Circuit Court for Montgomery County
Case No. 135941C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1641

September Term, 2021

ELIAS D. L.

v.

STATE OF MARYLAND

Graeff,
Zic,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 29, 2022

Convicted by a jury in the Circuit Court for Montgomery County of two counts of sexual abuse of a minor and related offenses, Elias D. L., appellant, presents for our review one issue: whether the court erred "in allowing the prosecutor to make improper and prejudicial statements during argument." For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called appellant's stepdaughters A., who at the time of appellant's June-July 2021 trial was 21 years old, and B., who at the time of trial was 25 years old. A. testified that from the time that she was approximately six or seven years old, she "would just randomly wake up in [her] mom's bed," "[n]ext to [appellant] on his side of the bed," and "with no underwear on." When A. and B. began "sharing . . . bunkbeds," appellant "would come into [their] room and . . . touch [them] both." On these occasions, appellant "would just put his hand on [A.'s] bunk and just like search around for [her] body and touch [her] private areas," including her vagina. When A. was "closer to" eight years old, appellant "started feeling [her] chest area more." A. "would . . . sometimes try sleeping with [B.] on her bed thinking maybe that that would stop it," but appellant "would still come in and do the same thing, touching [A.'s] private areas [and] vagina." The "last time that [A.] remember[ed]" appellant "coming into [her] bedroom and touching [her] in the middle of the night" was during the summer of 2014. A. testified that appellant entered her room, "hug[ged her] from behind," "move[d] his hand down under [A.'s] shirt" and "touched [her] breast," and moved "his hands . . . down into [A.'s] pants and touched [her] vagina." A. subsequently testified that from the time that she was seven or eight years old until she was fourteen or fifteen years old, appellant forced her, or attempted to force her,

to engage in vaginal intercourse on four occasions, anal intercourse on two occasions, and cunnilingus on one occasion. A. testified in considerable detail as to appellant's actions and statements during the incidents, her approximate age at the time of the incidents, the particular room in which they occurred, and the injuries that she sustained as a result.

B. testified that her relationship with appellant had been "[a]wful," because appellant had "molested . . . and sexually abused" her. B. stated that when she was eight years old, she "woke up in the middle of the night and felt [appellant] hovering over" her. Appellant tried "to take [B.'s] pants off," but was unsuccessful and departed. On another occasion, B. "woke up one morning and [her] pants were . . . unbuttoned and . . . not all the way on" her. On more than one occasion, B. "miss[ed] the bus to school" and asked appellant to drive her there. When appellant and B. "would be in the car, [appellant] would sometimes reach over and grab [B.'s] breasts[] and . . . thighs," and "try to grab [B.'s] vagina." B. also "remember[ed that] sometimes [she] would go into [appellant's] room and . . . ask . . . where [her] mom" was. On at least five of these occasions, appellant grabbed B. "from behind [with] his chest on [B.'s] back," tried to "fondle" her, and touched her breasts or "smack[ed]" her buttocks. On additional occasions, appellant "fondle[d]" B. by touching her thighs and buttocks over her clothes.

Appellant contends that the court "erred in allowing the [prosecutor] to make improper and prejudicial statements during opening and closing arguments." During the prosecutor's opening statement, the following colloquy occurred:

> [PROSECUTOR:] But what this comes down to is that these two women, who were once really little girls, living in a home with their mom

and the defendant, and each other, and their other sister, were not taken care of. They were not protected. They asked for help. They didn't get it.

And that will be shown through the evidence. These aren't grown women who want something or who are getting anything from putting themselves out there like they'll be putting themselves out there today. Nothing.

They were kicked out of their house because of this, by their mother. He wasn't kicked out. [A.] and [B.] were. If anything, they have suffered more by speaking out than by keeping it inside. They've lost so much as a result of speaking the truth.

They lost everything that they thought they would when they were little girls if they told too many people about what happened. Every fear that they had about not being heard, or being kicked out, or [their] mother being angry at them, came true when they walked into a police station on March 31st of 2019.

And yet, they're going to sit up there today and they're going to tell you what happened to them. And they're going to tell you all the times that they reached out for help and nobody helped them. They're going to ask for help again.

And at the conclusion –

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: – of evidence –

THE COURT: Overruled. Go ahead.

[PROSECUTOR]: At the conclusion of evidence and testimony, I'm going to stand back up here again and go through with you, all of those counts on the indictment.

During the prosecutor's closing argument, the following colloquy occurred:

[PROSECUTOR:] Look at the evidence. Push aside the distractions. The simplest answer is the truth. These girls are here for help. They want somebody to protect them. And so, when you go into the deliberation room and you are talking about all these counts, I just want to show you quickly. 17 counts in total.

> When you're talking about them and you're talking about [A.] and [B.], it's going to be hard. It is hard to sit in judgment of another human being. And it is easy to say let's just walk. He's not guilty. It's easy to do that. . . . . [B]ut the evidence shows that what [B.] and [A.] told you during the course of their testimony and the exhibits show is that they were horrifically sexually abused by that man, the defendant, over and over and over.
>
> And so when you go to fill out the verdict sheet on each count, I'm asking you. [B.] and [A.] are asking –
>
> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: Guilty. Guilty. Guilty for all 17 counts. Thank you.

Following a subsequent bench conference, defense counsel stated: "And, Your Honor, I did object to the State's last line." The court replied: "It was overruled."

Appellant challenges the entirety of the above-quoted argument on the ground that the prosecutor's "improper and prejudicial statements appeal[ed] to the passions and prejudices of the jurors in order to secure a conviction," and thus "deprived [a]ppellant of a fair and impartial jury." The State counters that appellant "has not properly preserved all of his claims for appeal," because he "did not lodge a timely objection to [all of the challenged] statements and thus did not give the trial court a contemporaneous opportunity to consider the propriety of the statements." The State further contends that the "preserved statements were proper," or alternatively, "[t]he error, if any, was harmless."

We agree with the State that appellant has preserved for our review challenges to only the prosecutor's remark in opening statement that A. and B. were "going to ask for help again," and the prosecutor's remark in closing argument that A. and B. were "asking"

for a verdict of guilty as to each count of the indictment. We have stated that "[i]n order to preserve an objection to an allegedly improper closing argument, defense counsel must object either immediately after the argument was made or immediately after the prosecutor's initial closing argument is completed," *Small v. State*, 235 Md. App. 648, 697 (2018) (citation omitted), and we see no reason why we should not apply the same principle to an allegedly improper opening statement. Here, defense counsel objected during opening statement only to the prosecutor's remark that A. and B. were "going to ask for help again," and during closing argument, specifically objected only to the prosecutor's remark that A. and B. were "asking" for a verdict of guilty as to each count of the indictment. Defense counsel did not make any other objections after the prosecutor completed her opening statement or closing argument, and hence, only these objections are preserved for our review.

We further agree with the State that any error by the court in overruling defense counsel's objections was harmless. Assuming, without deciding, that the prosecutor's remarks were improper, the Court of Appeals has stated that "the mere occurrence of improper remarks does not by itself constitute reversible error." *Wilhelm v. State*, 272 Md. 404, 431 (1974). A "prosecutor's improper comments . . . require reversal" only "if it appears that the . . . remarks actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice," and "[t]o determine whether improper comments influenced the verdict," a reviewing court "consider[s] the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (internal citations

and quotations omitted). Here, the challenged remark in opening statement was a single, isolated comment within a statement comprising approximately six pages of transcript, and the challenged remark in closing argument was a single, isolated comment within an argument comprising over thirty pages of transcript. Also, the court explicitly instructed the jury that "[o]pening statements and closing arguments of the lawyers are not evidence," and A. and B. gave extensive and detailed testimony regarding the offenses committed by appellant. We conclude that under these circumstances, the remarks did not actually mislead, and were not likely to have misled or influenced, the jury to appellant's prejudice, and hence, any error by the court in allowing the remarks was harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.