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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR08-1319

	Opinion Delivered September 16, 2009
VICTOR RASMUSSEN APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR-2007-403-IV]
V.	HONORABLE MARCIA HEARNSBERGER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from convictions of sexual assault in the first degree and sexual assault in the fourth degree committed by appellant, a man in his fifties, upon a teenage girl when she was under sixteen years of age. Appellant argues that he was not a person in a position of trust for purposes of the first-degree sexual assault statute; that magazines were improperly seized from his home during the course of a search pursuant to a warrant because the magazines were not mentioned in the affidavit; that the introduction of the magazines at trial served only to inflame the jury; that the trial court erred in denying his motion in limine to prohibit the State's witnesses from referring to the child as a "victim" at trial; and that the trial court erred in permitting a witness to testify as an expert witness when she had not been identified in discovery as an expert and where none of her reports were provided to appellant prior to trial. We affirm.

A person who is a temporary caretaker or in a position of trust over a person under the age of eighteen and engages in sexual intercourse with that person is guilty of first-degree sexual assault pursuant to Ark. Code Ann. § 5-14-124(a)(3) (Repl. 2006). Appellant asserts that the evidence is insufficient to show he was a temporary caretaker under the statute. When the sufficiency of the evidence is challenged on appeal from a criminal conviction, we review the evidence and all reasonable inferences in the light most favorable to the State and will affirm if the finding of guilt is supported by substantial evidence. *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another that passes beyond mere speculation or conjecture. *Id.*

Here, there was evidence that appellant was a close friend of the victim's family and that the victim was frequently allowed to spend the night in appellant's home while visiting appellant's son. We have repeatedly held that a family friend to whom a minor is entrusted in the capacity of babysitter or chaperone is in a position of authority or trust over that minor during the time of entrustment. *See*, *e.g.*, *May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006); *Murphy v. State*, *supra*. We think the evidence of appellant's close friendship with the victim's parents, and of their frequent entrustment of the victim to appellant's care and supervision, was sufficient to support the finding that appellant was a temporary caretaker or in a position of trust over the victim.

Nor do we agree with appellant's argument that pornographic magazines seized during the search of his home should have been suppressed because the magazines were not expressly identified in the warrant as things to be seized. Our standard of review for a trial court's decision to grant or deny a motion to suppress requires us to make an independent determination based on the totality of the circumstances, to review findings of historical facts for clear error, and to determine whether those facts give rise to probable cause, while giving due weight to inferences drawn by the trial court. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004). Our review of the probable cause for the issuance of the warrant is confined to the information contained in the affidavit, as that was the only information before the magistrate when he issued the warrant. *Id.* The warrant in this case expressly authorized the seizure of photographs. The affidavit stated that appellant likely possessed items used to arouse and entice children, including sexually oriented photographs, videos, and magazines depicting adults and children. The covers of the magazines in question were replete with references to depictions of "young girls" and "teens," bore photographs of nude girls or young women in suggestive poses, and were found in a location within the reasonable scope of the search for the items expressly specified in the affidavit. Considering the totality of the circumstances, we think that the pornographic magazines seized from appellant's home were within the scope of the search authorized by the warrant. In any event, under Ark. R. Crim. P. 13.3(d), if the officer prosecuting the search discovers things not specified in the warrant that he

reasonably believes to be subject to seizure, he may also take possession of things so discovered. *George v. State*, *supra*. We find no error on this point.

Likewise, we disagree with appellant's argument that the trial court erred under Arkansas Rule of Evidence 403 in admitting the magazines at trial. The question of whether relevant evidence is admitted under Ark. R. Evid. 402 or excluded under Rule 403 because its probative value is substantially outweighed by the danger of unfair prejudice is a matter addressed to the discretion of the trial judge, and on appeal the trial court's decision will not be disturbed in the absence of an abuse of that discretion. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006). Here, the victim stated that she had viewed pornography with appellant at his home. The items seized corroborated her testimony. *See*, *e.g.*, *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980). Furthermore, photographs of the partially clad victim in suggestive poses were found in close proximity to pornographic magazines with such titles as *Live Young Girls* and *Purely 18*. Under these circumstances, we cannot say that the trial court abused its discretion in determining that the probative value of the pornographic magazines was not substantially outweighed by the danger of unfair prejudice.

Appellant made a pretrial motion in limine to prohibit any reference to the child in this case as a victim, arguing that use of the term presupposed appellant's guilt. He argues on appeal that the trial judge erred in failing to grant this motion. We do not address this issue because it was not properly preserved. Appellant's motion in limine was not expressly denied by the trial judge, who stated that she believed that a motion to prohibit any use of the word

"victim" by any of the witnesses was too broad, and that her ruling would depend upon the particular context in which the term was used. Under such circumstances, where no definitive ruling is made on a motion in limine, it is necessary for counsel to make a specific objection at trial to preserve the point for appeal. *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). Here, appellant failed to do so, and the argument is therefore waived.

Finally, appellant argues that the trial court erred in permitting Ms. Tracy Sanchez to testify as an expert because, although she was listed as a witness, she was not listed as an expert witness. We find no reversible error. When evidence is not disclosed to a criminal defendant pursuant to pretrial discovery procedures, the burden is on the appellant to establish that the omission was sufficient to undermine confidence in the outcome of the trial. *Burton v. State*, 314 Ark. 317, 862 S.W.2d 252 (1993). The key in determining whether a reversible discovery violation occurred is whether the appellant was prejudiced by the prosecutor's failure to disclose; absent a showing of prejudice, we will not reverse. *Id.* Here, the testimony offered by Ms. Sanchez concerned the effect of sexual abuse on a child victim, particularly how such children often reveal the abuse inadvertently and then make inconsistent statements in order to protect the abuser. Ms. Sanchez's testimony, then, was directed primarily to the credibility of the victim. Had the victim's credibility regarding the abuse been seriously contested, appellant's point would merit consideration. Here, however, appellant himself subsequently took the stand and admitted having continued sexual relations

with the victim. In light of this admission, we cannot see how appellant could have been prejudiced by Ms. Sanchez's testimony.

Affirmed.

KINARD and BROWN, JJ., agree.