[Cite as *State v. Speakman*, 2011-Ohio-3430.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-013
	:	O P I N I O N
- vs -		7/11/2011
	:	
DANIEL G. SPEAKMAN, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 10CRI00055

David B. Bender, Fayette County Prosecuting Attorney, 1st Floor Courthouse, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

John H. Roszmann, 321 East Court Street, P.O. Box 475, Washington C.H., Ohio 43160, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Daniel G. Speakman, Jr., was convicted of five counts of unlawful sexual conduct with a minor after it was alleged that in 2009 and 2010 he committed sexual acts with a girl living in his household. Speakman appealed, challenging the sufficiency of the evidence for three of those counts. We reverse one

count, finding insufficient evidence, but affirm the two other counts appealed.

{¶2} Speakman was charged in Fayette County Common Pleas Court with six counts of the third-degree felony based upon allegations that he engaged in sexual conduct with a minor. The minor, M.M., was his wife's relative and had lived in their household since 2003. Two of the counts reportedly took place in 2009 when M.M. was 13 years of age. The three counts at issue in this appeal occurred when M.M. was 14 and Speakman was 37 years of age.

{¶3} Speakman's case was tried to a jury. At the beginning of trial, the state nolled Counts One through Six, charging Speakman with six counts of sexual battery. Speakman moved for a Crim.R. 29 dismissal of the remaining six counts, which were Counts Seven through Twelve of the indictment, at the close of the state's case. The trial court dismissed Count Eleven. The court indicated that it needed to recheck its notes and reserved ruling on Count Ten. It overruled Speakman's motion on the other four counts. Speakman renewed his motion at the close of all evidence, which the court overruled as to the remaining counts, including Count Ten. The jury returned a guilty verdict on all five counts. Speakman was sentenced to prison.

{¶4} As previously noted, Speakman appeals three of the five counts of his conviction. He raises three assignments of error for our review.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING, AS TO COUNTS NINE AND TEN, APPEL[L]ANT'S MOTION FOR ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE MADE AT THE CONCLUSION OF THE STATE'S CASE[.]"

{¶7} Speakman argues that the trial court should have granted his Crim.R. 29 motion and dismissed Counts Nine and Ten because there was insufficient evidence that

he engaged in "sexual conduct" with M.M..

{¶8} As previously noted, Speakman was charged with the offense of unlawful sexual conduct with a minor under R.C. 2907.04(A). The applicable version of R.C. 2907.04 states, in pertinent part, that:

{¶9} "(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶10} According to R.C. 2907.04(B)(3): "[I]f the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree."

{¶11} "Sexual conduct" is defined in R.C. 2907.01(A) as: "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶12} Penetration is not required to commit cunnilingus. *State v. Lynch* (2003), 98 Ohio St.3d 514, 2003-Ohio-2284, ¶86. The act of cunnilingus is completed by the placing of one's mouth on the female's genitals. Id. Fellatio has been defined as a sexual act in which the mouth or lips come into contact with the penis. *State v. Nelson*, Portage App. No. 2009-P-0070, 2010-Ohio-5932, ¶39.

{¶13} Crim.R. 29(A) states in pertinent part that the court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or

complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶14} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14. Therefore, when reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

{¶15} According to the record, Count Nine involved acts that were alleged to have occurred in January 2010 and Count Ten involved acts in February 2010.

{¶16} The state presented testimony from Elizabeth Sandman, a forensic interviewer for a child protection center, who interviewed M.M. for the purpose of "medical treatment and diagnosis for the child." Sandman stated that M.M. told her about "multiple times of sexual abuse," which included oral sex, fondling, kissing, and digital penetration of her vagina. Sandman testified that M.M. said the events occurred between July 1, 2009 and the interview of April 1, 2010. Asked to give specifics about the time frames involved, Sandman indicated that M.M. mentioned "multiple acts of sexual contact between February, January and going back into July of 2009, when she stated was the first time that there was a significant amount of sexual contact was in July of 2009."

{¶17} M.M. testified that in January of 2010 (Count Nine), Speakman hugged and kissed her and "mess[ed] with her breasts with his hands." She said it did not go further than that. When asked by the prosecutor whether Speakman touched her vagina with his mouth in January 2010, M.M. answered, "Yes," and indicated it mainly happened in her

bedroom after school and she believed it occurred five or six times.

{¶18} As to February 2010 (Count Ten), M.M. testified that Speakman had her touch his penis using her hand and he touched and used his mouth on her breasts. When asked if Speakman ever used his mouth or tongue on her vagina in February 2010, M.M. said, "Not that I know of, I'm not certain."

{¶19} Having reviewed the record of the evidence admitted regarding the acts that occurred in January 2010 in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of unlawful sexual conduct with a minor beyond a reasonable doubt for Count Nine. M.M. testified to the acts of cunnilingus. Therefore, the trial court did not err in refusing to dismiss Count Nine at the close of the state's case.

{¶20} Turning to evidence specifically pertinent to Count Ten, the forensic interviewer testified that M.M. told her sexual abuse occurred from July 2009 and into 2010, and the abuse included acts of oral sex and digital penetration. However, when asked for specifics for February 2010, M.M. did not testify to any cunnilingus, fellatio, or digital penetration. In other words, M.M. did not testify to acts constituting sexual "conduct." Therefore, we cannot say that, in viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of sexual conduct for Count Ten beyond a reasonable doubt. The trial court erred in not granting a Crim.R. 29 dismissal of Count Ten. Speakman's first assignment of error is overruled in part and sustained in part.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY RESERVING RULING ON APPELLANT'S RULE 29 MOTION AS TO COUNT TEN AT THE CLOSE OF THE STATE'S CASE."

{¶23} Based upon our determination on Count Ten under the first assignment of error, this assignment of error is rendered moot.

{¶24} Assignment of Error No. 3:

{¶25} "THE EVIDENCE PRESENTED BY THE STATE AS TO COUNTS NINE, TEN AND TWELVE OF THE INDICTMENT WAS INSUFFICIENT TO SUPPORT THE GUILTY VERDICTS AND WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶26} Speakman again argues that the conviction for unlawful sexual conduct with a minor was insufficient and against the manifest weight of the evidence for acts that allegedly occurred January 2010 (Count Nine), February 2010 (Count Ten), and March 16, 2010 (Count Twelve). We addressed Count Ten, indicating that it should have been dismissed. We previously found that sufficient evidence of Count Nine was presented for the jury to consider that count.

{¶27} We will consider the manifest weight of the evidence for Count Nine and Count Twelve, mindful that a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. *State v. Urbin,* 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. While a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Perkins,* Fayette App. No. CA2009-10-019, 2010-Ohio-2968, ¶9; see, also, *State v. Pollitt,* Scioto App. No. 08CA3263, 2010-Ohio-2556, ¶15.

{¶28} With a manifest weight of the evidence challenge, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury

clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Hancock,* 2006-Ohio-160, at ¶39.

{¶29} As previously discussed, M.M. told the jury after questioning by the prosecutor that Speakman touched her vagina with his mouth in January 2010, and she believed it occurred five or six times.

{¶30} When asked if she told anyone about what was occurring with Speakman, M.M. said that Speakman told her that if she told anyone or anyone found out, he would go to prison, and she would be sent to "JDC" until she was 18 and then to prison. She testified that she did say something to the other minor, a boy related to Speakman, who was also living in the home.

{¶31} The minor boy testified that he came to live with Speakman and Speakman's wife after M.M. was already living in the household. He said he and M.M. would be "grounded" at home for punishment. He said M.M. told him some things were occurring between M.M. and Speakman, but he didn't believe her at first. He said he changed his mind after noticing that M.M. was being released from being "grounded" and Speakman was spending time in M.M.'s room with the door closed. He also said he once saw Speakman and M.M. kiss on the lips.

{¶32} M.M. testified that when she asked Speakman if she could be "ungrounded," he would say, "you know what you have to do," which M.M. said was referring to "sexual activities." Specifically testifying about March 16, 2010, M.M. told the jury that she asked Speakman if he would "unground" her that day. While not using the actual terms, M.M. said Speakman performed cunnilingus on her and made her perform fellatio on him. She also provided testimony that would indicate that Speakman ejaculated during the encounter.

{¶33} The forensic investigator testified that M.M. told her that on March 16, 2010,

she performed oral sex on Speakman in a shed and the indication was Speakman ejaculated.

{¶34} Speakman testified that he did not engage in any sexual activities with M.M. He specifically denied having any sort of sexual relationship with M.M. in January, February and March 16. He said he was busy working, or hunting, or fishing, and doing other activities and did not engage in the behavior.

{¶35} Testimony was presented that Speakman's wife witnessed some activity between Speakman and M.M. on March 29, which formed the basis of a different count that is not part of this appeal. When asked to explain his behavior relative to that day, Speakman indicated that he sustained a concussion when he was younger and twice hit his head on March 29, and remembers nothing about telling a friend that he had done "sick" things to M.M. or telling police he had done bad things.

{¶36} We must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶37} Applying the applicable standard of review for a manifest weight of the evidence challenge, we find the jury clearly did not lose its way and create such a manifest miscarriage of justice that the conviction for Count Nine and Count Twelve must be reversed. The manifest weight of the evidence supports the finding that Speakman engaged in unlawful sexual conduct with M.M., a minor, in January 2010 and March 16, 2010. Accordingly, this finding is also dispositive of the sufficiency challenge. There was sufficient evidence to sustain the conviction for Count Nine and Count Twelve. Speakman's third assignment of error is overruled.

{¶38} Judgment is affirmed as to Count Nine and Count Twelve and reversed as to Count Ten, and Speakman is discharged as to Count Ten only.

RINGLAND and HENDRICKSON, JJ., concur.

[Cite as *State v. Speakman*, 2011-Ohio-3430.]