NOT DESIGNATED FOR PUBLICATION

DIVISION I

ARKANSAS COURT OF APPEALS

No.	CACR07-82
Opinion Delivered	October 31, 2007
ROBERT BERGSTROM APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [CR-03-788-1]
V.	HON. BERLIN C. JONES, CIRCUIT JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Robert Bergstrom received concurrent ten-year sentences following a jury's determination that he committed two separate sexual assaults. He raises three points on appeal. First, he claims that there was not substantial evidence to support his convictions; second, he argues that the trial court abused its discretion by limiting the testimony of Bergstrom's character witnesses; third, he argues that the trial court erroneously held that his proffered jury instruction was an incorrect statement of the law at the time that the offense occurred. We find no error and affirm.

While serving as a Pine Bluff police officer, Bergstrom was charged by information with sexual assault in the first degree and sexual assault in the second degree. The information alleged that in 2002 and 2003 he engaged in sexual intercourse or deviate sexual activity with a minor less than eighteen years of age (who was not his spouse) while Bergstrom was a professional in a position of trust or authority over the victim and that he utilized that position

of trust to carry out his crime. It also alleged that during the same time frame Bergstrom engaged in sexual contact with the same minor while employed as a section 12-12-507(b) professional. This special-status enhancement was based on the fact that he used his position as a law-enforcement officer to procure the illegal sexual contact.

At trial, the victim's mother, Emma McBride, testified that she first met Bergstrom one evening in 2002 when he brought her three children home from a local skating rink where he worked as a security guard. McBride's oldest child, the victim, was sixteen at the time; her son was fifteen; and her youngest daughter was eleven. McBride testified that she worked the 3:00 p.m. to 1:00 a.m. shift at the local Kohler plant and that Bergstrom would frequently stop by her home to "check" on the children while she was working. She recalled that he would often come bearing snacks—like honey buns—as a special "treat" for her kids. McBride testified that she had considered Bergstrom to be a family friend and that she appreciated his concern for her children.

The victim testified that Bergstrom would often bring her and her siblings home from the skating rink. He then began to frequent her home on a regular basis. She testified that, at some point, Bergstrom started touching her inappropriately as they visited on the porch, while her siblings were inside the house. Later, the victim and her siblings were invited to Bergstrom's apartment complex to swim. According to the victim, on one such occasion Bergstrom called her into his apartment and forced her to have sex with him.

The victim's younger sister testified that she once observed Bergstrom touching her sister in an inappropriate way as the two were exiting his vehicle. The victim's younger sibling

also noted that when Bergstrom was at their home, she did not observe him helping the victim with homework, contrary to his claim otherwise.

Officer Terry Hopson testified that he took a statement from Bergstrom. In this statement, Bergstrom initially denied touching the victim in any inappropriate way. Instead, Bergstrom asserted that the victim had fabricated the charge following an episode where he, in his capacity as a police officer, was involved in a confrontation with her boyfriend. Following the interview, Hopson obtained Bergstrom's consent to search his apartment; several pictures of the victim, her sister, and other girls were discovered. In the photos, the subjects were in various stages of undress—ranging from partially clad in swimwear or underwear to fully naked. Following this discovery, Bergstrom made a subsequent statement to the authorities. Officer Jeff Hubanks testified that in the second statement, Bergstrom admitted to having a sexual interlude with the victim, but he maintained that the contact was at her urging and that he terminated the intercourse shortly after it began.

After the State rested, Bergstrom moved for a directed verdict as to count one, arguing that the State had failed to prove that he occupied a position of trust or authority over the victim and also failed to prove that he utilized his position to procure sex with the victim. As to count two, he argued that the State failed to present sufficient evidence showing that he was in a position of trust or authority over the victim. His motions were denied.

The State then moved in limine to restrict the testimony of the defense witnesses to matters involving only character. It argued that because several of Bergstrom's witnesses were not present at the scene of the crime, their testimony was irrelevant. The motion was granted,

and Bergstrom then proffered the testimony of Shanequa (Nikki) Nelson, Fredrick Nelson, and their daughter D'Nequa Dotson. The Nelsons testified that Bergstrom was a family friend and that they trusted him with their children, including their young daughter. Ms. Nelson testified that she owned a daycare and as such was trained to identify abuse. She noted that she had never observed any signs that Bergstrom had touched her children in an inappropriate manner. D'Nequa testified that Bergstrom baby-sat her (including overnight visits to his apartment) and that when she was in his care—spending time alone or swimming with him—she was never concerned or worried that he would act in an inappropriate manner.

During the jury-instruction conference, the State offered a jury instruction that read:

> Robert Bergstrom was charged with the offense of Sexual Assault in the Second Degree. To sustain this charge the State must prove the following things beyond a reasonable doubt:
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> That Robert Bergstrom engaged in sexual contact with the victim; and
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> That the victim was less than eighteen years of age at the time of the alleged offense; and
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> That Robert Bergstrom was at the time of the alleged offense a law enforcement officer; or
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> That Robert Bergstrom was in a position of trust or authority over the victim.

Bergstrom challenged this instruction, particularly its use of the disjunctive between the third and fourth element. The State responded that the instruction was based on the statute that was in effect at the time the offense was committed. Bergstrom replied that the legislature had only made stylistic—not substantive—changes from the previous version. Further, Bergstrom argued that the prior version would criminalize lawful conduct, including consensual sexual

relations between an officer and a person less than eighteen years of age. The trial court accepted the State's version of the instruction. Bergstrom then proffered the version based on the most current statutory language. Following deliberations, the jury found Bergstrom guilty on both counts. He was sentenced to concurrent terms of ten years' imprisonment. Following his conviction and sentencing, he timely appealed to our court.

In our consideration of Bergstrom's appeal, we first review the sufficiency of the evidence as we must. *See May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006). A directed-verdict motion is a challenge to the sufficiency of the evidence. *Id.* 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. *Id.* 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, Bergstrom contends that his motions for directed verdict should have been granted because there was insufficient evidence that he occupied a position of trust and authority over the victim based on his occupation as a Pine Bluff police officer. The statute at the time of the offense provided, in relevant part, that a person commits sexual assault in the first degree when the person engages in sexual intercourse or deviate sexual activity with another person, not the person's spouse, who is less than eighteen (18) years of age, and the person is a professional under section 12-12-507(b) (Supp. 2001) and is in a position of trust or authority over the victim and uses the position to engage in sexual intercourse or deviate

sexual activity. Ark. Code Ann. § 5-14-124 (a)(2) (Supp. 2001). The professionals listed in section 12-12-507(b) are those who must immediately notify the child-abuse hotline when they become aware of a child who may be subject to maltreatment. The list of professionals includes law-enforcement officers. Ark. Code Ann. § 12-12-507(b)(10).

At trial, the victim testified that she first met Bergstrom at the skating rink not far from her home and that he was wearing his police uniform. He identified himself to her as "Officer Robert." Bergstrom increased his contact opportunity with the victim by frequenting her home while he was both "on-duty" and "off-duty." The victim's mother testified that these frequent encounters did not trouble her, because she knew that Bergstrom was a police officer and that, as such, she trusted him. Further, there is no dispute that the victim was under eighteen or that Bergstrom engaged in sexual contact with her. He admitted as much.

Bergstrom's argument is that because he was "off-duty" at the time that the sexual intercourse occurred, he was not using his position as a police officer over the victim. This is a ridiculous assertion. It was his position of power that allowed him to gain access to the child and to convince the child's mother that the children were safe in his care. Certainly the trial testimony was sufficient to support a conclusion that Bergstrom utilized his status as a police officer to easily gain the trust of the victim's mother and to gain easy entry into the child's home. Bergtrom's argument is also undermined by our supreme court's recognition of a law-enforcement officer's unique character and that "in a sense [an officer] is on duty 24 hours a day, seven days a week and is not relieved of his obligation to preserve the peace when 'off duty.'" *See Gibson v. State*, 316 Ark. 705, 711, 875 S.W.2d 58, 61 (1994).

Bergstrom was also convicted of second-degree assault for having inappropriately touched the victim at her home during his frequent "rounds" to check on the family. The victim testified that after several visits to the home, he began touching her breasts and vagina through her clothing. She also testified that the touching made her feel uncomfortable, but she was afraid to tell anyone.

For the same reasons the first-degree assault is supported by substantial evidence, so is the second-degree assault charge. The evidence showed that Bergstrom garnered a position of trust with the family based on his status as a police officer: the victim's mother testified that he was permitted unsupervised visits with her children because, as a police officer, he was presumed to be trustworthy. As such, there is more than sufficient evidence to support Bergstrom's two convictions.

As to his next point on appeal, Bergstrom argues that the court abused its discretion by granting the State's motion in limine limiting the testimony of his character witnesses. A trial court's ruling on relevancy will not be disturbed on appeal absent a manifest abuse of discretion. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). Further, we will not reverse absent a showing of prejudice to appellant. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999).

Here, Bergstrom proffered testimony by three members of another family concerning their relationship with him during 2002–2003. The Nelsons' proposed testimony in no way indicated that they knew or had any relationship with the victim or her family; as such the proffered testimony was collateral to the issue at hand. Furthermore, there was overwhelming evidence of Bergstrom's guilt—namely his confession that he did sexually assault the victim.

Because nothing that the Nelsons were prepared to say would have altered the impact of this confession, Bergstrom cannot show resulting prejudice, which is a prerequisite for reversal.

As to Bergstrom's third point on appeal, the State takes the position that in order to sustain the second-degree sexual-assault conviction it was only required to prove one of two elements: that Bergstrom either was a law-enforcement officer at the time or was in a position of trust or authority at the time. However, on July 16, 2003, the disjunctive "or" was replaced with the conjunctive "and." Despite Bergstrom's argument to the contrary, there is no question that the law at the time of the crime applies. Thus, we are faced with a task of pinpointing when the crime occurred—before or after July 16, 2003. If it was before, then the trial court used the proper statutory directive in its instruction.

Although there is some ambiguity in the testimony relating to the timing of this secondary assault, the victim's testimony that Bergstrom began abusing her in February 2002 and continued until August 2002 is enough to show that the appropriate version of the law was used at trial. Specifically, when asked when the abuse occurred, she stated that "[it] was shortly after that he started tracking me around my house and that lasted until the summer of 2002." She also stated that "for nine months he came to my house every day and sexually abused me while others were still in the house." Although his conduct may have continued after the law was changed, the testimony supports a conclusion that Bergstrom committed assault prior to the time that the law was changed and that the trial court used the proper statutory framework for the instruction to the jury.

The case is affirmed in all respects.

GLOVER and HEFFLEY, JJ., agree.