Circuit Court for Prince George's County
Case No. CT151534X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 20

September Term, 2017

HECTOR FUNES

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Prince George's County, Hector Funes, appellant, was convicted of sexual abuse of a minor and sexual abuse of a minor in a continuing course of conduct. His sole claim on appeal is that the trial court erred in allowing the State to argue facts not in evidence during its rebuttal closing argument. For the reasons that follow, we affirm.

At trial, Y.S. testified that Funes, her uncle, had sexually assaulted her on numerous occasions, starting when she was eight years old. According to Y.S., she told her mother about the abuse but her mother did nothing about it. Y.S. eventually reported the abuse to the police when she turned eighteen. During closing, defense counsel noted that "there was testimony that [Y.S.] reported [the abuse] to her mother" yet there was "no testimony from the mother or anyone else that any of these things were reported or mentioned[.]" The following then occurred during the State's rebuttal:

> PROSECUTOR: What [Y.S.] did is tell her mother. And she did nothing. That's mom's brother. *Unfortunately that happens a lot. It's something you don't talk about.*
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Just keep it moving. All right.

Funes contends that the italicized portion of the prosecutor's rebuttal argument improperly referenced facts not in evidence. We disagree. During closing, a party is prohibited from "comment[ing] upon facts not in evidence or . . . stat[ing] what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005) (citation omitted). At the same time, "[j]urors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of

common knowledge." *Johnson v. State*, 408 Md. 204, 222 n.4 (2009) (citation omitted). The fact that sexual abuse is a taboo subject and may not be reported when it is committed by a family member, while not in evidence, is certainly a matter of common knowledge. Consequently, we are not persuaded that the prosecutor's argument was improper.

Moreover, even if we assume that the argument was improper, it is well-settled that not every improper remark made by the State during closing argument results in a new trial. *See Wilhelm v. State*, 272 Md. 404, 431 (1974). ("[T]he mere occurrence of improper remarks does not by itself constitute reversible error"). Instead, reversal is only required if it appears that improper remarks "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice[.]" *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (citation omitted). In determining whether an allegedly improper statement in closing argument constitutes reversible error, we consider the following factors: (1) the severity and pervasiveness of the remarks; (2) the measures taken to cure any potential prejudice; and (3) the weight of the evidence against the accused. *Id*. at 497 (citation omitted).

Here, the State had a strong case against Funes including evidence of his recorded interview with the police, where he admitted that he had abused Y.S. approximately eight to ten times. Moreover, the prosecutor's comment was isolated, it did not pervade the entire trial, and the trial judge instructed the jurors that closing arguments were not

evidence. Consequently, even if improper, the prosecutor's comment would not warrant reversal under the circumstances.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.