Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-1049

	Opinion Delivered MAY 13, 2009
MONICA ANN CLUCK APPELLANT	APPEAL FROM THE GREENE COUNTY CIRCUIT COURT, [NO. CR-2007-460 (H) CR-2007-459]
V.	HONORABLE BARBARA HALSEY, JUDGE
STATE OF ARKANSAS APPELLEES	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Monica Ann Cluck was convicted by a Greene County jury on June 20, 2008, on two counts of sexual assault in the first degree and of contributing to the delinquency of a minor. On appeal, she contends that the trial court erred in denying her motion in limine, her motion to suppress, and her motions for directed verdict. We affirm.

Statement of Facts

By information filed in October 2007, twenty-five-year-old Cluck was charged with sexual assault in the first degree and contributing to the delinquency of a minor. Cluck was accused of being involved in a sexual relationship with a seventeen-year-old male and a fifteen-year-old male while serving as their leader in the Singing Hands group, which is a youth group affiliated with the First Baptist Church of Marmaduke. Before trial, Cluck filed a motion in limine to exclude the State from making reference to the fact that she was a

school teacher, arguing that the fact was irrelevant and prejudicial. The trial court denied the motion, claiming that the jury should determine the weight of the information as to whether it is relevant to her being in a position of trust.

At trial, Cluck's former husband testified that he suspected his wife of having an affair. He had found several things in his house, including love notes and used condoms. He set up surveillance in his house then left for the weekend in early August 2007. When he returned and retrieved the hidden device, he watched the videotaped recording of his wife and the seventeen-year-old male consuming alcohol and having sexual relations. He gave the police this recording.

Deputy Shannon Anthony testified that he arrested Cluck on August 7, 2007. Anthony testified that at the time of the arrest, Cluck's husband woke her, and she came into the living room area. She was read her *Miranda* rights and told she was being arrested for sexual assault. She asked what sexual assault was, and Anthony told her it involved her engaging in sexual relations with a minor. Cluck then asked, "Which one?" Anthony testified that Cluck was arrested for a second count of sexual assault on August 13, 2007, based upon conversations with the fifteen-year-old victim. At trial, Cluck moved to suppress the statement, "Which one?" based upon the argument that the deputy's verbal statement of the *Miranda* warning was insufficient. The trial court denied the motion, finding that the statement was spontaneous.

Kim Bridges testified that he is the pastor of First Baptist Church in Marmaduke, and that Cluck was the leader of Singing Hands. Cluck was in charge of the teenagers involved,

sometimes providing transportation and chaperoning practices and at least one "lock-in." The pastor claimed that he trusted Cluck with the children involved in the group and believed she was in a position of authority over them.

Several parents testified that their children were involved with Singing Hands and that they considered Cluck as the person in charge or temporary caretaker of the children. The mother of the fifteen-year-old victim testified that her son was taken out of the group on the day she found inappropriate text messages on her son's cellular telephone from Cluck. The date was April 19, 2007. She testified that her son was part of Singing Hands, was grounded for a couple of weeks, then rejoined the group for several months until she took him out in April 2007. The fifteen-year-old victim testified that he was part of the group and that he had sexual intercourse with Cluck fifteen or twenty times. He claimed that sex with Cluck was voluntary on his part and that he ended the relationship.

Two members of the Singing Hands group testified that they attended parties at Cluck's home where alcohol was served. The eighteen-year-old victim testified that his sexual relationship with Cluck did not begin until the Singing Hands group had been disbanded in late July 2007. He admits having told police that their relationship started in March and ended August 5, 2007, but claimed that he had lied to police.

Cluck moved for a directed verdict at the close of the State's case, arguing that the State failed to establish that the acts took place while Cluck was in a position of trust or authority over the victims. She argued that the group had disbanded by the time the videotaped evidence was recorded regarding the seventeen-year old, and that the fifteen-year-

old was not a member of the group, and that his testimony of sexual activity was the only proof the State offered. The motion for directed verdict was denied.

The seventeen-year-old's mother testified on behalf of the defense, claiming that it did not bother her that her son was sexually involved with Cluck and that she did not view Cluck as her son's caretaker or in a position of authority over him. Another member of the group testified that the fifteen-year-old was not involved with the group, but did attend the lock-in. This group member also admitted that alcohol was served at the party at Cluck's house after the group disbanded.

Cluck testified that she decided she wanted a divorce around Christmas 2006. She testified that she had sex with the fifteen-year-old around April 2007. She further admitted that she became sexually involved with the seventeen-year-old at the end of July or first of August 2007, after the Singing Hands group had disbanded. She also admitted to providing alcohol to the group.

At the conclusion of the defense's case, Cluck moved for a directed verdict, and the trial court denied the motion. The jury convicted Cluck of contributing to the delinquency of a minor and two counts of sexual assault in the first degree. She was sentenced to a $750 fine for contributing to the delinquency of a minor and eight years' imprisonment on each count of sexual assault to run concurrently. A timely notice of appeal was filed, and this appeal followed.

Motion for Directed Verdict

Although Cluck raises this issue as her final point on appeal, double-jeopardy concerns

require that we review arguments regarding the sufficiency of the evidence first. *Boldin v. State*, 373 Ark. 295, ___S.W.3d ___ (2008). An appeal from a denial of a motion for directed verdict is a challenge to the sufficiency of the evidence. *Price v. State*, 373 Ark. 435, ___S.W.3d ___ (2008). When reviewing a challenge to the sufficiency of the evidence, this court determines whether the verdict was supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other beyond speculation or conjecture. *Id.* The reviewing court views the evidence in the light most favorable to the verdict and considers only evidence that supports the verdict. *Id.*

Circumstantial evidence may constitute substantial evidence to support a conviction. *Price*, *supra*. The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Id.* This question is for the jury to decide. *Id.* Upon review, this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict. *Id.* Finally, the credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Cluck contends that the trial court erred in denying her motion for directed verdict, claiming that, as to the seventeen-year-old victim, the evidence was not sufficient to support the conviction of sexual assault in the first degree. A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity with another

person who is less than eighteen years of age and is not the actor's spouse and the actor is a temporary caretaker, or a person in a position of trust or authority over the victim. Ark. Code Ann. § 5-14-124(a)(3). Cluck maintains that she was not in a position of trust or authority over the seventeen-year-old male. She points out that the victim's mother testified that she did not consider Cluck as a temporary caretaker of her son, nor did she think of Cluck as in a position of trust or authority over her son. Cluck argues, without citing authority, that a position of trust or authority cannot continue indefinitely.

She claims that the same argument applies to the fifteen-year-old victim. She argues that there was evidence that the fifteen-year-old was not a part of the Singing Hands group. She claims that the trial court erred in finding that she had a continuing position of trust or authority over him after he had left the group.

This court stated in *May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006), that where a relationship raises a strong inference of trust and supervision, and where the appellant's function in the relationship could be characterized at a minimum to be that of a chaperone, this meets the statutory threshold of a "temporary caretaker" as stated in the sexual assault statute. *See* Ark. Code Ann. § 5-14-124(a)(3). The State presented substantial evidence that Cluck had longstanding relationships with the two victims as their mentor and chaperone at the time of the offenses. The pastor testified that he trusted Cluck with the youth group, and on many occasions, she was the only adult in charge. Several parents also testified that they entrusted their children to Cluck. This evidence, along with the videotape of her sexual encounter with one victim, the testimony of both victims, and the admissions

of Cluck, is substantial and supports the jury's conclusion that Cluck engaged in sexual intercourse with two minors at a time when she was acting as the leader and chaperone of a group of teenage boys and girls. Accordingly, we affirm on this point.

Motion in Limine

Appellant challenges the circuit court's denial of her motion in limine to prevent the State from introducing the fact that she was a kindergarten teacher. Under Arkansas Rules of Evidence 402, relevant evidence is admissible. Circuit courts have broad discretion in evidentiary rulings, and a circuit court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Green v. Alpharma, Inc.*, 373 Ark. 378, ___ S.W.3d ___ (2008).

Appellant argues that the fact that she was a teacher was irrelevant and prejudicial. She argues that her employment as a kindergarten teacher in Paragould, Arkansas, has no relevance to her sexual relations with teenage boys in the Singing Hands group at the First Baptist Church in Marmaduke. She maintains that this information does nothing to make the facts of the alleged offense more or less probable. *See Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995). She argues that her status as a kindergarten teacher was of no consequence to the determination of whether sexual assault occurred.

She also claims that the trial court erred in allowing the jury to determine the relevancy of this fact. She asserts that the trial court deferred the determination of whether the information was relevant to the jury, but relevancy was for the trial court to determine. She

argues that by allowing the jury to be the gatekeeper of what evidence is admissible, the court abused its discretion.

Finally, she claims that even if the evidence was relevant, the trial court should have excluded it as its probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. *See* Ark. R. Evid. 403. She argues that knowing that she was a kindergarten teacher could only serve to make the offense look more egregious to the jury. She contends that allowing this information was not harmless error because evidence of her guilt was not overwhelming and came down to whether she was in a position of trust or authority over these individuals at the time of their relationship. She maintains that it would have been too easy for the jury to misconstrue her role as kindergarten teacher as a position of trust or authority, and therefore, it was highly prejudicial and misleading.

The State argues that a crucial element of the offense of first-degree sexual assault is that the offender held a position of trust or authority over the victim. Ark. Code Ann. § 5-14-124 (a)(3). The State contends that the trial court found that Cluck's profession, being a kindergarten teacher, was germane to the trust element. The State maintains that Cluck's work status is neither irrelevant nor inflammatory. The State asserts that evidence that she was a professional bolstered other evidence that she held positions of trust with respect to the victims. Such evidence simply formed another link in the State's allegations that she had abused the trust. Further, the State contends that evidence that she taught kindergarten was cumulative to other evidence that she taught Sunday school as well as directed children in a church choir.

The State contends that if the lower court was in error, the error was harmless in view of the overwhelming evidence established through a videotape of her sexual encounter with one victim, the testimony of her husband, her own admissions, and the testimony of her victims, which all supported that she was guilty of the crime for which she was accused. *See Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002).

We hold that the trial court did not abuse its discretion in denying appellant's motion in limine. The trial court stated:

> The court finds that the fact that Ms. Cluck is a school teacher is a part of who she is. The weight of that information as to whether it is relevant to her being in a position of trust or authority is a decision for the jury to make and it will be allowed.

Assuming without deciding that the trial court meant for the jury to determine "relevancy" rather than the "weight" of the evidence, we agree with the State that any error was harmless in that her guilt was established by overwhelming evidence. *See Spencer*, *supra*.

Motion to Suppress

Our review of a denial of a motion to suppress evidence is de novo, and we make an independent determination based on the totality of the circumstances, giving due deference to the trial court's ability to assess the credibility of the witnesses. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). In *Davis*, our supreme court clarified the standard of review by replacing a view of the evidence "in the light most favorable to the State" with a "proper deference to the findings of the trial court," which was held to be more consistent with the standard announced by the Supreme Court of the United States. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690 (1996)).

It is well settled that a suspect's voluntary or spontaneous statement, even though made in police custody, is admissible against him. *See Rhode Island v. Innis*, 446 U.S. 291 (1980); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003); *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002). A spontaneous statement is admissible because it is not compelled or the result of coercion under the Fifth Amendment's privilege against self-incrimination. *Arnett*, *supra*; *Fairchild*, *supra*. In determining whether a statement is spontaneous, we focus on whether the statement was made in the context of a police interrogation, meaning direct or indirect questioning put to the accused by the police with the purpose of eliciting a statement from him. *Id.* Custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to have the force of a question on the accused, and therefore be reasonably likely to elicit an incriminating response. *See State v. Pittman*, 360 Ark. 273, 200 S.W.3d 893 (2005).

Cluck argues that Deputy Anthony knew or should have known that his actions would likely have caused Cluck to incriminate herself. She claims that the environment was interrogatory. She was awakened after midnight and was surrounded by four officers and her estranged husband. She maintains that by continuing the conversation with her, Deputy Anthony was interrogating her. Therefore, she argues that the statement must be suppressed. She also points out that the only testimony that she had been *Mirandized* was from Deputy Anthony, who admitted he was not following standard procedure, which included having the

suspect sign a form. She argues that allowing this statement into evidence was not harmless error as "the jury's hearing Monica's words shortly after her arrest constituted a power tool which unquestionably lead to her conviction."

The testimony adduced at the suppression hearing demonstrated that Cluck was standing in her own home, was not being interrogated, and had not been asked a single question either directly or indirectly when she indicated that she had sexual intercourse with more than one minor. The State argues, and we agree, that there is not any evidence showing that her admission was prompted by a purposeful police inquiry or that it was the product of duress. Whether Cluck was read her *Miranda* rights before she blurted out her question is irrelevant, and it is likewise irrelevant that she was under arrest at the time. *See Arnett*, *supra*. The totality of the circumstances demonstrate that Cluck's statement was spontaneous and, therefore, voluntary. Accordingly, we affirm.

Affirmed.

KINARD, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case should be affirmed, but write separately because there was obvious error in the trial judge's disposition of the motion in limine. In her motion, Cluck sought to exclude any reference to the fact that she was a school teacher at the time that the incidents occurred. She argued that the entire episode had nothing to do with her place of employment, which at the time was the Kindergarten section of the Paragould

School District. She emphasized that none of the minors involved were in the Paragould School District. Further, "her role as a teacher had nothing to do with this incident." She noted that the State's theory of the case was that she was in a "position of trust or authority" by virtue of her role as an adult leader with a Church group in her home town of Marmaduke. She contended that introducing the fact she was a school teacher in another town, with an unconnected school district, is unduly prejudicial to her, and outweighed any probative value this fact may have.

In denying Cluck's motion, the trial judge stated:

> The court finds that the fact that Ms. Cluck is a school teacher is part of who she is. The weight of that information as to whether it is relevant to her being in a position of trust or authority is a decision for the jury to make and it will be allowed.[1]

It is axiomatic that questions of relevancy are for the trial court to determine. *NationsBank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001); *Lovell v. Beavers*, 336 Ark. 551, 987 S.W.2d 660 (1999). Because the question is squarely before us, we should not shirk our duty to address the issue.

Although we review evidentiary rulings under the very deferential abuse-of-discretion standard, *id.*, I believe it was a clear abuse of discretion to admit evidence of Cluck's occupation as a Kindergarten teacher. Rule 401 defines relevant evidence as "evidence having

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[1] Here the trial judge merely made a relevancy ruling under Rule 401 of the Arkansas Rules of Evidence. Also raised, but not ruled upon, was an argument that sounded under Rule 403, whether the evidence of Cluck's occupation was more prejudicial than probative. Cluck has apparently failed to get a ruling on that aspect of her motion in limine, therefore, we will not address it on appeal.

any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401 (2008). As the State revealed in a motion in limine of its own seeking the trial court's determination as to whether it was appropriate to charge Cluck under Arkansas Code Annotated section 5-14-124 (Repl. 2006), asserting that her status as a "position of trust, authority or was caretaker of the minor victims" emerged in connection with her directorship of the Singing Hands youth group at the First Baptist Church in Marmaduke. As Cluck indicated in her motion in limine, to be per se in a position of authority as a teacher, section 5-14-124(a)(3) requires that the perpetrator be employed in the victim's school or school district.[2] Outside the school district where the defendant is employed, the teacher is just another citizen and should not be treated or punished differently than any other citizen. Otherwise, we are not treating citizens equally under the law. Accordingly, the fact that she was a school teacher in another town was not a "fact that is of consequence" as contemplated by Rule 401.

Nonetheless, I believe that the error is harmless. As the majority intimates, there was overwhelming evidence that Cluck engaged in sexual activity with minors during the time period that she was a temporary caretaker of the minors while serving as a volunteer director of a Baptist youth group. Both elements of first-degree sexual assault were thus established.

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[2] I am mindful that section 5-14-124(a)(2) provides for teachers, who are among the professionals listed in section 12-12-507(b), to be prosecuted for first degree sexual assault. However, that subsection also requires proof that the person was "in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity."

More importantly, however, Cluck was sentenced to concurrent eight-year terms for first-degree sexual assault where the sentence range was six to thirty years. As the supreme court stated in *Bond v. State*, 374 Ark. 332, --- S.W.3d ---- (2008), a defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself, and it is impermissible to reverse absent a showing of prejudice by the defendant. In spite of the State's obvious attempt to use Cluck's status as a school teacher to inflame the jury, it is apparent that the tactic did not work. Accordingly, I believe that we must affirm.