[Cite as *State v. Hawkins*, 2011-Ohio-6197.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 11CA0007
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KEVIN HAWKINS	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee	CASE No. 10-CR-0350

DECISION AND JOURNAL ENTRY

Dated: December 5, 2011

DICKINSON, Judge.

INTRODUCTION

{¶1} Kevin Hawkins started talking with "Jenna44691" in an internet chat room. Although "Jenna" said she was a 14-year-old junior-high student from Wooster, she was actually Officer April Teichmer of the Wooster police department. During one of their conversations, Mr. Hawkins asked "Jenna" if she wanted to have sex with him, and she agreed to meet him at a park. When Mr. Hawkins arrived at the park, he was arrested, and the Grand Jury indicted him for attempted unlawful sexual conduct with a minor under Section 2907.04 of the Ohio Revised Code and importuning under Section 2907.07(D)(2). Mr. Hawkins waived his right to a jury trial, and his case was tried to the bench. At the conclusion of the State's case, the trial court granted Mr. Hawkins's motion for judgment of acquittal on the attempted unlawful sexual conduct with a minor charge. After hearing all the evidence, it found him not guilty of importuning, concluding there was reasonable doubt regarding whether he believed the person

with whom he had been chatting "was 14 or was reckless in that regard." The State has attempted to appeal the trial court's dismissal of the attempted unlawful sexual conduct with a minor charge. We dismiss the attempted appeal because the State may not appeal a judgment of acquittal entered under Rule 29 of the Ohio Rules of Criminal Procedure.

JURISDICTION

{¶2} Under the Ohio Constitution, Ohio's courts of appeals "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district . . . ." Ohio Const. Art. IV, § 3(B)(2). The Ohio Supreme Court has "interpreted this constitutional provision to mean that 'the state has no absolute right of appeal in a criminal matter unless specifically granted such right by statute.'" *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St. 3d 405, 2010-Ohio-2430, at ¶18 (quoting *State v. Fisher*, 35 Ohio St. 3d 22, 24 (1988)). The State's right to appeal in criminal cases is governed by Section 2945.67(A) of the Ohio Revised Code, which provides that "[a] prosecuting attorney . . . may appeal as a matter of right any decision of a trial court in a criminal case . . . which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case . . . ." *Steffen*, 2010-Ohio-2430, at ¶20 (quoting R.C. 2945.67(A)).

{¶3} Under Rule 29(A) of the Ohio Rules of Criminal Procedure, "[t]he 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." "A directed verdict of acquittal by the trial judge in a criminal case is a 'final verdict' within the meaning of R.C. 2945.67(A) which is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." *State v. Keeton*, 18 Ohio St. 3d 379, paragraph two of the syllabus (1985).

{¶4} The State has argued that this Court has jurisdiction over the appeal because, even though Mr. Hawkins called his motion a Criminal Rule 29 motion, it was actually a motion to dismiss the indictment under Criminal Rule 12. At trial, Officer Teichmer testified about the conversations she had with Mr. Hawkins leading up to their agreement to meet in the park. Lieutenant Gregory Bolek testified about Mr. Hawkins's arrest and subsequent interview at the police station. Detective William Belcher testified about items that were found in Mr. Hawkins's car and bedroom. After the State rested, Mr. Hawkins's lawyer told the court that he had "a motion to make under Rule 29" on the attempted unlawful sexual conduct with a minor count. He argued that "the language of the indictment . . . fails to state an offense . . . in the way it is worded. However, assuming the State can somehow amend the indictment to accurately reflect the language of the statute . . . we would argue that . . . there has been no evidence that [Mr.] Hawkins attempted to engage in sexual conduct with a fourteen year old . . . . [T]here is no fourteen year old. . . . [T]he testimony was that this Jenna44691 was a police officer, was thirty-four years of age. Even construing the evidence most favorable toward the State . . . there has been no evidence that [Mr. Hawkins] did anything . . . that would constitute a substantial step toward engaging in sexual conduct with a fourteen year old . . . person. . . . [T]he other . . . basis for this motion under the statute is that . . . there was no evidence presented . . . that this

imaginary fourteen year old . . . was not . . . [Mr. Hawkins's] spouse. So we'd argue that the State failed to establish the essential elements."

{¶5} In response to Mr. Hawkins's motion, the prosecutor argued that the indictment "reads as the statute reads." Mr. Hawkins's lawyer again argued that the "language of the indictment does not mirror the language of the statute and as a result, this Count . . . either fails to state a charge as it stands or for the reasons I've already indicated . . . the State has failed to establish the elements of whatever its charging with the amount of evidence to survive a Rule 29." After the prosecutor said that she did not have anything further to say on the issue, the trial court entered its ruling, saying: "I think, I mean, I think that 2907.04 is, states that it's, it's against the law to engage in sexual conduct . . . with a minor and I just, I don't think it applies to this situation. I think you've added something that's not in the statute. So, I'm going to grant the motion[.]" In its "Final Judgment Entry," the court wrote that, "[a]t the close of the State's case, the Court granted defendant's motion for judgment of acquittal on [the attempted sexual conduct with a minor count]."

{¶6} The trial court's in-court explanation for granting Ms. Hawkins's motion was ambiguous. Reading the trial court's first statement in isolation, it appears that the court agreed with Mr. Hawkins's argument that the crime of attempted sexual conduct with a minor requires an actual minor, and acquitted him because the State did not present sufficient factual evidence to establish that Mr. Hawkins attempted to engage in sexual conduct with a minor. The court's statement regarding "add[ing]" something to the indictment, however, suggests that the court may have granted Mr. Hawkins's motion because it agreed that the wording of the indictment failed to charge a crime. The Grand Jury had indicted Mr. Hawkins for "attempt[ing] to engage in sexual conduct with a law enforcement officer posing as a fourteen-year-old female, not his

spouse . . . knowing that purported juvenile female was . . . fourteen years of age, or was reckless in that regard[.]"

{¶7} The Ohio Supreme Court has "repeatedly stated that a court speaks exclusively through its journal entries." *In re Guardianship of Hollins*, 114 Ohio St. 3d 434, 2007-Ohio-4555, at ¶30. In its "Final Judgment Entry," the trial court explained that it had "granted [Mr. Hawkins's] motion for judgment of acquittal" on the attempted unlawful sexual conduct with a minor count. We, therefore, conclude that, despite the trial court's remarks about the language of the indictment, its reason for granting Mr. Hawkins's motion was because the State failed to prove he attempted to engage in sexual conduct with a minor. Because the trial court dismissed the charge under Criminal Rule 29 instead of Rule 12, the State may not appeal its decision. See *State v. Bistricky*, 51 Ohio St. 3d 157, 160 (1990) (holding that a court of appeals has discretion "to decide whether to review substantive law rulings made in a criminal case which results in a judgment of acquittal so long as the verdict itself is not appealed.").

{¶8} The dissent has suggested that the trial court's judgment entry "concludes by indicating that the trial court . . . dismissed Count Two, necessarily pursuant to Crim. R. 12." Although the trial court did, after writing that it had granted Mr. Hawkins's motion for acquittal, also write that the indictment was dismissed, it did not cite Criminal Rule 12 as a basis for that dismissal. The State's attempted appeal is dismissed.

CONCLUSION

{¶9} The State may not appeal the trial court's judgment of acquittal because it is a "final verdict" under Section 2945.67(A) of the Ohio Revised Code. The appeal is dismissed.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶10} I respectfully dissent.

{¶11} The majority asserts that the trial court's oral explanation at trial for granting Mr. Hawkins' motion was ambiguous, and I agree. I would further note that Mr. Hawkins' argument in support of his motion precipitated the ambiguous oral ruling. I also agree that it is well settled that "a court speaks only through its journal entries, not through mere oral pronouncements." *Radcliff v. Steen Elec., Inc.*, 164 Ohio App.3d 161, 2005-Ohio-5503, at ¶56, citing *State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, paragraph one of the syllabus.

{¶12} In this case, I disagree with the majority's conclusion that the final judgment entry resolved the ambiguity at trial and definitively granted a judgment of acquittal pursuant to Crim.R. 29 in regard to Count Two. I believe that the judgment entry itself is ambiguous. The

trial court wrote that, "[a]t the close of the State's case, [it] granted defendant's motion for judgment of acquittal on Count 2[,]" although it never ordered in writing that the motion for judgment of acquittal was granted. At the end of the judgment entry, however, the trial court ordered that the indictment be dismissed with prejudice. Therefore, while the judgment entry first appears to indicate that the trial court intended to grant Mr. Hawkins' motion for judgment of acquittal pursuant to Crim.R. 29, it concludes by indicating that the trial court instead dismissed Count Two, necessarily pursuant to Crim.R. 12. Given the ambiguity permeating the record, I would accept jurisdiction over the State's appeal and address the case on the merits.

APPEARANCES:

DANIEL R. LUTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellant.

JOHN E. JOHNSON, JR., Attorney at Law, for Appellee.