ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION IV

CACR07-1238

May 28, 2008

DAVID BRIAN GIBSON
APPELLANT

APPEAL FROM GRANT COUNTY CIRCUIT COURT [NO. CR-07-14-2]

V.

HON. PHILLIP SHIRRON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

The appellant was convicted of Internet Stalking of a Child, a violation of Ark. Code Ann. § 5-27-306 (Repl. 2006). As charged, one of the elements of that offense is that the defendant believed the victim to be fifteen years of age or younger. On appeal, appellant argues that the evidence was insufficient to show that he believed the victim to be younger than fifteen, that the trial court erred in denying his Ark. R. Evid. 403 motion to exclude a video of him masturbating, that the trial court erred in not declaring a mistrial because of remarks made by the prosecutor during closing arguments, and that Ark. Code Ann. § 5-27-306 is void for vagueness. We affirm.

We first address the sufficiency of the evidence to support the finding that appellant believed that the victim was fifteen years old or younger. In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Instead, we view the

evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id*. We will affirm the conviction if there is substantial evidence to support the finding of guilt. *Hughes v. State*, 74 Ark. App. 126, 46 S.W.3d 538 (2001). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

Here, there was evidence that the victim (an undercover police officer) told appellant during an internet chat that he was a fourteen-year-old girl, and that appellant acknowledged that he understood that the victim was fourteen. There was also evidence that appellant delayed meeting with the victim because he was afraid about the "age difference" and asked why the victim wanted to engage in sex acts with appellant rather than with a local boy her own age. We recognize that there were discrepancies in the evidence regarding appellant's knowledge; nevertheless, regardless of discrepancies, inconsistencies, and contradictory evidence, matters of credibility are for the jury to determine. *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000). Viewing the evidence, as we must, in the light most favorable to the appellee, we hold that the jury could properly conclude that appellant believed that he was soliciting a person fifteen years of age or under.

We next consider appellant's argument that the trial court erred in permitting introduction at trial of a videotape showing him masturbating during an internet chat session with the undercover police officer. Arkansas Rule of Evidence 404(b) provides that, although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

in order to show that he acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The parameters of this rule are set by Rule 403: In response to an objection that the evidence is unfairly prejudicial, the probative value of the evidence must be weighed against the danger of unfair prejudice. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). The question to be decided on appeal is whether the trial court abused its discretion in admitting the evidence. *Id.*

We find no such abuse. There is no doubt that a video presentation of appellant masturbating as he chatted with the victim was prejudicial, but the question is whether there was *unfair* prejudice. Here, the statute appellant was charged with violating required evidence not only that he lured someone whom he believed to be fifteen years of age or under, but also that he did so for the purpose of engaging in sexually explicit conduct. The video, prejudicial as it was, was powerful evidence of appellant's intent to engage in sexual conduct – something not susceptible to proof by direct evidence – and we cannot say that the trial court abused its discretion in finding that its probative value was not outweighed by the potential for unfair prejudice.

Appellant further argues that the trial court erred in refusing to grant a mistrial because of inflammatory arguments made by the State during closing and sentencing. During his closing argument in the guilt phase, the prosecuting attorney likened appellant to a "dog in heat" who preyed on underage girls. During his closing in the sentencing phase, the prosecutor remarked that appellant was lucky that his acts were not committed later, because

the crime was later elevated to a Class D felony. The State also argued that punishing appellant with only probation would be the equivalent of trampling on the United States flag with respect to the message that would be sent by such an outcome.

We find no reversible error. A prosecutor is allowed to argue any inference reasonably and legitimately deducible from the evidence, and the trial court has wide discretion in controlling the arguments of counsel. *Samples v. State*, 50 Ark. App. 163, 902 S.W.2d 257 (1995). Although it may have been in poor taste to refer to appellant as a "dog," it is rare that a prosecutor's appeal to the juror's passions is so great as to require reversal, *Brown v. State*, 95 Ark. App. 348, 237 S.W.3d 95 (2006), and the characterization of appellant as being "in heat" was not unreasonable given the evidence. The State's argument during closing was no more inflammatory than the language we approved in *Samples*, *supra*.[1]

With regard to the prosecutor's arguments for a long jail term and his reference to anything less as the equivalent of trampling on the flag during sentencing, "send a message" and "American values" arguments are generally permissible. *See Muldrew v. State*, 331 Ark. 519, 522, 963 S.W.2d 580, 582 (1998); *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980). Although we think that the reference to "trampling on the flag" may have tended to incite the passions of the jurors, we do not think that any incitement was sufficiently powerful and personal that it could not have been remedied by a curative instruction. *See Muldrew v. State*, *supra*; *compare Adams v. State*, 229 Ark. 777, 318 S.W.2d 599 (1958).

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[1] During closing arguments in *Samples*, the State characterized the appellant therein as a "sexual deviate" and "pervert" who was "taking pictures of this community's children."

Finally, appellant argues that the statute he was convicted of violating is constitutionally invalid because it is void for vagueness. Because appellant's constitutional challenge to the statute is presented for the first time on appeal, it is not properly before us and we do not address it. *See McLane Company, Inc. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

Affirmed.

BIRD and VAUGHT, JJ., agree.