

SUPREME COURT OF ARKANSAS

No. CR12-441

JAMES STEWART

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 29, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR2011-1720]HONORABLE HERBERT THOMAS
WRIGHT, JR., JUDGEAFFIRMED.**KAREN R. BAKER, Associate Justice**

On January 26, 2012, appellant, James Stewart, was convicted by a Pulaski County Circuit Court jury of one count of rape and one count of second-degree sexual assault. Stewart was sentenced to life imprisonment, an additional eighteen years, and a \$10,000 fine. Stewart raises one point on appeal, alleging that the circuit court abused its discretion by overruling Stewart's objections to the prosecution's closing argument during the guilt phase of his trial. This court has jurisdiction over this case pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2012). We affirm.

Because Stewart does not challenge the sufficiency of the evidence against him, only a brief recitation of the facts is necessary. *See Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341. Stewart's convictions arise from the rape and sexual assault of his granddaughter at his daughter's home in Pulaski County, Arkansas, in 2010. The ten-year old victim and her

fifteen-year old sister both testified against Stewart at the trial.

For his sole point on appeal, Stewart asserts that the circuit court erred by permitting the prosecution to argue during the closing arguments of the guilt phase of his trial that the jurors' belief in the credibility of the prosecution's witnesses equated with proof beyond a reasonable doubt. Stated differently, Stewart argues that the prosecution's arguments misrepresented the applicable burden of proof to convict Stewart. The State asserts that the prosecution's closing argument was proper because it was based on permissible inferences from the evidence, and also permissible responses to defense counsel's earlier attacks on the credibility of the prosecution's witnesses.

In reviewing closing arguments, "the [circuit] court has discretion to control closing argument and is in a better position to determine the possibility of prejudice by observing the argument first hand." *Wainwright v. State*, 302 Ark. 371, 387, 790 S.W.2d 420, 428 (1990). This court "will not reverse the action of the [circuit] court in matters pertaining to its controlling, supervising, and determining the propriety of, the arguments of counsel in the absence of manifest gross abuse." *Rowland v. State*, 263 Ark. 77, 84, 562 S.W.2d 590, 594 (1978).

Here, during closing argument, the prosecution made arguments regarding the victim's testimony and witnesses' testimony, and encouraged the jury to believe the testimony. Stewart repeatedly objected to the prosecution's closing argument, including the following statements made by the prosecution to the jury:

Why would [the victim's mother] want to get this man out of her house for anything

other than what she did once she found out he raped her daughter? Why would she want to get him out of the house when he's there to help her?

The defense [of Stewart] has to be that the kids are lying.

So does it make any sense that the kids would then come up with [this story]? That they're sophisticated enough to come up with this story, to make up this story and not only make it up, but act it out.

Ladies and gentleman, what we're asking you to do is believe the children when they tell you. You saw 'em with your own eyes, and you know. You were able to see them in here in the court room. You were able to judge their demeanor. You were able to know the information that they've given a long time ago and information that they gave you here in the court room today. Ladies and gentleman, it's all that we're asking you to do is just believe them.

Defense counsel objected to these statements, asserting that “[i]f the jury decides the case mainly on the basis that [these] witness[es] ha[ve] told the truth, it might be based on the preponderance of the evidence.” Defense counsel ultimately made a “running objection that [the prosecution] is continuing to make comments that are burden shifting.” The circuit court overruled the objections. However, the circuit court gave the following cautionary instruction to the jury during the prosecution's closing argument:

Ladies and gentleman, closing arguments, lawyers [sic] are allowed to make all the reasonable arguments based on the inferences from the [evidence]. Whether or not something's reasonable, that's for all of y'all to decide.

Stewart asserts on appeal that the circuit court abused its discretion in allowing the prosecution to make these arguments because the prosecution misstated the State's burden of proof. Specifically, Stewart asserts that the closing argument improperly implied that if the jury believed the witnesses, they must convict Stewart. The State contends that the prosecution simply responded to Stewart's assertions that its witnesses had lied, that the

statements were permissible arguments, and that the circuit court should be affirmed.

With regard to closing arguments, “the rule [is] that closing arguments must be confined to questions in issue, the evidence introduced during the trial, and all reasonable inferences and deductions which can be drawn therefrom.” *Woodruff v. State*, 313 Ark. 585, 592, 856 S.W.2d 299, 303 (1993). “Where an attorney’s comment during closing arguments is directly reflecting or inferable from testimony at trial, there is no error.” *Id.* at 592, 856 at 303–304 (1993).

Here, relying on *U.S. v. Stanfield*, Stewart contends that the prosecution’s argument confused the jurors, which amounted to a misstatement of the burden of proof, and the circuit court abused its discretion in allowing the arguments. 521 F.2d 1122, 1125 (9th Cir. 1975). However, *Stanfield* is not similar to the instant case. In *Stanfield*, the Ninth Circuit Court of Appeals reversed the district court when the district court itself, not the attorneys, made the opening statement in a case and obscured “the correct standard for jury consideration of evidence in a criminal case.” *Id.* Therefore, we do not find Stewart’s argument persuasive.

Further, the prosecution did not suggest that if the jury believed its witnesses, the jury was required to convict Stewart. Rather, the prosecution’s statements were a direct response to defense counsel’s attacks on the credibility of the prosecution’s witnesses. The record demonstrates that from the onset of the trial, defense counsel challenged the witnesses’ testimony and their veracity. In her opening statement, defense counsel stated: “No one believed the [victim]. Not her mother, not the police and I’ll be able to argue in close why the prosecutors didn’t believe this [victim]. . . . [T]his case is filled with pausing and hesitating.

. . . The mother didn't believe her own child. . . . And why? That's burden shifting." Then in her cross-examinations of the prosecution's witnesses, defense counsel again challenged their credibility by asking, "Hm. Are you forgetting things about this case?" and, "Oh. You're guessing right?" Finally in her closing, defense counsel argued that "it is all about the credibility of the civilian testimony. That is all this case was about."

We addressed a claim similar to Stewart's in *Hendrix v. State*, 2011 Ark. 122. In that case, Hendrix was convicted of sexual assault and, on appeal, challenged the prosecution's closing argument asserting that the prosecution had attempted to shift the burden by arguing "[t]here's no reason, not one reason has been presented . . . why this is made up, or why this girl would make this up out of thin air." *Id.* at 10. During cross-examination, the prosecution asked Hendrix if he could think of any reason why the victim "would make [the allegations] up." *Id.* at 11. Hendrix responded, "I have no idea. I am just as dumbfounded about that as you are, sir." *Id.* at 6. We held that the prosecution's closing argument did not constitute error, and was in response to credibility challenges. *Id.* As in *Hendrix*, the prosecution's closing argument here was in response to the credibility challenges made to its witnesses.

Clearly, defense counsel's strategy hinged on the credibility, or lack of credibility, of the prosecution's witnesses. The prosecution's closing argument was a response to defense counsel's attacks on the witnesses' credibility, directly related to the testimony at trial, and was also a fair inference drawn from that testimony. Thus, we hold that the circuit court did not abuse its discretion in overruling Stewart's objections to the prosecution's closing argument.

In compliance with Ark. Sup. Ct. R. 4–3(i), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to Stewart, and no prejudicial error has been found.

Affirmed.

Clint Miller, Deputy Public Defender, by: *Sharon Kiel*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att’y Gen., by: *Vada Berger*, Ass’t Att’y Gen., for appellee.