

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs March 7, 2023

**FILED**  
05/18/2023  
Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. GREGORY HICKMAN**

**Appeal from the Criminal Court for Shelby County**  
**No. 17-02157**                      **Lee V. Coffee, Judge**

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**No. W2022-00671-CCA-R3-CD**

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A Shelby County jury convicted the Defendant, Gregory Hickman, of rape of a child, and the trial court sentenced the Defendant as a Range II offender to forty years in prison. On appeal, the Defendant contends that the evidence is insufficient to sustain his conviction and that the trial court erred when it allowed the State to submit a rebuttal closing argument. After our review, we affirm the trial court’s judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and ROBERT H. MONTGOMERY, JR., JJ., joined.

J. Shae Atkinson (on appeal), and Juni S. Ganguli (at trial), Memphis, Tennessee, for the appellant, Gregory Hickman.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Dru Carpenter and Alyssa Henning, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. Facts**

This case arises from allegations made by an eleven-year-old victim, A.M.<sup>1</sup>, that the Defendant was the father of the child the victim conceived and delivered while in elementary school. Based on these allegations, the Shelby County grand jury indicted the Defendant for rape of a child.

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<sup>1</sup> In order to protect the victim’s privacy, we will refer to her by her initials only.

At the Defendant's trial, the parties presented the following evidence: K.M., the victim's mother, testified that the victim was born on March 26, 2005. K.M. knew the Defendant because, around the time that the rape occurred, he was K.M.'s best friend's boyfriend and also a friend of K.M.'s sister's boyfriend. K.M. recalled that the Defendant frequently played with the neighborhood kids, including A.M. The Defendant would sometimes interact with the kids when they would go to a nearby convenience store to purchase small items.

K.M. recounted the events leading to her discovery of the rape. She said that A.M., who was eleven and in the fifth grade in elementary school at the time, had a friend over in October of 2016. The friend touched A.M.'s stomach and said that it was hard. K.M., who was present, began asking questions of A.M., who immediately told her that she had been raped. K.M. took A.M. to the hospital where they learned that A.M. was pregnant. K.M. immediately reported the pregnancy to law enforcement. K.M. complied with all of law enforcement's requests with regard to the investigation, including taking A.M. for a forensic interview.

K.M. said that A.M. delivered a baby girl, M.M., on December 30, 2016, when she was eleven years old. M.M. still lived with K.M. and was five years old at the time of the Defendant's trial.

During cross-examination, K.M. agreed that the Defendant "stayed" in K.M.'s home for about a month because he had no other place to live. The Defendant had moved out at the time that K.M. learned that he had raped A.M.

A.M. testified that she was seventeen at the time of trial, in high school, and working to save money for college where she would study to become a lawyer. A.M. said that, when she was eleven, she knew the Defendant as "Little Greg," and he was a family friend. Specifically, the Defendant was friends with her uncle and was dating her mother's friend.

A.M. recalled how she and her cousins, with whom she lived in 2016, would sometimes go to a nearby convenience store. On one occasion, she went to the convenience store with the Defendant. He bought cigarettes, and then the two went the back way back to her house. They took a shortcut behind a church, and A.M. described the area as having "a lot of bushes" and a hill. At some point, the Defendant grabbed her arm, and she slipped and fell. He pulled down her pants and raped her. She said that his private part went inside of her private part. When the Defendant was done, he told her that he was going to kill her if she told anyone, so she kept the rape a secret.

In October 2016, a friend of the family noticed the victim's protruding stomach. A.M. said that because she was only eleven years old, she did not realize she was pregnant. When confronted with this information, A.M. told her mother that the Defendant had raped her. Her mother took her to the hospital where her pregnancy was confirmed. A.M. said that she spoke with an interviewer at the Child Advocacy Center ("CAC") and told her what had happened. She identified a video and audio recording of her interview.

A.M. confirmed that she gave birth to M.M., on December 30, 2016. She said that a police investigator came to see M.M. and the victim and collected DNA samples from both of them.

Memphis Police Investigator Aaron Kant testified that the victim directed him to the area where the rape occurred, and he photographed the scene and surrounding area. He showed those photographs to the jury.

Teresa Onry testified that she worked at CAC as a forensic interviewer and that she interviewed the victim in this case on October 19, 2016. The State then played for the jury the recording of the victim's interview.

In the recording, after some preliminary conversation, the victim told Ms. Onry the same version of events about which she testified in court. She identified her rapist by name, described how she knew him, said he was in his twenties, and explained the location of the rape. She said that as they were walking home from the store, the Defendant asked her to take a short cut. He then pulled her down, pulled down his own pants and her pants, and then raped her. The victim said that the rape occurred in July 2016 in the evening. The victim said that the Defendant "jacked" her up and told her that if she told anyone that he would kill her. She described how she felt something wet on her during the rape and, when she went to the bathroom later, she saw something white on her panties.

The victim told Ms. Onry about how her friend poked her stomach because it was "poking out." Her mother then felt her stomach and asked her if she "had been doing something." At that point, the victim told her mother about the rape. Before then, she had no idea she was pregnant, despite the fact that she noticed her stomach was changing. Her mother took her to the hospital. The victim said she was angry when she found out she was pregnant.

Sergeant Stacey Hughes, who was a sergeant with Memphis Police Department in October 2016, testified that she investigated the victim's rape. As such, she had observed the forensic interview, confirmed the victim's pregnancy, and later, after M.M. was born, took DNA swabs of both A.M. and M.M.

On December 7, 2016, Sergeant Hughes interviewed the Defendant, who waived his rights and chose to speak with her. The Defendant told the sergeant that he did not know how old A.M. was but that he knew that she was “young.” He had last seen her at her aunt’s house in May 2016. The Defendant said that he was never alone with the victim, that he never walked with her to the store without others present, and that he never touched her inappropriately. During the interview, Sergeant Hughes collected a DNA swab from the Defendant.

Derek Cutler, an employee at a forensic DNA testing laboratory, testified that he completed the analysis of the DNA samples in this case. The results indicated that there was a greater than 99.99% chance that the Defendant was M.M.’s father.

At the conclusion of this evidence, the Defendant moved for Judgment of Acquittal arguing that no rational trier of fact could convict him. He said that the victim had not reported the rape for several months and that her testimony was flawed. He further argued that the DNA evidence was unreliable. The trial court denied the motion.

The jury convicted the Defendant of rape of a child. It is from this judgment that the Defendant now appeals.

## **II. Analysis**

On appeal, the Defendant asserts that the evidence is insufficient to sustain his conviction and that the trial court erred when it allowed the State to submit a rebuttal closing argument.

### **A. Sufficiency of Evidence**

The Defendant contends that the evidence is insufficient to sustain his conviction because there were “no witnesses to the alleged rape,” the victim did not report the rape, and because the victim’s mother continued to allow him to live in the house after the rape occurred. He further contends that there were “issues” that undermine the results of the DNA testing. The Defendant states, “it is not believable nor credible that a crime as serious as this would occur and the victim would go months and months without disclosing it.” He further contends that there was no witness or physical evidence “outside the DNA test” that would corroborate the victim’s story. The State counters that the evidence is sufficient. We agree.

When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “*any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). “The jury decides the weight to be given to circumstantial evidence, and ‘[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.’” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). “The standard of review [for sufficiency of the evidence] ‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this Court should not reweigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). “Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the ““strongest legitimate view of the evidence”” contained in the record, as well as ““all reasonable and legitimate inferences”” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a

defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted).

Tennessee Code Annotated section 39-13-522(a) (2018) defines the offense of rape of a child as “the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age.” Furthermore, Tennessee Code Annotated section 39-13-501(7) (2018) defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body . . . .” Thus, for the jury to convict the Defendant of child rape, it had to find that the State proved beyond a reasonable doubt that A.M. was less than thirteen years of age and that the Defendant sexually penetrated her.

The evidence presented against the Defendant is overwhelming. The Defendant’s rape of A.M. resulted in the birth of a child. The Defendant’s reliance on the victim’s failure to disclose this rape is misplaced. By all accounts, the victim was under the age of thirteen when she gave birth to a child biologically linked by DNA evidence to the Defendant. She had turned eleven in March of 2016 before she delivered the child in December of 2016.

The evidence, viewed in the light most favorable to the State, showed that the Defendant accompanied the victim on a walk home from a convenience store in the summer of 2016. He pulled her by her arm until she fell to the ground. He then pulled down her pants and his own and sexually penetrated her. When he finished, he told her that he would kill her if she told anyone. The victim noted a wet discharge during the intercourse and said that there was “white stuff” on her panties when she went to the bathroom. She did not disclose the rape and did not initially realize that she had conceived as a result of the rape.

A family friend noted that the victim’s stomach was protruding, and the victim’s mother agreed. After speaking with the victim, the victim’s mother took her to the hospital where her pregnancy was confirmed. DNA tests later revealed that the Defendant was the father of the victim’s child. The Defendant’s attempt at calling the DNA testing into question was rejected by the jury, and we will not disturb that finding. This evidence is sufficient to support the Defendant’s conviction for rape of a child. He is not entitled to relief.

## **B. Rebuttal Closing Argument**

The Defendant next contends that the trial court erred when it allowed the State to give a rebuttal closing argument. He argues that, after the State's closing argument, he waived his closing argument and did not argue facts or case law, so the State should not have been able to give a rebuttal closing argument.

During the closing arguments of the trial, the State first offered its closing argument. The Defendant's attorney then stated:

Justice Antonin Scalia several years ago wrote that, "A jury is the final [inaudible] of justice." I suppose what that means is that the jury has the ultimate power in any criminal case. As the court has told you, you are the judges of the facts in this case.

I am not – explicitly not going to talk about the facts in this case. You've heard them. You've listened carefully. You've taken notes. And I will explicitly not talk about the facts of this case.

I'm not going to talk to [you] about the law because the court's given you the law, and I'm not going to waste your time talking about the law in this case.

If the facts and law rise to the level of rape of a child, your verdict should reflect that. However, if you find that there is reasonable doubt, your verdict should reflect that. We ask you to do the right thing. Thank you.

Before the State's rebuttal argument, the Defendant's counsel objected, arguing that the State was not entitled to rebuttal because the prosecutor had not discussed the law or the facts so there was nothing to rebut. The trial court disagreed and overruled the objection. The trial court stated that the Defendant's counsel had not waived argument and in fact did argue the case. It pointed out that the Defendant's attorney had quoted Justice Scalia and told the jury that if the facts and the law did not support the verdict that the jury should find the Defendant not guilty. The trial court said that, while defense counsel's argument was "very strategic," it still qualified as an argument, and the State was entitled to rebut it. The State then offered a rebuttal argument during which it noted that the Defendant's actions had robbed the victim of her childhood.

The Defendant contends that the jury would not have convicted him, but for the State's rebuttal "sympathy argument to the jury." He asks this court to reverse his conviction. The State counters that the cases cited by the Defendant are either inaccurate or inapplicable and that the trial court did not err. We agree with the State.

The state's rebuttal closing argument may not exceed the scope of the subject matter covered in the state's initial closing argument and the defendant's intervening closing argument. *See* Tenn. R. Crim. P. 29.1(b). Moreover, a party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Middlebrooks*, 995 S.W.2d 550, 557 (Tenn. 1999). Beyond these limitations, the manner and conduct of closing argument is left to the discretion of the trial court. *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994). Generally, the trial court may afford both the state and the defense wide latitude in the scope of their closing argument. *Id.* In turn, the trial court is afforded wide discretion in its determination of the propriety of counsel's closing argument, and the court's decision will not be reversed on appeal absent a showing of an abuse of discretion. *See Middlebrooks*, 995 S.W.2d at 557; *State v. Zirkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). For a defendant to be granted a new trial based on the prosecutor's improper comments during closing, the contested conduct must have affected the verdict to the prejudice of the defendant. *See Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965).

The trial court found that the Defendant's counsel did, in fact, make a closing argument and had not waived closing argument. We agree. While the Defendant's counsel did not argue the law and the facts, he did argue reasonable doubt. Defense counsel asked the jury to "do the right thing," and reminded the jurors that, "If the facts and law rise to the level of rape of a child, your verdict should reflect that. However, if you find that there is reasonable doubt, your verdict should reflect that." Defense counsel had, in his opening statement, professed the Defendant's innocence. During the trial, defense counsel had called into question the victim's recount of the rape and the DNA evidence. It was clear what defense counsel thought the outcome should be when he asked the jury to "do the right thing." This was clearly and implicitly a call for the jury to find that reasonable doubt existed as to the charged offense and acquit the Defendant. We agree that defense counsel's statement did not constitute a waiver of his closing argument. As such, the State was entitled to rebuttal argument.

In the cases cited by the Defendant, the defense waived closing argument. *Wallis v. State*, 546 S.W.2d 244 (Tenn. Crim. App. 1976) (defense counsel stated, "the defendant will stand on the proof."); *see also Myers v. State*, 470 S.W.2d 848, 851 (Tenn. Crim. App. 1971) (stating "all three defendants waived closing arguments"); *Tindall v. State*, 99 Fla. 1132 (1930) (stating "the defendant's counsel having made no argument . . ."). Those cases are distinguishable by the fact that the defendant's counsel in those cases did not make a closing argument, and in the case presently before us, the trial court did not err when it determined that the Defendant's counsel's statements constituted a closing argument about whether there existed reasonable doubt. The Defendant is not entitled to relief on this issue.



### **III. Conclusion**

For the foregoing reasons, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE