DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0423
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
DAVID WALTER SWAN, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-007518-001 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 David Swan appeals from his conviction for sexual conduct with a minor. Prior to his conviction, the court denied Swan's motion for a judgment of acquittal, finding that substantial evidence supported a conviction. For the reasons set forth below, we affirm.

Facts and Procedural Background

¶2 In October 2009, a jury convicted Swan on eight criminal counts involving sexual acts with minors. Swan appeals his conviction under Count 13 of the indictment, which charged that in violation of Arizona Revised Statute ("A.R.S.") § 13-1405 Swan committed sexual conduct with a minor. Specifically, Count 13 alleged that between May 1 and September 1, 2006, Swan engaged in sexual intercourse (or "masturbatory contact") with a female victim under the age of fifteen.

¶3 At trial, the following facts were presented in support of the allegation.[1] In November 2004, Swan's friend and two of her children moved in with Swan because the friend was having financial difficulties. Another of the friend's daughters, the victim in this case (born in October 1994), ordinarily lived with her father in California but lived with her mother and Swan during the summers of 2005 and 2006. One

[1] We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Swan. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

day during the summer of 2006, when the victim was eleven, Swan asked the victim to come into his bedroom and offered to pay her money if she "did something for him." After the victim entered the room, Swan locked the door and pushed her on the bed so that she was lying face up. Swan took both the victim's and his clothes off and climbed on top of her until "all of his body" was touching hers. The victim tried to push Swan off of her but was unsuccessful. The victim testified that while Swan was on top of her, he was "trying to hump [her]. . . . [l]ike going back and forth, moving his body on [hers], back and forth," and he was touching her "vaginal area" with his penis. This continued for approximately ten minutes. The victim testified that Swan's penis "was not inside of [her]."

¶4 After the presentation of evidence, Swan moved for a judgment of acquittal on Count 13 pursuant to Rule 20 of the Arizona Rules of Criminal Procedure. Swan argued that the victim's general descriptions of the body parts involved in the act were too vague to support a conviction. The court disagreed and denied Swan's motion. The jury later found Swan guilty on Count 13 and other counts involving sexual acts with minors. On Count 13, Swan was sentenced to twenty years' imprisonment, to run consecutive to his other sentences. Swan timely appealed the court's denial of his motion for a judgment of acquittal,

and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A)(1) (2010).

Discussion

¶5 Swan argues that the court erred in not granting his motion for judgment of acquittal on Count 13. A court is required to grant a defendant's motion for a judgment of acquittal if "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence has been described as evidence that reasonable persons could find sufficient to support the conclusion that the defendant committed the charged offense beyond a reasonable doubt." *State v. Stevens*, 184 Ariz. 411, 412, 909 P.2d 478, 479 (App. 1995) (citing *State v. Mathers*, 165 Ariz. 64, 796 P.2d 866 (1990)). Specifically, Swan argues the court erred because A.R.S. §§ 13-1405 and 1401, under which Swan was convicted, require sexual intercourse or oral sexual contact and there was no evidence that Swan either sexually penetrated the victim or had oral sex with her in 2006. Because Swan raises this particular argument for the first time on appeal, we review for fundamental error. *See State v. Hamblin*, 217 Ariz. 481, 484 n.2, ¶ 7, 176 P.3d 49, 51 n.2 (App. 2008) (stating that argument made for first time on appeal is forfeited absent fundamental error). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and

error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶6 Swan's argument reveals a basic misunderstanding of the statutes underlying his conviction. Swan was convicted under A.R.S. § 13-1405, which states:

> A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

This section is to be read in conjunction with A.R.S. § 13-1401, which defines "sexual intercourse" in the disjunctive as *either* "penetration into the penis, vulva or anus by any part of the body or by any object" *or* "masturbatory contact with the penis or vulva." Here, the State sought a conviction for sexual conduct with a minor on the basis of masturbatory contact, not sexual penetration. Indeed, the jury forms clarified that the alleged conduct at issue in Count 13 was "masturbatory contact with penis and vulva." Thus, the question is not whether there was evidence of sexual penetration or oral sex but whether there was substantial evidence of masturbatory contact. Here, the court did not err in ruling that substantial evidence of masturbatory contact had been presented at trial.

¶7 In *State v. Crane*, the defendant was convicted of two counts of sexual conduct with a minor. 166 Ariz. 3, 5, 799 P.2d 1380, 1382 (App. 1990). In one incident, the defendant positioned himself on top of the victim while she was in bed and went "up and down." *Id.* at 6, 799 P.2d at 1383. The victim testified that the defendant's "ding dong" was between her legs. *Id.* In another incident, the defendant lay on top of the victim while both were naked and touched his penis to the victim's "private parts" and between her legs. *Id*. The defendant "went up and down" and ejaculated onto the victim's stomach. *Id*. The defendant argued that the trial court erred in not granting his motion for judgment by acquittal as no evidence of sexual intercourse was presented. *Id*. at 7, 799 P.2d at 1384. The trial court disagreed and this court affirmed, stating:

> We conclude that A.R.S. § 13-1401(3) does not mandate penetration in every case. Manual masturbatory contact with another is sufficient. We see no difference between a case where a defendant has a child manually masturbate him and where defendant positions the child's body, and his own, in such a way that contact with her body accomplishes the same purpose. From our interpretation of the legislative intent the activity prohibited by the statute is masturbative contact with the body of another.

Id. at 9, 799 P.2d at 1386 (internal citations omitted).

¶8 We agree with the analysis in *Crane* and apply it here. As in *Crane*, there was substantial evidence that Swan used the

victim's body to masturbate his penis. This alone would have been enough to constitute masturbatory contact under A.R.S. § 13-1401. The evidence also showed, however, that Swan used his penis to masturbate the victim's vulva at the same time. The victim testified that while both were naked, Swan got on top of her, touched his penis to her "vaginal area" and tried to "hump" her by "going back and forth, moving his body on [hers]." The court could have found substantial evidence of sexual conduct with a minor, as defined, based on testimony that Swan had masturbatory contact with his penis or the victim's vulva. Here, the victim testified that both occurred. Like the court in *Crane*, we see no difference between a defendant having a child manually masturbate him and a defendant positioning himself on a child's body such that the contact between the two accomplishes the same purpose. *See* 166 Ariz. at 9, 799 P.2d at 1386. Thus, the court did not err in ruling that substantial evidence was presented at trial that Swan engaged in sexual intercourse, defined as "masturbatory contact with the penis or vulva," with a child under fifteen. *See* A.R.S. §§ 14-1401, -1405. Thus, there was sufficient evidence to support the conviction for sexual conduct with a minor.

Conclusion

¶9 For the foregoing reasons, we affirm.

/s/
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DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/
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PETER B. SWANN, Presiding Judge

/s/
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PATRICIA K. NORRIS, Judge