is correct when he states that courts often sustain the defendant's objection to such arguments and instruct the jury to disregard the argument, *see Tompkins*, 774 S.W.2d at 217 (objection sustained, instruction to disregard given; motion for mistrial denied); *Howard v. State*, 453 S.W.2d 153, 154 (Tex. Crim. App. 1970) (objection sustained; motion for mistrial denied; instruction to disregard given), courts have in appropriate circumstances found such arguments permissible. *Burns*, 556 S.W.2d at 285; *Easley*, 454 S.W.2d at 761.

Here, the evidence shows that appellant sexually molested and had sexual intercourse with the complainant, a female relative. The complainant testified that she was living with appellant, that she slept in appellant's bed, and that she was first sexually assaulted by appellant when she was about five or six years old. The complainant told jurors that she first reported the assaults to her mother in about 1994, when the complainant would have been about twelve years old. Although we cannot commend the prosecutor's epithets, *see Tompkins*, 774 S.W.2d at 217; *Grant*, 472 S.W.2d at 534; *Swilley*, 25 S.W.2d at 1099, we determine that the terms are supported by the record and fall within the limits permitted by case law.

Even if we were to assume the trial court erred by overruling the objections, we would find such error harmless. Erroneous rulings related to jury argument are generally treated as non-constitutional error, within the purview of Texas Appellate Rule 44.2(b). *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000). We must disregard any error that does not affect appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Jones v. State*, 38 S.W.3d 793, 797 (Tex. App.—Houston [14th Dist.] 2001, pet. filed). We should not overturn a criminal conviction for non-constitutional error if we, after reviewing the record as a whole, have fair assurance that the error did not influence the jury or had but

a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). We use three factors to analyze the harm associated with improper jury argument and to determine whether we must reverse: (1) the severity of the misconduct; (2) measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct. *Martinez*, 17 S.W.3d at 692-93.

In the instant case, the prosecutor's actions constitute at most curable misconduct. Even if we were to assume the trial court should have sustained the objection, the prosecutor's statements likely would have been cured by instructions to disregard. *See Tompkins*, 774 S.W.2d at 217; *Howard*, 453 S.W.2d at 154. The prosecutor did not inject facts outside the record but, at most, engaged in name-calling. *See Mosley v. State*, 983 S.W.2d 249, 260 (Tex. Crim. App. 1998) (finding that prosecutor's "mildly inappropriate" criticism of defense counsel "relatively small" misconduct). As for the corrective action taken by the trial court, because it overruled appellant's objection, the trial court took no such action. In connection with the certainty of conviction absent the misconduct, the complainant testified about the crime. A police officer testified as an outcry witness and related the complainant's statement concerning the sexual assault. Moreover, a physician testified that an examination revealed physical evidence consistent with the complainant's story. Appellant testified and denied the allegations. The prosecutor's characterizations were, at most, mere vituperation heaped upon the lawful evidence adduced at trial. While the comments may have been gratuitous, were we to assume trial court error, we find the injurious effect not so great as to warrant reversal. *See Tucker v. State*, 15 S.W.3d 229, 238 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (finding that prosecutor's statement injecting facts outside the record not so injurious as to warrant reversal).

We overrule appellant's point of error and affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed July 12, 2001

Panel consists of Justices Anderson, Hudson, and Seymore.

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