

In the
Supreme Court of Ohio

IRAN DOSS,

Plaintiff-Appellee,

v.

STATE OF OHIO,

Defendant-Appellant.

: Case No. 2012-0162
:
: On Appeal from the
: Cuyahoga County
: Court of Appeals,
: Eighth Appellate District
:
: Court of Appeals Case
: No. 96452

MERIT BRIEF OF STATE OF OHIO

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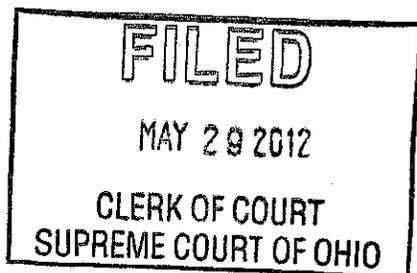


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
A. Iran Doss was convicted of rape and kidnapping.	2
B. The Eighth District vacated Doss’s kidnapping conviction and initially sustained his rape conviction, but on Doss’s motion for reconsideration, the panel vacated the rape conviction as well. This Court denied review.....	5
C. Doss brought a civil action under R.C. 2743.48 for wrongful imprisonment and obtained summary judgment based on the Eighth District’s decision vacating his convictions.	7
ARGUMENT.....	9
<u>The State of Ohio’s Proposition of Law No. I:</u>	
<i>A trial court adjudicating a contested claim of innocence may not grant summary judgment in favor of a former inmate based solely on an appeals court finding that a criminal conviction was not supported by sufficient evidence.....</i>	
	9
<u>The State of Ohio’s Proposition of Law No. II:</u>	
<i>Under R.C. 2743.48 an inmate must prove actual innocence by a preponderance of the evidence, which is a separate and distinct legal standard than whether the evidence in a criminal case is sufficient to convict a person beyond a reasonable doubt.</i>	
	9
A. The General Assembly created a comprehensive framework for providing compensation for wrongful imprisonment.....	9
B. A judgment of acquittal is insufficient, by itself, to prove actual innocence, and has no preclusive effect in wrongful-imprisonment actions under R.C. 2743.48(A).	10
1. R.C. 2743.48(A)(5) requires from the claimant an affirmative showing of innocence beyond the bare fact of an acquittal.....	10
2. The courts below failed to enforce the legislative command that Doss affirmatively establish his actual innocence.	13

C. Disputed issues of material fact pervade Doss’s actual innocence claim and preclude summary judgment in his favor.	15
CONCLUSION.....	18
CERTIFICATE OF SERVICE	unnumbered
APPENDIX	
Notice of Appeal, Jan. 30, 2012.....	Exh. A
<i>Doss v. State</i> , No. 96452, 2011-Ohio-6429 (8th Dist.) (“ <i>Doss III</i> ”)	Exh. B
Journal Entry Granting Pl.’s Mot. for Summ. J., Jan. 26, 2011.....	Exh. C
<i>State v. Doss</i> , No. 88443, 2007-Ohio-6483 (8th Dist.) (“ <i>Doss I</i> ”).....	Exh. D
<i>State v. Doss</i> , No. 88443, 2008-Ohio-449 (8th Dist.) (“ <i>Doss II</i> ”)	Exh. E
R.C. 2305.02	Exh. F
R.C. 2743.48	Exh. G

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Baxter v. Palmigiano</i> , 425 U.S. 308 (1976).....	13
<i>Doss v. State</i> , No. 96452, 2011-Ohio-6429 (8th Dist.) (“ <i>Doss III</i> ”)	7, 8, 14
<i>Dresher v. Burt</i> , 75 Ohio St. 3d 280 (1996).....	15
<i>Ellis v. State</i> , 64 Ohio St. 3d 391 (1992).....	11
<i>Gover v. State</i> , 67 Ohio St. 3d 93 (1993).....	10
<i>Griffith v. City of Cleveland</i> , 128 Ohio St. 3d 35, 2010-Ohio-4905.....	9
<i>Ratcliff v. State</i> , 94 Ohio App. 3d 179 (4th Dist. 1994)	11
<i>Sampson v. Cuyahoga Metro. Hous. Auth.</i> , 131 Ohio St. 3d 418, 2012-Ohio-570.....	15
<i>Smith v. McBride</i> , 130 Ohio St. 3d 51, 2011-Ohio-4764.....	15
<i>State ex rel. Jones v Suster</i> , 84 Ohio St. 3d 70 (1998).....	11, 12
<i>State ex rel. Verhovec v. Mascio</i> , 81 Ohio St. 3d 334 (1998).....	12
<i>State v. Arnold</i> , 61 Ohio St. 3d 175 (1991).....	11
<i>State v. Doss</i> , 118 Ohio St. 3d 1507, 2008-Ohio-3369.....	7
<i>State v. Doss</i> , No. 88443, 2007-Ohio-6483 (8th Dist.) (“ <i>Doss I</i> ”).....	3, 4, 5, 6
<i>State v. Doss</i> , No. 88443, 2008-Ohio-449 (8th Dist.) (“ <i>Doss II</i> ”)	6, 8, 14

<i>Walden v. State</i> , 47 Ohio St. 3d 47 (1989).....	<i>passim</i>
<i>Williams v. First United Church of Christ</i> , 37 Ohio St. 2d 150 (1974).....	15

STATUTES

R.C. 2743.48	<i>passim</i>
R.C. 2901.05(A).....	12
R.C. 2907.02	4, 5, 16, 17

OTHER AUTHORITIES

Civ. R. 30.....	12
Civ. R. 33	12
Civ. R. 36.....	12
Civ. R. 56(C).....	15
Fifth Amendment.....	12, 13

INTRODUCTION

In 2006, a Cuyahoga County jury convicted Iran Doss of kidnapping and rape. Doss appealed, and the Eighth District vacated his convictions and entered a judgment of acquittal, finding that there was insufficient evidence to support the jury's verdict. Doss then sued for wrongful imprisonment. He filed a civil action in the Cuyahoga County Court of Common Pleas seeking a declaration that he was a wrongfully-imprisoned individual under R.C. 2743.48.

To obtain compensation for wrongful imprisonment, a claimant must prove that he meets the criteria in R.C. 2743.48(A). At issue here is what is known as the actual innocence requirement contained in subparagraph (A)(5). To prevail on his wrongful-imprisonment claim as pleaded, Doss must prove, among other things, either that the crimes he was charged with were committed by someone else or not at all. *Id.* Despite this Court's longstanding rule that an acquittal, by itself, is insufficient to establish actual innocence, Doss moved for and obtained summary judgment solely on the basis of his prior acquittal.

This Court's decision in *Walden v. State*, 47 Ohio St. 3d 47 (1989), precludes a claimant from relying solely on a prior judgment of acquittal to establish actual innocence. Instead, R.C. 2743.48 requires an affirmative showing on that issue by the claimant and a *de novo* determination by the trial court. The prior acquittal cannot be given preclusive effect. It was therefore error for the courts below to award judgment to Doss on the basis of his acquittal alone.

Moreover, there plainly are disputed issues of material fact concerning Doss's actual innocence. On summary judgment, Doss carries the initial burden of showing the absence of such disputed issues. At most, however, the Eighth District's vacatur of his convictions establishes that there was insufficient evidence at trial to support a conviction. It does not prove that Doss is actually innocent. And even if the prior acquittal constituted some evidence of Doss's actual innocence, the record—including the criminal trial record—contains evidence

from which a reasonable factfinder could conclude that Doss did commit rape. Summary judgment was therefore improper.

The Court should vacate the Eighth District's decision and remand for further proceedings.

STATEMENT OF THE CASE AND FACTS

A. Iran Doss was convicted of rape and kidnapping.

The events giving rise to Doss's conviction began on New Year's Eve 2004, in downtown Cleveland, and continued through the morning of January 1, 2005. Transcript of Proceedings, *State v. Doss*, Case No. CR465093, 407 ("Trial Tr.").¹ On New Year's Eve, the victim ("J.P.") joined several friends to celebrate the New Year. The celebration began at a downtown hotel. Trial Tr. 407-12. While at the hotel, J.P. consumed several glasses of wine and several beers. Trial Tr. 413-14. Around 11:00 p.m., the group moved to a bar called Club Moda Trial Tr. 414. Once at the bar, J.P. consumed two shots of Jägermeister and a glass of champagne. Trial Tr. 417-19. (The first shot was prepared above the bar by a female bartender; the second shot was prepared by a male bartender out of J.P.'s sight. Trial Tr. 417-18.)

J.P. has no memory of the events that occurred just after midnight on January 1, until being shaken awake by a woman she did not know.² Trial Tr. 420-23. Upon waking in an unfamiliar bed and apartment, J.P. encountered two individuals later identified as Doss and his girlfriend, Eileen Wiles. Trial Tr. 422-23, 441-42, 613-15. At the time, J.P. had no idea who they were. Trial Tr. 422-23, 442. Although J.P. was disoriented after waking up, she immediately noticed her underwear was missing. Trial Tr. 424. The only piece of clothing she

¹ All pages of the trial transcript referenced in this brief are included in the accompanying Supplement.

² Aaron Reynolds, who joined J.P. for the shots of Jägermeister, testified that he also experienced a blackout, and with the exception of getting into a cab sometime between 2:00 and 2:30 a.m., could recall none of the evening's events after around midnight. Trial Tr. 283-84.

had on from the previous night was her bra, and the t-shirt and pajamas she was wearing were not hers. Trial Tr. 430-33. J.P. also noticed bruising on her legs and arms, abrasions similar to carpet burn, a gash on her left knee, and a knot on her head. Trial Tr. 435.

At J.P.'s request, Doss and Wiles drove her back to her home in Ravenna. Trial Tr. 441, 450-60. During the drive, Wiles informed J.P. that she and Doss had come upon her at Club Moda and when they encountered her, she was disoriented, did not know her own name, and could not find her friends. Trial Tr. 456. Wiles stated that she and Doss decided to take J.P. home with them to be "good Samaritans." Trial Tr. 456. Wiles later told Doss that "Tyson" had told them to get J.P. home before a missing person report was filed. Trial Tr. 456. When J.P. asked who Tyson was, Wiles told her he was a bouncer at Club Moda and a "shady character". Trial Tr. 458. (Tyson Simpkins, a bouncer at Club Moda, pleaded guilty to abduction and sexual battery of J.P. in a related case. *State v. Doss*, No. 88443, 2007-Ohio-6483 ¶ 4 (8th Dist.) ("*Doss I*"), App'x Exh. D.)

After being dropped off at her home, J.P. tried to sleep but was very distressed. Trial Tr. 460. She was nauseated, vomited, and ultimately cried herself to sleep. Trial Tr. 460-62. She also suffered excruciating pain when urinating, and this continued for several days. Trial Tr. 463-64. J.P. became concerned that she had been sexually assaulted and sought medical treatment. Trial Tr. 463-64.

When she reported this incident, the police were called to the emergency room and commenced an investigation, which eventually led to Doss and Wiles. Trial Tr. 467-68, 605-06, 613-16. In his statement to the police, Doss admitted having sexual intercourse with J.P., Trial Tr. 627-28, but maintained that she initiated it, Trial Tr. 632-34.

A grand jury subsequently indicted Doss on two counts of rape and one count of kidnapping. *Doss I*, 2007-Ohio-6483 ¶ 7. Of the two rape counts, one alleged forcible rape in violation of R.C. 2907.02(A)(2). The other alleged sexual contact with a person whose ability to consent or resist was substantially impaired in violation of R.C. 2907.02(A)(1)(c). Trial Tr. 21.

At trial, J.P. testified that she did not consent to any sexual activity with Doss. Trial Tr. 478. She acknowledged that, because of her memory loss, she was not sure what had happened to her that night but stated her belief that, given her state, she would not have been able to consent to sexual activity. Trial Tr. 489-90, 510.

Just before she was seen leaving with Doss and Wiles, one witness described J.P. as very intoxicated, confused, and unable to stand on her own. Trial Tr. 318-23. Kristen Collins, one of the bartenders at Club Moda, testified that she observed J.P. from approximately 12:45 until 2:15 a.m. Trial Tr. 572. When she first observed J.P., Collins recalled that J.P. was drunk and that she would not have served her more alcohol. Trial Tr. 543-45. Collins stated that J.P.'s drunkenness progressed, Trial Tr. 573, she was not coherent, Trial Tr. 552-54, and she appeared at various points to be slumping and struggling to remain awake, Trial Tr. 554-55. Collins recounted J.P.'s concern over having lost track of her friends. Trial Tr. 553-55. And Collins confirmed that Doss was around J.P. the entire time she observed these events. Trial Tr. 572. Finally, Collins stated that when she saw J.P. leave with Doss and Wiles, it was difficult to tell if J.P. could walk on her own and J.P. appeared to be leaning on Doss for support. Trial Tr. 566-67.

In his statement to the police, Doss confirmed that he knew J.P. was intoxicated when he took her home. Trial Tr. 635. He stated that she had been stumbling around. Trial Tr. 636. And

he noted that although the two of them were not previously acquainted, she was hugging him and telling him she loved him. Trial Tr. 635.

After resting its case, the prosecution dismissed the forcible rape count. Doss elected not to present a case-in-chief. Trial Tr. 718-19. The jury convicted Doss on the remaining rape and kidnapping charges. Trial Tr. 818.

B. The Eighth District vacated Doss’s kidnapping conviction and initially sustained his rape conviction, but on Doss’s motion for reconsideration, the panel vacated the rape conviction as well. This Court denied review.

Doss appealed. The Eighth District vacated his kidnapping conviction, *sua sponte* raising the issue of sufficiency of the evidence. *Doss I*, 2007-Ohio-6483 ¶¶ 24-25. However, the panel initially upheld Doss’s rape conviction. *Id.* ¶¶ 8-23.

Doss had been convicted of rape in violation of R.C. 2907.02(A)(1)(c), which defines rape as (1) “sexual conduct with another” (2) when “[that person’s] ability to resist or consent is substantially impaired because of a mental or physical condition” and (3) “the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired.” R.C. 2907.02(A)(1)(c); *see also Doss I*, 2007-Ohio-6483 ¶ 10.

Doss challenged his rape conviction on several grounds, but the two issues of interest to the court of appeals were (1) whether J.P.’s ability to consent was substantially impaired due to a mental or physical condition and (2) whether sufficient evidence showed that Doss knew of that substantial impairment. Reviewing the record—including testimony of J.P., the treating physician, and the bartender—the Eighth District, in a 2-1 vote, concluded that there was sufficient evidence to support the jury’s finding that J.P.’s capacity to consent was substantially impaired. *Doss I*, 2007-Ohio-6483 ¶¶ 13-16. And relying on Doss’s statement that he knew J.P. was intoxicated and the bartender’s testimony concerning the severity of J.P.’s intoxication, among other things, the majority also concluded that there was sufficient evidence to support the

jury's finding that Doss knew (or had reason to know) J.P. was substantially impaired. *Id.* ¶¶ 20-23.

Doss moved for reconsideration, and after one of the judges in the original majority reversed course, the panel issued a new opinion vacating both the kidnapping and rape convictions. *State v. Doss*, No. 88443, 2008-Ohio-449 (8th Dist.) ("*Doss II*"), App'x Exh. E.

In vacating the rape conviction, the new majority cited insufficient evidence. *Id.* ¶¶ 11-26. The majority acknowledged that the record might have been sufficient to show that J.P.'s ability to consent was substantially impaired, *id.* ¶¶ 12-20, but said there was insufficient evidence to show that Doss knew or had reason to know this, *id.* ¶¶ 21-23. The majority credited Doss's statement to the police claiming that the sex was consensual (a proposition the jury had apparently rejected). *Id.* "From all accounts, and as strange as this 'good Samaritan' scenario may seem, J.P.'s decision to go home and sleep with [Doss] was just as voluntary as her intoxication on New Year's Eve," the Eighth District said. *Id.* ¶ 25.

The dissenting judge concluded otherwise: "Construing the evidence in the light most favorable to the State, as we must, there is sufficient evidence in this record, if believed, that could lead a reasonable person to conclude that the victim's ability to consent was 'substantially impaired' due to intoxication and that the defendant knew this or had a reasonable cause to believe it." *Id.* ¶ 27 (Sweeney, J., dissenting in part). The dissent pointed out that numerous witnesses observed that J.P. exhibited an "overtly high level of intoxication" and was unable "to perform ordinary functions," providing "sufficient probative evidence indicating that the defendant knew or had reasonable cause to believe that the victim was substantially impaired." *Id.* ¶ 30.

The State appealed the vacatur of the rape conviction, but this Court declined review.

State v. Doss, 118 Ohio St. 3d 1507, 2008-Ohio-3369.

C. Doss brought a civil action under R.C. 2743.48 for wrongful imprisonment and obtained summary judgment based on the Eighth District's decision vacating his convictions.

After his release, Doss filed a civil action in the Cuyahoga County Court of Common Pleas seeking a declaration that he was a wrongfully-imprisoned person under R.C. 2743.48, App'x Exh. G. *Doss v. State*, No. 96452, 2011-Ohio-6429 ¶ 4 (8th Dist.) ("*Doss III*"), App'x Exh. B. Doss moved for summary judgment, and supported his motion with a two-page memorandum arguing that his conviction, incarceration, and successful appeal established each of the elements outlined in R.C. 2743.48(A). *See* Pl.'s Mot. for Summ. J.

The State argued that Doss failed to carry his burden of proving actual innocence because the Eighth District's decision, by itself, cannot establish his actual innocence. *See* Def's. Br. Opp. Pl.'s Mot. for Summ. J. The State also moved to enter the criminal-trial record into the summary-judgment record, and the court granted that request. Journal Entry Granting Def.'s Mot. to Transfer Transcripts Jan. 13, 2011.

Finding that the only disputed issue was Doss's actual innocence, the trial court awarded him summary judgment, concluding, "The Court of Appeals'[s] decision to reverse and vacate Plaintiff Doss's conviction . . . can only be interpreted to mean that either Plaintiff Doss was innocent of the charges upon which he was convicted, or that no crime was committed by Plaintiff Doss, or both." Journal Entry Granting Pl.'s Mot. for Summ. J. Jan. 26, 2011, App'x Exh. C.

The State appealed, challenging the trial court's reliance on the prior judgment of acquittal to establish Doss's actual innocence. *See* Br. of Appellant State of Ohio 10-14. The State also emphasized the evidence that was presented against Doss in his criminal trial that

undercut his claim of actual innocence. The State pointed out the testimony of eyewitnesses placing Doss in J.P.'s vicinity while she was severely intoxicated and his own statement acknowledging that she was intoxicated when he took her home. *Id.* at 2-10, 15. In light of Doss's failure to offer any contrary evidence, the State argued that disputed issues of fact remained as to Doss's actual innocence and precluded summary judgment.

Relying entirely on the prior criminal opinion, a divided panel of the Eighth District affirmed. *Doss III*, 2011-Ohio-6429 ¶¶ 9-18. The majority reasoned that the prior opinion established that the State failed to produce any evidence that Doss knew or had reason to know of J.P.'s substantial impairment. *Id.* ¶ 15. This conclusion, according to the majority, supported a finding of actual innocence and therefore justified summary judgment in Doss's favor. *Id.* ¶¶ 16-18. In dissent, Judge Celebrezze observed, "Our holding in [*Doss II*] does not mean that Doss is innocent—merely that, based upon the evidence the state presented, Doss's guilt could not be established beyond a reasonable doubt. The same cannot automatically be said of whether Doss can show by a preponderance of the evidence that he did not know or reasonably should not have known of [J.P.'s] incapacity." *Id.* ¶ 21 (Celebrezze, J., dissenting).

The State appealed, and this Court accepted jurisdiction.

ARGUMENT

The State of Ohio's Proposition of Law No. I:

A trial court adjudicating a contested claim of innocence may not grant summary judgment in favor of a former inmate based solely on an appeals court finding that a criminal conviction was not supported by sufficient evidence.

The State of Ohio's Proposition of Law No. II:

Under R.C. 2743.48 an inmate must prove actual innocence by a preponderance of the evidence, which is a separate and distinct legal standard than whether the evidence in a criminal case is sufficient to convict a person beyond a reasonable doubt.

The State's propositions of law address overlapping aspects of the actual-innocence requirement in wrongful-imprisonment cases. For clarity, and to avoid repetition, the two propositions are therefore addressed together.

A. The General Assembly created a comprehensive framework for providing compensation for wrongful imprisonment.

In 1986, the General Assembly enacted R.C. 2743.48, creating a cause of action against the State for wrongful imprisonment. The General Assembly specified a two-step process. First, the individual must file a declaratory judgment action in a common pleas court to determine whether he is a wrongfully-imprisoned person under R.C. 2743.48(A). *See* 2305.02, App'x. Exh. F. Second, if the common pleas court finds that the individual was wrongfully imprisoned, he may file an action in the Court of Claims to recover money damages. R.C. 2743.48(B); *Griffith v. City of Cleveland*, 128 Ohio St. 3d 35, 2010-Ohio-4905 ¶ 30; *see also Walden*, 47 Ohio St. 3d at 49-50.

Under the first step, governed by R.C. 2743.48(A), a claimant must meet five criteria. The first four are straightforward and not at issue here: A claimant must prove that he was convicted of a felony or aggravated felony under state law, that he did not plead guilty to it, that he served his sentence in a state facility, and that his conviction was somehow vacated and

further charges cannot or will not be brought. R.C. 2743.48(A)(1)-(4). The fifth and final factor, which is at issue here, requires the individual to show either that a “procedural error” resulted in his release, or that he is actually innocent (meaning, that the offense was not committed by him or was not committed at all). R.C. 2743.48(A)(5). Doss does not seek relief under the procedural-error prong of (A)(5). Instead, he claims “actual innocence”—that he did not commit the offenses of which he was convicted or that no crime was committed at all. Am. Cmplt. ¶ 6 (“Plaintiff states that . . . the offenses of which he was found guilty . . . were not committed by plaintiff.”).

B. A judgment of acquittal is insufficient, by itself, to prove actual innocence, and has no preclusive effect in wrongful-imprisonment actions under R.C. 2743.48(A).

Being actually innocent under R.C. 2743.48(A)(5) is a world away from simply having been acquitted in a criminal trial. The plain language of (A)(5) makes this clear. To show actual innocence under that section, a claimant must prove that “the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.” R.C. 2743.48(A)(5). In enacting this statute, “the General Assembly intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” *Walden*, 47 Ohio St. 3d at 52 (interpreting the actual innocence language in the predecessor statute, R.C. 2743.48(A)(4)); *see also Gover v. State*, 67 Ohio St. 3d 93, 95 (1993).

1. R.C. 2743.48(A)(5) requires from the claimant an affirmative showing of innocence beyond the bare fact of an acquittal.

In construing the actual-innocence prong of 2743.48(A)(5), this Court has long recognized that “a claimant must affirmatively prove her innocence by a preponderance of the evidence,” and that a judgment of acquittal “is not to be given preclusive effect” in a wrongful imprisonment proceeding. *Walden*, 47 Ohio St. 3d 51-52. Time and again this Court has

emphasized: “The petitioner . . . must produce more evidence than a judgment of acquittal, which is merely a judicial finding that the state did not prove its case beyond a reasonable doubt. The petitioner carries the burden of proof in affirmatively establishing his or her innocence.” *State ex rel. Jones v Suster*, 84 Ohio St. 3d 70, 72 (1998) (emphasis in original) (citing *Ellis v. State*, 64 Ohio St. 3d 391, 393 (1992)). This is no less true when acquittal is premised on sufficiency of the evidence. *See, e.g., Ratcliff v. State*, 94 Ohio App. 3d 179, 182 (4th Dist. 1994) (“Evidence insufficient to prove guilt beyond a reasonable doubt does not necessarily prove innocence by a preponderance of the evidence. If the legislature had intended all persons whose convictions are reversed based upon insufficiency of the evidence to receive compensation for wrongful imprisonment, the legislature would have written R.C. 2743.48 in such a manner.”).

In addition to the plain language of (A)(5), other indicators corroborate the well-settled view that this section requires a claimant to affirmatively prove actual innocence. First, the structure of R.C. 2743.48 confirms this requirement. The preceding subsection of the statute, R.C. 2743.48(A)(4), requires a claimant to establish that his conviction “was vacated or was dismissed, or reversed on appeal.” If satisfying that element established a right to recover, then (A)(5)’s showing—that the offense either was not committed by the individual or was not committed at all—would be superfluous. *State v. Arnold*, 61 Ohio St. 3d 175, 178 (1991) (“It is a cardinal rule of statutory construction that a statute shall be expounded, if practicable, as to give some effect to every part of it.”) (internal quotation marks omitted). Side by side, these provisions are instructive. They draw a clear distinction between a conviction that has been “vacated,” “dismissed,” or “reversed” on appeal, R.C. 2743.48(A)(4), and proof that the offense

“either was not committed by the individual or was not committed by any person,” R.C. 2743.48(A)(5).

Second, “the qualitative differences between civil and criminal proceedings . . . militate against giving criminal judgments preclusive effect in civil or quasi-civil litigation.” *Walden*, 47 Ohio St. 3d at 52. In a criminal trial, the State must establish the defendant’s guilt by proving each of the essential elements of the crime beyond a reasonable doubt. R.C. 2901.05(A). By contrast, R.C. 2743.48 places the burden of proof on the *claimant*: He must prove his factual innocence by a preponderance of the evidence. *Walden*, 47 Ohio St. 3d at 53; *see also Suster*, 84 Ohio St. 3d 72. The burdens in each proceeding are inverted, and the ultimate questions differ vastly. Accordingly, as this Court has long recognized, it defies logic to suggest that the State’s failure to prove guilt beyond a reasonable doubt compels the conclusion that the defendant is, in fact, innocent. “[A]cquittal in a criminal trial is a determination that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is innocent.” *Walden*, 47 Ohio St. 3d at 51.

The different discovery and evidentiary rules in criminal versus civil proceedings also explain why the General Assembly’s actual-innocence requirement demands an affirmative showing by the claimant. *Walden*, 47 Ohio St. 3d at 51. In a criminal trial, the State may not compel testimony from the accused. But in a wrongful-imprisonment action, the State may seek written discovery in the form of interrogatories or requests for admission. The State may also compel the claimant to testify at a deposition or at trial. *Id.*; *see also* Civ. R. 30, 33, 36. And even if the claimant could assert his Fifth Amendment privilege and avoid testifying in the civil trial—perhaps because of a lingering possibility of prosecution in another jurisdiction—the State would be free to request an adverse inference. *See, e.g., State ex rel. Verhovec v. Mascio*, 81

Ohio St. 3d 334, 337 (1998) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”). The constitutional limitations against gathering evidence from the accused in criminal trials, and the leeway for gathering such information in wrongful-imprisonment suits, further confirm that criminal proceedings are a poor proxy for determining actual innocence. Accordingly, the General Assembly rightly requires the actual-innocence showing to be made affirmatively, and adjudicated *de novo*, in a wrongful-imprisonment action.

Finally, there is a danger when courts disregard *Walden* and base an actual innocence finding on a judgment of acquittal. Prosecutors who are perfectly satisfied that they have probable cause to bring charges against an individual may nonetheless be reluctant to prosecute an appropriate case for fear that, in hindsight, a reviewing court might conclude that the evidence of guilt at trial was wanting. The risk of such a chilling effect may be particularly high in situations where the prosecution’s case is circumstantial. This is not to say that the strength of proof in a case is irrelevant to the charging decision. But that decision should not be distorted by a prosecutor’s concern that her good-faith miscalculation about the strength of a case will lead inexorably to financial liability for wrongful imprisonment, irrespective of whether the claimant could affirmatively establish actual innocence.

2. The courts below failed to enforce the legislative command that Doss affirmatively establish his actual innocence.

The General Assembly’s command in 2743.48(A) is clear. A prior judgment of acquittal is insufficient, by itself, to establish actual innocence and shall not be given preclusive effect in a wrongful-imprisonment action. Yet throughout this litigation, Doss has argued that the successful appeal of his convictions entitled him to compensation as a wrongfully-imprisoned

person. By accepting that premise, the courts below equated acquittal with factual innocence, something the statutory scheme and this Court's precedents plainly forbid. The appeals court therefore erred in granting summary judgment to Doss.

It is important to focus on what the trial court and Eighth District said below. The trial court concluded: "The Court of Appeals'[s] decision to reverse and vacate Plaintiff Doss's conviction . . . can only be interpreted to mean that either Plaintiff Doss was innocent of the charges upon which he was convicted, or that no crime was committed by Plaintiff Doss, or both." Journal Entry Granting Pls.'s Mot. for Summ. J. Jan. 26, 2011. The flaw in the court's reasoning is obvious. The criminal appellate ruling established nothing about whether Doss was factually innocent of the crimes charged. It stands only for the proposition that the State failed to prove Doss's guilt beyond a reasonable doubt.

The Eighth District's analysis is similarly flawed. Although the panel majority gave a perfunctory nod to the rule that an acquittal does not necessarily establish a claimant's actual innocence, its analysis was plainly unfaithful to that precept. *Doss III*, 2011-Ohio-6429 ¶ 10. The majority did not independently review the record before it and determine whether disputed issues of material fact exist. Rather, like the trial court, the Eighth District looked to the prior criminal judgment and determined that *Doss II* conclusively established that there was no evidence of Doss's knowledge of J.P.'s substantial impairment. *Id.* ¶ 15.

The courts below required nothing of Doss other than his showing that the State failed to prove its case against him during the criminal trial. This contravenes the clear statutory mandate requiring affirmative proof and *de novo* determination of actual innocence.

C. Disputed issues of material fact pervade Doss's actual innocence claim and preclude summary judgment in his favor.

The appellate review standard for summary judgment orders is well-known. This Court's review is *de novo*. *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St. 3d 418, 2012-Ohio-570 ¶ 19. Summary judgment is proper only when there is no genuine issue of material fact. *Smith v. McBride*, 130 Ohio St. 3d 51, 2011-Ohio-4764 ¶ 12. And Doss bears the burden of showing the absence of disputed issues of material fact, *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996), while the Court must draw all inferences in favor of the State, the non-moving party, Civ. R. 56(C); *see also Williams v. First United Church of Christ*, 37 Ohio St. 2d 150, 151-52 (1974).

There is no way Doss merited summary judgment below. To be sure, it is undisputed that Doss meets the first four requirements for wrongful imprisonment. *See* R.C. 2743.48(A)(1)-(4). But the facts surrounding the rape offense are rife with disputed issues of material fact on the question of Doss's actual innocence under R.C. 2743.48(A)(5). Even if Doss's successful appeal provided *some* support for his claim of actual innocence, there is still ample evidence from which a reasonable factfinder could conclude that Doss committed rape. Under these circumstances, awarding summary judgment to Doss was wrong.

For starters, the case's procedural history alone is telling. A jury found sufficient evidence that Doss was guilty of rape. The Eighth District did too initially. And even after the appeals court reversed course on reconsideration, one appellate judge still saw plenty of evidence to uphold the jury's verdict. This procedural history refutes the Eighth District's conclusion that Doss's factual innocence was clear cut from the criminal trial record.

Moreover, abundant evidence contradicts Doss's claim of actual innocence, and at a minimum, presents disputed issues of material fact that preclude summary judgment. The

elements of the rape offense show why. Doss had been charged with rape under R.C. 2907.02(A)(1)(c), which required (1) “sexual conduct with another,” (2) when “[that person’s] ability to resist or consent is substantially impaired because of a mental or physical condition,” and (3) “the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired.” As to the first element, Doss never disputed that he had sexual contact with J.P., Trial Tr. 763-64, and in his statement to the police, he admitted having sex with her, Trial Tr. 627-28. As to the second prong—whether J.P. was substantially impaired—there was considerable testimony about her severe intoxication at the time she was seen leaving with Doss and Wiles. Trial Tr. 318-23. The bartender who observed her from approximately 12:45 a.m. until she left with Doss likewise described J.P.’s high level of intoxication. Trial Tr. 543-45, 554-55, 573. And J.P. herself testified that she blacked out shortly after midnight and had no memory of anything until being shaken awake by a strange woman (Wiles) in a stranger’s apartment (Doss’s). Trial Tr. 422-23. In short, there was ample evidence supporting a reasonable inference that J.P.’s ability to consent was substantially impaired when Doss took her back to his home and had sex with her.

As for the third element, the record likewise contains evidence from which one could infer Doss’s knowledge or reason to know of J.P.’s substantial impairment. Doss’s own statement confirmed that he knew J.P. was intoxicated, and sufficiently so that she was stumbling around and hugging him and telling him she loved him, despite not knowing him. Trial Tr. 635-36. Moreover, the bartender who observed J.P. before she left with Doss and Wiles confirmed that Doss was around J.P. the entire time she was showing signs of severe intoxication. Trial Tr. 543-45, 554-55, 572-73. Given this evidence, one could reasonably

conclude that Doss “kn[ew] or ha[d] reasonable cause to believe” that J.P.’s “ability to resist or consent [wa]s substantially impaired.” R.C. 2907.02(A)(1)(c).

In short, there was evidence from which a reasonable factfinder could infer that Doss committed rape. That is all that is required to defeat his summary judgment motion. The Court should therefore vacate the decision below and remand the case for further proceedings.

CONCLUSION

For all of these reasons, the Court should vacate the decision below and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of State of Ohio was served by U.S. mail
this 29th day of May, 2012, upon the following counsel:

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Iran Doss



Alexandra T. Schimmer
Solicitor General

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO.

12-0162

Defendant-Appellant,

On Appeal from The Cuyahoga
County Court of Appeals, Eighth
Appellate Judicial District

-vs-

Court of Appeals Case No. 96452

IRAN DOSS

Plaintiff-Appellee.

NOTICE OF APPEAL OF DEFENDANT-APPELLANT
STATE OF OHIO

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RECEIVED
JAN 30 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JAN 30 2012
CLERK OF COURT
SUPREME COURT OF OHIO

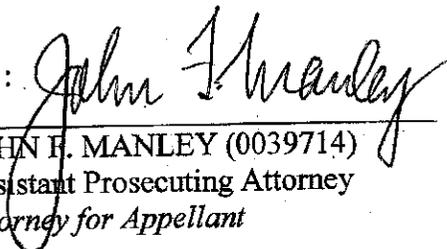
NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes Defendant-Appellant State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate Judicial District entered in Case No. 96452 on December 15, 2011, a copy of which is attached hereto.

This case is one of public interest.

Respectfully submitted,
WILLIAM D. MASON,
CUYAHOGA COUNTY
PROSECUTING ATTORNEY

By:

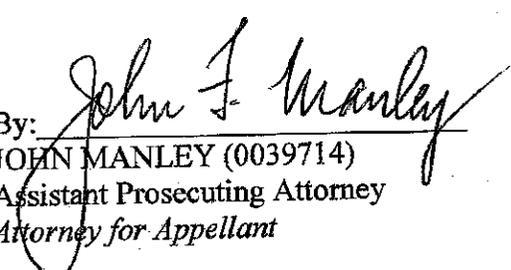


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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal has been sent by Ordinary U. S. Mail pre-paid postage on this 27th day of January, 2012 to:

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[Cite as *Doss v. State*, 2011-Ohio-6429.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96452

IRAN DOSS

PLAINTIFF-APPELLEE

vs.

STATE OF OHIO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-665993

BEFORE: E. Gallagher, J., Celebrezze, P.J., and Jones, J.

RELEASED AND JOURNALIZED: December 15, 2011



Exh. B

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EILEEN A. GALLAGHER, J.:

{¶ 1} Appellant, the state of Ohio, appeals from the decision of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of appellee. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} Appellee was indicted on April 22, 2005, for two counts of rape in violation of R.C. 2907.02(A)(1)(c) and one count of kidnapping with a sexual motivation in

violation of R.C. 2905.01(A)(2) and (4) and R.C. 2941.147 stemming from events that allegedly occurred on the night of December 31, 2004. On March 27, 2006, a jury found appellee guilty of one count of rape and one count of kidnapping and appellee was sentenced to four years in prison.

{¶ 3} On appeal in *State v. Doss*, Cuyahoga App. No. 88443, 2008-Ohio-449 (“*Doss P*”), this court found that the record contained insufficient evidence to sustain appellee’s convictions. We vacated those convictions and ordered him to be discharged from prison.

{¶ 4} On July 25, 2008, appellee filed a declaratory judgment action in the Cuyahoga County Court of Common Pleas seeking a determination that he had been a wrongfully imprisoned person as defined by R.C. 2305.02 and 2743.48. On July 2, 2010, appellee filed a motion for summary judgment relying solely on this court’s decision in *Doss I*. The state, relying on the transcripts from appellee’s criminal trial, opposed appellee’s motion for summary judgment arguing that appellee had failed to establish his innocence by a preponderance of the evidence.

{¶ 5} On January 26, 2011, the trial court granted appellee’s motion for summary judgment on the basis of our holding in *Doss I*. Specifically, the trial court stated, “[t]he court of appeals’ decision to reverse and vacate [appellee’s] conviction and order his immediate release can only be interpreted to mean that either [appellee] was innocent of the charges upon which he was convicted, or that no crime was committed by [appellee],

or both.” The state brought the present appeal, advancing the following sole assignment of error:

“The trial court erred in granting appellee’s motion for summary judgment when it held that the vacation of his criminal conviction on appeal could only mean actual innocence or that no crime was committed.”

{¶ 6} Our review of a trial court’s grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus; *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264.

{¶ 7} “The Ohio Revised Code provides a two-step process whereby a person claiming wrongful imprisonment may sue the State for damages incurred due to the alleged wrongful imprisonment.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 1998-Ohio-275, 701 N.E.2d 1002, citing *Walden v. State* (1989), 47 Ohio St.3d 47, 547

N.E.2d 962. The first action, in the common pleas court, seeks a preliminary factual determination of wrongful imprisonment. Id. The second action, in the Court of Claims, provides for damages. Id.

{¶ 8} A “wrongfully imprisoned individual” is defined in R.C. 2743.48(A) as an individual who satisfies each of the following requirements:

“(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

“(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

“(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

“(4) The individual’s conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

“(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual’s release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.”

{¶ 9} In a wrongful imprisonment claim, the petitioner bears the burden of proving by a preponderance of the evidence, his or her innocence. *Jones v. State*, Cuyahoga App. No. 96184, 2011-Ohio-3075, at ¶9, citing *Suster*, 84 Ohio St.3d at 72.

In the present instance, the state argues that appellee, by relying solely on this court's decision in *Doss I*, has failed to establish his innocence by a preponderance of the evidence.

{¶ 10} This court has previously stated that “[e]vidence insufficient to prove guilt beyond a reasonable doubt does not necessarily prove innocence by a preponderance of the evidence as required by R.C. 2743.48.” *Id.* at ¶11, citing *Ratcliff v. State* (1994), 94 Ohio App.3d 179, 640 N.E.2d 560. While we are mindful that a criminal insufficient evidence finding does not *necessarily* lead to the conclusion that a defendant's innocence has been established by a preponderance of the evidence, we find that the uncontroverted evidence in the record sub judice mandates that we affirm the trial court's grant of summary judgment.

{¶ 11} As the trial court noted in its January 26, 2011 journal entry, the only contested issue before the court was appellee's innocence under R.C. 2743.48(A)(5). None of the other elements under R.C. 2743.48(A) were disputed before the trial court.

{¶ 12} The sole evidence before the trial court on summary judgment consisted of trial transcripts from appellee's criminal trial.¹ This court previously reviewed this evidence in *State v. Doss*, Cuyahoga App. No. 88443, 2008-Ohio-449, and concluded not

¹The state of Ohio's brief in opposition to plaintiff's motion for summary judgment references allegations made by the alleged victim in an amended complaint from her civil suit against appellee. However, contrary to statements on page 4 of the state's brief, certified copies of this referenced amended complaint are not attached to the state's brief and not before the trial court on summary judgment.

only that the evidence was insufficient to sustain appellee's convictions but that appellee's own statement describing the events was *uncontradicted evidence* in his favor on elements of both the kidnapping and rape charges.

{¶ 13} With respect to appellee's conviction for kidnapping in violation of R.C. 2905.01(A)(2) and (4), this court, in reviewing the record, stated "no evidence was presented showing force, threat, deception, or the restraint of liberty." *Id.* at ¶10. "Nobody testified that [the alleged victim] went with [appellee] against her will, or that [appellee] restrained her in any way." *Id.* at ¶10. This court explicitly stated, "[appellee's] statement maintained that the ride home, as well as the sex, was consensual. No evidence contradicts, or even questions, this." *Id.* at ¶10.

{¶ 14} With respect to appellee's conviction for rape in violation of R.C. 2907.02(A)(1)(c), this court noted the challenge of distinguishing permissible sexual conduct with a person who is merely intoxicated from impermissible sexual conduct with someone who is substantially impaired. *Id.* at ¶18.

{¶ 15} We noted that "[t]he only evidence in the record of events happening between 2:30 and 8:00 a.m. on New Year's Day is [appellee's] statement." *Id.* at ¶23. After reviewing the evidence in the record, this court stated, "[t]he only evidence about [the alleged victim's] mental condition at the time of the alleged rape is found in [appellee's] statement. A careful review of this statement reveals no evidence that [appellee] knew, or should have known, that J.P.'s 'ability to resist or consent is

substantially impaired because of voluntary intoxication.” Id. at ¶23. We noted that “the state presented no evidence in opposition to appellee’s statement.” Id. at ¶20.

{¶ 16} This court concluded, “[t]he evidence shows that [appellee] had consensual sex with a woman who had been drinking alcohol, albeit while his girlfriend was in the other room. [Appellee] gave a detailed description of [the alleged victim’s] consensual conversation with him, and [her] not only being aware, but being in control, of her actions. From all accounts, and as strange as this ‘good Samaritan’ scenario may seem, [her] decision to go home and sleep with [appellee] was just as voluntary as her intoxication on New Year’s Eve.” Id. at ¶25.

{¶ 17} Based upon the unique circumstances presented in this case, specifically the uncontradicted evidence in the form of appellee’s own statement recounting the events of the night in question, and the fact that the state introduced no further evidence beyond the criminal record discussed above, we find no error in the trial court’s conclusion that the state of Ohio failed to raise a genuine issue of fact in regards to any of the elements under R.C. 2743.48(A).

{¶ 18} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said lower court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, J., CONCURS;
FRANK D. CELEBREZZE, JR., P.J., DISSENTING WITH
SEPARATE OPINION

FRANK D. CELEBREZZE, JR., P.J., DISSENTING:

{¶ 19} I respectfully dissent because Doss has not demonstrated that he is entitled to judgment as a matter of law.

{¶ 20} In his two-page motion for summary judgment, Doss only points to the decision of this court reversing his convictions. The Ohio Supreme Court has instructed that "a previous finding of not guilty is not sufficient to establish innocence. The petitioner seeking to establish a claim for wrongful imprisonment must produce more evidence than a judgment of acquittal, which is merely a judicial finding that the state did not prove its case beyond a reasonable doubt." *Ellis v. State*, 64 Ohio St.3d 391, 393, 1992-Ohio-25, 596 N.E.2d 428, 430. The petitioner carries the burden of proof in affirmatively establishing his or her innocence under R.C. 2743.48(A)(5). *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 1998-Ohio-275, 701 N.E.2d 1002.

{¶ 21} The differing burdens of proof are key to distinguishing why a vacation of Doss's conviction does not prove his innocence. Our holding in *Doss I* does not mean

that Doss is innocent — merely that, based upon the evidence the state presented, Doss's guilt could not be established beyond a reasonable doubt. The same cannot automatically be said of whether Doss can show by a preponderance of the evidence that he did not know or reasonably should not have known of the victim's incapacity. *Ratcliff v. State* (1994), 94 Ohio App.3d 179, 182, 640 N.E.2d 560 (“[A]n appellate court's reversal of a criminal conviction does not require a court to find that the claimant was not engaging in criminal conduct at the time in question. Evidence insufficient to prove guilt beyond a reasonable doubt does not necessarily prove innocence by a preponderance of the evidence.”).

{¶ 22} This is not a case where the evidence is so clear that Doss can be found to be innocent solely on this court's prior opinion, especially, as the dissenting opinion points out, where “[a]t least to some eyewitnesses, the victim was displaying signs of being too intoxicated to perform ordinary functions” and “[t]he majority opinion is full of instances illustrating the victim's overtly high level of intoxication.” *Doss I* at ¶30, (Sweeney, J., dissenting).

[Cite as *State v. Doss*, 2007-Ohio-6483.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88443

STATE OF OHIO

PLAINTIFF-APPELLEE
vs.

IRAN DOSS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-465093

BEFORE: Calabrese, J., Sweeney, P.J., and McMonagle, J.

RELEASED: December 6, 2007

JOURNALIZED:

Exh. D

[Cite as *State v. Doss*, 2007-Ohio-6483.]

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[Cite as *State v. Doss*, 2007-Ohio-6483.]
ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant Iran Doss (appellant) appeals his rape and kidnapping convictions. After reviewing the facts of the case and pertinent law, we affirm in part and vacate in part.

I.

{¶ 2} On the night of December 31, 2004, 23-year-old J.P. celebrated New Year's Eve with friends at Club Moda near downtown Cleveland. It is undisputed that J.P. consumed alcohol during the course of the evening. J.P. remembers being on the dance floor shortly after midnight, when what she describes as a "black curtain" came down over her. J.P. does not recall what happened from that time until approximately 8:00 a.m. the next morning, when a woman she did not know shook her awake. J.P. was in a strange bed, and she was not wearing her own clothing. She was also nauseous, disoriented, and bruised.

{¶ 3} J.P. noticed a man in the room, who she later identified as appellant. The man and woman told J.P. to clean herself up, then drove her home. During the drive, the woman told J.P. that she and appellant had found her intoxicated at the bar, that J.P. did not know her own name or where her friends were, and that they had taken J.P. home with them to be good Samaritans. The woman also mentioned a man named Tyson, whom J.P. did not know. The woman gave J.P. a napkin with the name Eileen and a telephone number on it. According to J.P., appellant did not say anything to her.

{¶ 4} After she was dropped off, J.P. continuously vomited, and when she urinated, she experienced pain in her vaginal area. J.P. called a friend, who took her to the hospital. J.P. was given a rape kit and the police arrived to question her. No drugs were found in her system, and DNA tests later revealed that semen found on J.P.'s underwear belonged to Tyson Simpkins (Simpkins), a bouncer at Club Moda who was working that night. Simpkins pled guilty to abduction and sexual battery in a related case.

{¶ 5} Using the napkin given to J.P. with a name and number on it, the Bedford Police subsequently located Eileen Wiles (Wiles) and her boyfriend, appellant, both of whom J.P. identified from photographs as the man and woman in whose apartment she awoke and who drove her home.

{¶ 6} On January 20, 2005, appellant gave a written statement to the police regarding the incident. In the statement, appellant recalled that as he and Wiles were getting ready to leave Club Moda around 2:00 a.m., they noticed that J.P. was there, apparently drunk and without a ride home. He and Wiles decided to take J.P. to their place to sleep and then drive her home later that morning. Appellant alleges in his statement that he and J.P. had sexual intercourse. Additionally, when asked whether appellant thought J.P. seemed intoxicated, he said, "Yes, she was hugging me and she didn't know me and she said she loved me." When asked if anyone else said J.P. was intoxicated, appellant replied, "Yes, the bartender and the

bouncer.” Finally, the following question and answer are found in appellant’s written statement: “Q: Before you left your bedroom with this girl what did you say to her? A: After we were fondling each other I said do you want to go in the living room and she said yes.”

{¶ 7} On April 22, 2005, appellant was indicted for two counts of rape in violation of R.C. 2907.02(A)(1)(c) and one count of kidnapping with a sexual motivation in violation of R.C. 2905.01(A)(2) and (4) and 2941.147. On March 27, 2006, a jury found appellant guilty of one count of rape and one count of kidnapping. On June 5, 2006, the court labeled appellant a sexually oriented offender, sentenced him to four years in prison, and ordered appellant to pay restitution and a fine.

II.

{¶ 8} In his first assignment of error, appellant argues that he “was denied due process of law when the court admitted defendant’s statement without independent proof of the corpus delecti of the crime.” Specifically, appellant argues that it was error for the court to admit his January 20, 2005 written statement to the police, which appellant argues is a confession, without first requiring the state to offer “some corroborating circumstances tending to prove criminal agency ***.” *State v. Maranda* (1916), 94 Ohio St. 364, 370.

{¶ 9} The pertinent parts of appellant's statement read as follows: "We had sex for about five minutes, then she pulled me to the floor, and we had sex there, for about 10 more minutes. After we were done, I was getting up, and she pushed my head down, towards her vagina, and I started to give her oral sex, for about one to two minutes. After that, we both put our PJ's on, and went back to bed."

{¶ 10} Appellant was convicted of violating R.C. 2907.02(A)(1)(c), which defines rape as "[n]o person shall engage in sexual conduct with another *** when *** [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition *** and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired ***." Additionally, appellant was convicted of violating R.C. 2905.01(A)(2) and (4), which defines kidnapping as "[n]o person, by force, threat, or deception *** shall remove another from the place where the other person is found or restrain the liberty of the other person, *** [t]o facilitate the commission of any felony ***; [or] [t]o engage in sexual activity ***."

{¶ 11} A careful reading of appellant's written statement to the police shows that he did not confess to raping or kidnapping J.P. On the contrary, appellant maintains throughout his statement that, although J.P. was intoxicated, she agreed to go back to appellant's apartment to sleep until she could be taken home in the morning, and he and J.P. had consensual sex that night. This position is not

consistent with the statutory definitions for rape or kidnapping, and we decline to see appellant's statement as a confession. Given this, the corpus delicti rule requiring extraneous evidence to support a confession does not apply to the case at hand. See *State v. Netters* (Sept. 30, 1982), Cuyahoga App. No. 44352 (holding that the defendant's "statement was not a 'confession' in the true sense of the word. [Defendant] merely explained the origin of the rifle and acknowledged ownership but did not admit his guilt of unlawful possession of a dangerous ordnance or possession of criminal tools").

{¶ 12} Accordingly, the court did not err in admitting appellant's statement, and his first assignment of error is overruled.

III.

{¶ 13} In his second assignment of error, appellant argues that he "was denied due process of law when the court failed to define the term substantially impaired." Specifically, appellant argues the court was required to define "substantially impaired" in its instructions to the jury, pursuant to R.C. 2945.11, which reads: "In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict."

{¶ 14} In *State v. Zeh* (1987), 31 Ohio St.3d 99, 103, the Ohio Supreme Court held that because the phrase "substantially impaired" is not defined in the Ohio Criminal Code, it "must be given the meaning generally understood in common

usage.” The *Zeh* court also held that it is sufficient for the state to establish substantial impairment by offering evidence at trial showing a reduction or decrease in the victim’s ability to act or think. *Id.* at 103-104.

{¶ 15} In the instant case, J.P. testified that she was intoxicated, she blacked out sometime after midnight, and did not remember anything until she woke up the next morning. The doctor that subsequently examined J.P. testified that, in his professional medical opinion, J.P.’s symptoms were consistent with someone who was inebriated, and that when one is inebriated, his or her ability to make typical judgments is decreased. Additionally, Kristen Collins, a bartender at Club Moda who was working that night, testified as follows about J.P.’s condition as she was leaving the club: “ She didn’t really know what was going on, and she just really didn’t - she looked really out of it. *** [S]he seemed like she was going to go to sleep, because she kept leaning over, and slumping. *** Slumping, like she was sitting on the bench but she was just like - kind of, like slumping, not sitting up straight. Not really aware, to, looked very drunk.”

{¶ 16} We hold that this testimony is sufficient to establish J.P.’s substantial impairment, within the common meaning of that phrase. Accordingly, the jury had the information necessary to determine whether J.P. was, in fact, substantially impaired, and the court did not err by failing to expressly define the phrase. Appellant’s second assignment of error is without merit.

IV.

{¶ 17} In his third assignment of error, appellant argues that he “was denied due process of law when voluntary intoxication was raised to an element of mental or physical condition that deprived one of the ability to consent.” Although unclear from his brief, it seems as if appellant argues that the state’s theory of voluntary intoxication as a substantially impaired mental condition under R.C. 2907.02(A)(1)(c) is unconstitutional. We disagree.

{¶ 18} In *In re King*, Cuyahoga App. Nos. 79830 and 79755, 2002-Ohio-2313, we followed the Twelfth District Court of Appeals of Ohio’s holding in *State v. Martin* (Aug. 12, 2000), Brown App. No. CA99-09-026 :

“[V]oluntary intoxication is included in the term ‘mental or physical condition’ as used in R.C. 2907.02(A)(1)(c). A person who engages in *** sexual conduct *** when the victim’s ability to resist or consent is substantially impaired by reason of voluntary intoxication is culpable for rape. *** A person’s conduct becomes criminal under this section only when engaging in sexual conduct with an intoxicated victim when the individual knows or has reasonable cause to believe that the victim’s ability to resist or consent is *substantially impaired* because of voluntary intoxication.” (Emphasis in original.)

{¶ 19} Appellant fails to show how he was denied due process of law regarding evidence of J.P.’s voluntary intoxication, and in line with *In re King* and *Martin*, we hold that this evidence may be properly used to show substantial impairment under R.C. 2907.02(A)(1)(c). Appellant’s third assignment of error is overruled.

V.

{¶ 20} In his fourth assignment of error, appellant argues that he “was denied due process of law when the court overruled his motion for judgment of acquittal.” Specifically, appellant argues that there was insufficient evidence to convict him of rape.

{¶ 21} When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259. The elements of R.C. 2907.02(A)(1)(c), which have been thoroughly discussed in assignments of errors one and three, require that the state prove appellant had sexual conduct with J.P. while J.P. was substantially impaired, and appellant knew, or had reason to believe, that she was substantially impaired. Furthermore, R.C. 2901.22(B) defines “knowledge” as follows: “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶ 22} In the instant case, in appellant’s written statement to the police he admits to having sex with J.P., and he states that J.P. was intoxicated. In addition, the bartender, the examining doctor, and J.P. herself testified that J.P. was intoxicated on the night in question. The bartender’s testimony that J.P. “didn’t

really know what was going on,” coupled with J.P.’s testimony that she blacked out and has no memory of the incident, amount to sufficient evidence of a violation of R.C. 2907.02(A)(1)(c). Compare with *State v. Schmidt*, Cuyahoga App. No. 88772, 2007-Ohio-4439 (holding that “[a]ssuming, without deciding, that there was sufficient evidence of substantial impairment *** , the evidence is lacking as a matter of law on the element of defendant’s knowledge of such impairment. *** There is nothing in this record that would enable a trier of fact to reasonably conclude that defendant was aware that [the victim] was substantially impaired to the point that it affected her ability to control *** her conduct”).

{¶ 23} A rational trier of fact could have found the essential elements of substantially impaired rape proven beyond a reasonable doubt, and appellant’s fourth assignment of error is overruled.

VI.

{¶ 24} In his fifth assignment of error, appellant argues that he “was denied due process of law when the court failed to merge the rape and kidnapping convictions.” Putting this assignment of error aside, we sua sponte address the sufficiency of the evidence presented to convict appellant of kidnapping. See Crim.R. 52(B). When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259. Appellant was convicted of violating R.C. 2905.01(A)(2) and (4), which define kidnapping as “[n]o person, by force, threat, or deception *** shall remove another from the place where the other person is found or restrain the liberty of the other person, *** [t]o facilitate the commission of any felony ***, [or] [t]o engage in sexual activity *** with the victim against the victim’s will ***.”

{¶ 25} In the instant case, no evidence was presented showing force, threat, deception or the restraint of liberty. Pursuant to R.C. 2901.01(A)(1), “‘Force’ means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” Appellant’s statement maintained that the ride home, as well as the sex, was consensual. J.P. testified that she did not remember anything from midnight until 8:00 a.m. the next morning. Various people testified that J.P. was intoxicated, but nobody testified that she went with appellant against her will, or that appellant restrained her in any way. Accordingly, we hold that there was insufficient evidence to convict appellant of kidnapping. See *State v. Nieland*, Greene App. No. 2005-CA-15, 2006-Ohio-784 (holding that there was no evidence that the victim was restrained in any way, therefore, there was insufficient evidence to support a kidnapping conviction).

{¶ 26} Appellant’s kidnapping conviction is vacated, thus rendering his fifth assignment of error moot.

VII.

{¶ 27} In his sixth assignment of error, appellant argues that he “was denied due process of law when the court ordered restitution along with a fine.” Specifically, appellant argues that the court erred when it ordered appellant as follows: “pay restitution in the amount of \$1,034.94 for medical expenses incurred by [J.P.] and \$80 in missing cash. I’m going to fine you \$1,000 in each crime of rape and kidnapping and you will pay your court costs.”

{¶ 28} Pursuant to R.C. 2929.18(A)(1), the court may order a felony offender to pay restitution to the victim “in an amount based on the victim’s economic loss.” The statute further reads that “the court shall determine the amount of restitution to be made by the offender” and a restitution hearing is required only if a party disputes the amount. In addition, R.C. 2929.18(A)(2) states that the court may also order the offender to pay a fine, with “the amount of the fine based on a standard percentage of the offender’s daily income over a period of time determined by the court and based on the seriousness of the offense.”

{¶ 29} In the instant case, appellant argues that the court arbitrarily picked a figure for restitution. However, the facts of the case show otherwise. J.P. testified that she had \$80 in her purse that evening that was missing the next morning, thus supporting the court ordering appellant to pay her \$80. Furthermore, in R.C. 2929.01(M), “economic loss” includes medical costs as a result of the commission of

the offense, thus allowing the court to order appellant to pay \$1,034.94 in medical bills. We hold that the court's restitution order was anything but arbitrary, and because appellant did not dispute the amount during sentencing, the court was not required to hold a hearing.

{¶ 30} As for the court ordering appellant to pay fines, he argues that he does not have any money and was found indigent, therefore, it was "improper and unconstitutional" to impose the fines. We disagree. "A determination that a criminal defendant is indigent for purposes of receiving appointed counsel does not prohibit the trial court from imposing a financial sanction pursuant to R.C. 2929.18." *State v. Kelly* (2001), 145 Ohio App.3d 277, 283. In addition, we held the following in *State v. Powell* (1992), 78 Ohio App.3d 784, 789-90:

"Many criminal defendants, even those who have steady income, are not able to raise sufficient funds to pay the retainer fee required by private counsel before counsel will make an initial appearance. This difference is even more evident in cases where the defendant has to utilize his financial resources to raise sufficient bond money in order to be released from jail. In contrast, the payment of a mandatory fine over a period of time is not equivalent to the immediate need for legal representation at the initiation of criminal proceedings."

{¶ 31} As such, appellant's sixth assignment of error is overruled.

VIII.

{¶ 32} In his final assignment of error, appellant argues that he "was denied effective assistance of counsel." Specifically, appellant argues that his counsel was ineffective in the following three ways: 1) failing to request a definition of "substantially impaired"; 2)

failing to file a motion to suppress; and 3) “counsel objected to the court’s giving of an instruction on the lesser offense of sexual battery.”

{¶ 33} In order to substantiate a claim of ineffective assistance of counsel, an appellant must demonstrate that 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel’s performance if appellant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136. “The object of an ineffectiveness claim is not to grade counsel’s performance.” *Id.* at 142.

{¶ 34} First, appellant argues his counsel was ineffective in failing to request a definition of “substantially impaired.” After a thorough analysis of this issue in appellant’s second assignment of error, we concluded that the court was not required to define the phrase; therefore, defense counsel’s performance was not flawed or deficient on this issue.

{¶ 35} Appellant’s second argument regarding ineffective assistance of counsel concerns the failure to file a motion to suppress. However, it is unclear from appellant’s brief what exactly he would have the court suppress and why. Appellant

alleges that he “was arrested without a warrant at his home and taken to the Bedford police station. At the police station he gave a statement without any warning although in custody. After executing a search warrant at defendant’s home, defendant was taken to the Bedford police station. In addition various items were seized which were used as exhibits at trial. While Det. Shawn Klubnik testified defendant was not under arrest he was under arrest and taken by the police to the police station.”

{¶ 36} We assume *arguendo* that appellant asserts his written statement to the police should have been the subject of a motion to suppress, because there was an illegal arrest. However, appellant does not identify any facts in the record to support his argument. On the contrary, a review of appellant’s written statement shows both his initials and his signature expressly waiving his *Miranda* rights and identifying his actions as voluntary. Nothing in the record, or in appellant’s arguments to this court, contradicts this position. See *State v. Lather*, 110 Ohio St.3d 270, 2006-Ohio-4477 (holding that a court’s determination of a *Miranda* waiver is “viewed in light of all the surrounding circumstances”).

{¶ 37} Appellant further argues that “counsel was deficient in not moving to suppress the identification procedure” police used in showing J.P. a single photograph of him. This procedure need not be analyzed, as this argument squarely fails the second prong of *Strickland*. Appellant’s admission of sexual relations with

J.P. renders her out-of-court identification of him immaterial to the case against appellant. In other words, without the identification, the result of the procedure would still have been the same.

{¶ 38} Appellant's third argument regarding ineffective assistance of counsel concerns an objection to the lesser included offense of sexual battery. Appellant's naked assertion that counsel was ineffective when objecting to the sexual battery instruction is both illogical and unsupported by case law. Appellant's entire argument on this point reads as follows: "Counsel objected to the court's giving of an instruction on the lesser offense of sexual battery. Sexual battery would be a probational offense." Pursuant to App.R. 12(A)(2), we "may disregard an assignment of error presented for review if the party raising it *** fails to argue the assignment separately in the brief, as required under App.R. 16(A)." Accordingly, we decline to render an opinion on this issue.

{¶ 39} Appellant's final assignment of error is overruled.

Judgment affirmed in part and vacated in part.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing said court to carry this judgment into execution. The defendant's conviction having been

affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., JUDGE

JAMES J. SWEENEY, P.J., CONCURS;
CHRISTINE T. McMONAGLE, J., DISSENTS WITH
SEPARATE OPINION

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 40} I dissent.

{¶ 41} The majority holds that it is rape to have sexual contact with someone of age who consents to the encounter while voluntarily intoxicated. I do not believe this is the law; I do not believe this *should* be the law. The consent necessary for lawful intercourse is the consent which is communicated at the time, not that which, upon sober reflection, is repented.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION

No. 88443

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

IRAN DOSS

DEFENDANT-APPELLANT

**JUDGMENT:
CONVICTIONS VACATED;
DEFENDANT DISCHARGED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-465093

BEFORE: Calabrese, J., Sweeney, A.J., and McMonagle, J.

RELEASED: January 24, 2008

JOURNALIZED: FEB 11 2008

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Exh. E

ANTHONY O. CALABRESE, JR., J.:

Defendant Iran Doss (appellant) appeals his rape and kidnapping convictions. After reviewing the facts of the case and pertinent law, we vacate the convictions and order appellant be discharged from prison.

I.

On the night of December 31, 2004, 23-year-old J.P. celebrated New Year's Eve with friends at Club Moda near downtown Cleveland. It is undisputed that J.P. consumed alcohol during the course of the evening. J.P. remembers being on the dance floor shortly after midnight, when what she describes as a "black curtain" came down over her. J.P. does not recall what happened from that time until approximately 8:00 a.m. the next morning, when a woman she did not know shook her awake. J.P. was in a strange bed, and she was not wearing her own clothing. She was also nauseous, disoriented, and bruised.

J.P. noticed a man in the room, who she later identified as appellant. The man and woman told J.P. to clean herself up, then drove her home. During the drive, the woman told J.P. that she and appellant had found her intoxicated at the bar, that J.P. did not know where her friends were, and that they had taken J.P. home with them to be good Samaritans. The woman also mentioned a man named Tyson, whom J.P. did not know. The woman gave J.P. a napkin with the

name Eileen and a telephone number on it, stating that J.P. should call her sometime. According to J.P., appellant did not say anything to her.

After she was dropped off, J.P. continuously vomited, and when she urinated, she experienced pain in her vaginal area. J.P. called a friend, who took her to the hospital. J.P. was given a rape kit, and the police arrived to question her. No drugs were found in her system, and DNA tests later revealed that semen found on J.P.'s underwear belonged to Tyson Simpkins (Simpkins), a bouncer at Club Moda who was working that night. Simpkins pled guilty to abduction and sexual battery.

Using the napkin given to J.P. with the name and number on it, the Bedford Police subsequently located Eileen Wiles (Wiles) and her boyfriend, appellant, both of whom J.P. identified from photographs as the man and woman in whose apartment she awoke and who drove her home.

On January 20, 2005, appellant gave a written statement to the police regarding the incident. In the statement, appellant recalled that as he and Wiles were getting ready to leave Club Moda around 2:00 a.m., they noticed that J.P. was there, apparently intoxicated and without a ride home. She was unable to give directions to her home, so appellant and Wiles decided to take J.P. to their place to sleep and then drive her home later that morning. Specifically, the pertinent parts of appellant's statement are as follows:

"So I told the girl that we would take her home in the morning. She said ok. So we went to our apartment and as we were walking upstairs the girl kept hugging me so I pushed her away because my girlfriend was their [sic]. When we got into the apartment we made coffee and gave some to the girl and she said thanks and thanks for taking me home. So we said we would take her home the next morning. So Eileen gave her some PJs and we all went to bed and the girl kept hugging on me so I thought she wanted me but my girlfriend was there. So we went to sleep and the girl woke me up by hugging me so we were forplaying [sic] under the blankets, so we went into the living room so we wouldn't wake Eileen up. We were still forplaying [sic] in the living room and I was kissing her and she took of [sic] my shirt and I pushed her shirt up and started kissing her bress [sic] and she started filling [sic] on my penis and I was filling [sic] on her vagina. She started [sic] pulling her pants down and I was rubbing her vagina and then I pulled my pants down and she got on top of me while I was sitting on the sofa. We had sex for about five minutes, then she pulled me to the floor, and we had sex there, for about 10 more minutes. After we were done, I was getting up, and she pushed my head down, towards her vagina, and I started to give her oral sex, for about one to two minutes. After that, we both put our PJs on, and went back to bed. Eileen was still sleeping and me and the girl cuddled a little and fell asleep. The next morning we woke up around 8:30 am and she said thanks for taking care of her ***."

Additionally, when asked whether appellant thought J.P. seemed intoxicated, he said, "Yes, she was hugging me and she didn't know me and she said she loved me." When asked if anyone else said J.P. was intoxicated, appellant replied, "Yes, the bartender and the bouncer." Finally, the following question and answer are found in appellant's written statement: "Q: Before you

left your bedroom with this girl what did you say to her?" A: "After we were fondling each other I said do you want to go in the living room and she said yes."

On April 22, 2005, appellant was indicted for two counts of rape in violation of R.C. 2907.02(A)(1)(c) and one count of kidnapping with a sexual motivation in violation of R.C. 2905.01(A)(2) and (4) and 2941.147. On March 27, 2006, a jury found appellant guilty of one count of rape and one count of kidnapping. On June 5, 2006, the court labeled appellant a sexually oriented offender, sentenced him to four years in prison, and ordered appellant to pay restitution and a fine.

II.

Appellant assigns six errors for our review. However, sua sponte, we first address the sufficiency of the evidence presented to convict appellant of kidnapping. When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259. Appellant was convicted of violating R.C. 2905.01(A)(2) and (4), which defines kidnapping as "[n]o person, by force, threat, or deception *** shall remove another from the place where the other person is found or restrain the liberty of the other person, *** [t]o facilitate the commission of any felony ***;

[or] [t]o engage in sexual activity *** with the victim against the victim's will
***”

In the instant case, no evidence was presented showing force, threat, deception, or the restraint of liberty. Pursuant to R.C. 2901.01(A)(1), “Force” means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” Appellant’s statement maintained that the ride home, as well as the sex, was consensual. No evidence contradicts, or even questions, this. J.P. testified that she did not remember anything from midnight until 8:00 a.m. the next morning. Various people testified that J.P. was intoxicated, as will be analyzed later in this opinion, but nobody testified that she went with appellant against her will, or that appellant restrained her in any way. Accordingly, we hold that there was insufficient evidence to convict appellant of kidnapping. See *State v. Nieland*, Greene App. No. 2005-CA-15, 2006-Ohio-784 (holding that there was no evidence that the victim was restrained in any way, therefore, there was insufficient evidence to support a kidnapping conviction).

We now turn to appellant’s fourth assignment of error, in which he argues that he was “denied due process of law when the court overruled his motion for judgment of acquittal.” Specifically, appellant argues that there was insufficient evidence to convict him of rape.

When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259. Appellant was convicted of violating R.C. 2907.02(A)(1)(c), which defines rape as “[n]o person shall engage in sexual conduct with another *** when *** [t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition *** and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired ***.”

Before we analyze the sufficiency of the evidence against appellant, a brief discussion of a “substantially impaired” rape victim is required. In *State v. Zeh* (1987), 31 Ohio St.3d 99, 103, the Ohio Supreme Court held that because the phrase “substantially impaired” is not defined in the Ohio Criminal Code, it “must be given the meaning generally understood in common usage.” The *Zeh* court also held that it is sufficient for the state to establish substantial impairment by offering evidence at trial establishing a reduction or decrease in the victim’s ability to act or think. *Id.* at 103-04. Additionally, in *In re King*, Cuyahoga App. Nos. 79830 and 79755, 2002-Ohio-2313, we followed the Twelfth

District Court of Appeals of Ohio's holding in *State v. Martin* (Aug. 12, 2000),

Brown App. No. CA99-09-026 :

“[V]oluntary intoxication is included in the term ‘mental or physical condition’ as used in R.C. 2907.02(A)(1)(c). A person who engages in * sexual conduct *** when the victim’s ability to resist or consent is substantially impaired by reason of voluntary intoxication is culpable for rape. *** A person’s conduct becomes criminal under this section only when engaging in sexual conduct with an intoxicated victim when the individual knows or has reasonable cause to believe that the victim’s ability to resist or consent is *substantially impaired* because of voluntary intoxication.”**

(Emphasis in original.)

Furthermore, R.C. 2901.22(B) defines “knowledge” as follows: “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

In *King*, supra, the victim was a minor who was served a substantial amount of alcohol by the defendant. See, also, *State v. Jones*, Summit App. No. 22701, 2006-Ohio-2278; *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026. The *Martin* court noted the following regarding intoxication and substantial impairment:

“We agree with appellant that the Committee Comment to R.C. 2907.02 evinces a legislative intent to exclude the

situation where a person 'plies his intended partner with drinks or drugs in the hope that lowered inhibitions might lead to a liaison.' However, the statute plainly intends to hold a person culpable for rape when that individual engages in sexual conduct with someone the individual knows or has reason to know is substantially impaired because of a mental or physical condition. While R.C. 2907.02 was not intended to criminalize sexual conduct as the result of an alcohol-induced state of 'lowered inhibitions,' we cannot say that it was not intended to criminalize conduct where the victim is 'substantially impaired' because of intoxication. Interpreting the statute in such a way would produce a profoundly absurd result."

We recently reviewed substantial impairment via voluntary intoxication as related to sexual battery, a lesser included offense of rape. Similar to the case at hand, in *State v. Schmidt*, Cuyahoga App. No. 88772, 2007-Ohio-4439, two adult strangers met at a downtown Cleveland bar where they consumed alcohol and later went with friends to a nearby hotel. In *Schmidt*, the victim recalled the journey from the bar to the hotel, including walking and talking in a "normal" fashion, and driving and parallel parking her car. In addition, she remembers consenting to various sexual acts with Schmidt while at the hotel, including digital penetration of her vagina. The victim maintained, however, that she did not consent to vaginal intercourse with the defendant. The victim testified that she lost consciousness momentarily and "at one point awoke to defendant with his penis inside of her without her consent." *Id.* at ¶28.

The *Schmidt* court held the following: "Assuming, without deciding, that there was sufficient evidence of substantial impairment ***, the evidence is lacking as a matter of law on the element of defendant's knowledge of such impairment. *** There is nothing in this record that would enable a trier of fact to reasonably conclude that defendant was aware that [the victim] was substantially impaired to the point that it affected her ability to control his or her conduct." *Id.* at ¶¶43, 46.

As *Schmidt* demonstrates, when reviewing substantial impairment due to voluntary intoxication, there can be a fine, fuzzy, and subjective line between intoxication and impairment. Every alcohol consumption does not lead to a substantial impairment. Additionally, the waters become even murkier when reviewing whether a defendant knew, or should have known, that someone was impaired rather than merely intoxicated. Of course, there are times when it would be apparent to all onlookers that an individual is substantially impaired, such as intoxication to the point of unconsciousness. On the other hand, "a person who is experiencing [an alcohol induced] blackout may walk, talk, and fully perform ordinary functions without others being able to tell that he is 'blacked out.'" Westin, Peter, Egelhoff Again (1999), 36 *Am.Crim.L.Rev.* 1203, 1231. In addition, J.P.'s testimony describes a blackout as "where someone who drinks alcohol heavily can function and be, appear to be there, and conscious, but

in reality, they would not have any memory of what they did or where they were." Furthermore, Aaron Reynolds, a classmate of J.P.'s at NEOUCOM, who was also at Club Moda on the night in question, testified that he blacked out from approximately midnight until leaving the bar between 2:00 and 2:30 a.m. While Reynolds did not remember anything from that time period, he stated that his friends told him that he was dancing and having a good time. He also testified that when he saw J.P. at the bar, "she was intoxicated, but she wasn't unmanageable."

In the instant case, J.P. testified that she was intoxicated on the New Year's Eve in question. The doctor who examined J.P. the next day testified that, in his professional opinion, J.P.'s symptoms were consistent with someone who was inebriated the night before, and that when one is inebriated, his or her ability to make typical judgments is decreased. Additionally, Kristen Collins, a bartender at Club Moda who was working that night, testified as follows: between midnight and 2:30 a.m., Collins served J.P. nothing but water; J.P. was very drunk; J.P. was carrying on conversations, sitting, standing or dancing with appellant, Wiles, and Simpkins; when J.P. was sitting, she was "[s]lumping, like she was sitting on the bench but she was just like - kind of, like slumping, not sitting up straight. Not really aware, *** looked very drunk." Collins also testified that she heard the group talking about appellant giving J.P. a ride

home and then saw J.P., appellant, and Wiles leave the club together. Specifically, Collins testified that "I saw [J.P.], I saw her get up, and I saw her walk out the door with *** Doss and Wiles. I saw her walk past the bar, she walked past the bar, and the last I saw of them, they were headed either for the bathrooms, or the side door." Collins added that she was unable to tell if J.P. was walking out on her own or if she was leaning on appellant and Wiles.

While we offer no opinion on this specific issue, we note that this testimony is sufficient to establish that J.P. *may have been* substantially impaired. However, we conclude that there is insufficient evidence to find that appellant had knowledge of J.P.'s condition of substantial impairment - not just intoxication - beyond a reasonable doubt. The only evidence linking appellant to sexual conduct with J.P. is his own admission. Nowhere in appellant's written statement does he mention anything about knowing that J.P.'s ability to resist or consent was substantially impaired, as is required in R.C. 2907.02(A)(1)(c). Furthermore, the state presented no evidence in opposition to appellant's statement.

J.P.'s testimony that she does not remember anything about the incident is not evidence that she did not consent to the sexual encounter or that appellant knew that she may have been substantially impaired.

Collins' testimony, which is the most detailed evidence the state presented to show J.P. may have been substantially impaired, does not give rise to the inference that appellant knew, or should have known, about such impairment. Collins stated that after midnight she only served J.P. water, and J.P. was carrying on multiple conversations with appellant, Wiles, and Simpkins. Collins testified that she had state training as a bartender to recognize stages of intoxication, and that on a scale of one to four, J.P. was a three. Collins also testified that she had worked at Club Moda for two-and-a-half years, and as a bartender at another establishment before that, giving her years of experience dealing with intoxicated people.

The only evidence in the record of events happening between 2:30 and 8:00 a.m. on New Year's Day is appellant's statement. It is unclear at exactly what time appellant and J.P. engaged in sexual intercourse; however, it is fair to say it was sometime after 3:00 a.m. There is no evidence that J.P. consumed any alcohol after midnight; therefore, hours had passed between J.P.'s last drink and the alleged rape. The only evidence about her mental condition at the time of the alleged rape is found in appellant's statement. A careful review of this statement reveals no evidence that appellant knew, or should have known, that J.P.'s "ability to resist or consent is substantially impaired because of voluntary intoxication." *King, supra.*

In reviewing the entire record, there is evidence that appellant used a condom during the sexual intercourse with J.P.; that he took J.P., and she voluntarily went to his house; that they gave J.P. pajamas to sleep in, then let her keep them the next day; that they gave J.P. a ride home the next day; that Wiles gave J.P. her name and phone number in appellant's presence; that appellant gave a voluntary statement to the police insisting that the encounter was consensual; and that appellant's version of the events never changed. These actions are not consistent with someone who knowingly commits a rape.

While we recognize that this is a sensitive issue, we must follow the statutory and case law before us. In the instant case, the state had the burden to prove that the rape victim was substantially impaired and that the defendant knew or should have known of the substantial impairment. We conclude that the state failed to meet this burden. The evidence shows that appellant had consensual sex with a woman who had been drinking alcohol, albeit while his girlfriend was in the other room. Appellant gave a detailed description of J.P.'s consensual conversation with him, and J.P. not only being aware, but being in control, of her actions. From all accounts, and as strange as this "good Samaritan" scenario may seem, J.P.'s decision to go home and sleep with appellant was just as voluntary as her intoxication on New Year's Eve.

Accordingly, appellant's remaining assignments of error are moot; his kidnapping and rape convictions, as well as his sexually oriented offender classification, are ordered vacated, and appellant is ordered discharged from prison.

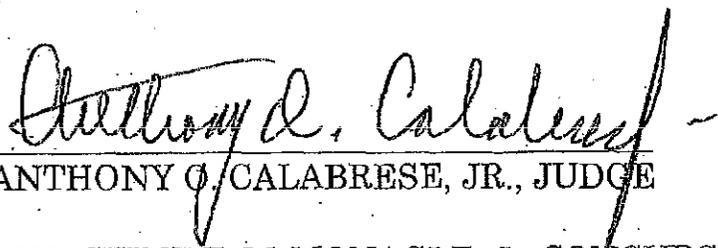
Judgment vacated.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


ANTHONY G. CALABRESE, JR., JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
JAMES J. SWEENEY, A.J., CONCURS IN PART AND
DISSENTS IN PART WITH SEPARATE OPINION

JAMES J. SWEENEY, A.J., CONCURRING IN PART AND DISSENTING IN PART:

Although I concur in the majority's disposition of the kidnapping conviction for insufficient evidence, I respectfully dissent from the majority's

finding that there was insufficient evidence of rape under R.C. 2907.02(A)(1)(c) to send the charge to the jury. Construing the evidence in a light most favorable to the State, as we must, there is sufficient evidence in this record, if believed, that could lead a reasonable person to conclude that the victim's ability to consent was "substantially impaired" due to intoxication and that the defendant knew this or had a reasonable cause to believe it.

I accept the majority's position that to establish a substantial impairment the State must offer evidence to prove a reduction or decrease in the victim's ability to act or think. As the majority notes intoxication, even voluntary intoxication, of the victim can fall within the rubric of this offense under the plain statutory language. *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026 ("we cannot say that it [R.C. 2907.02(A)(1)(c)] was not intended to criminalize conduct where the victim is 'substantially impaired' because of intoxication.")

Here, the State offered evidence that the victim was in an alcohol-induced blackout and that the defendant, the bouncer, and the bartender recognized her as being intoxicated. The victim maintains that a "black curtain" came down on her at the club and remembers nothing until waking the next morning in a strange bed. While it is fair and certainly appropriate for the defense to argue that the victim engaged in consensual intercourse due to an alcohol-induced

state of "lowered inhibitions" rather than being unable to consent or resist, it is not for the court to decide this factual point.

The evidence in this case is unlike the evidence at issue in *Schmidt*, where this Court vacated a sexual battery conviction due to insufficient evidence of the defendant's knowledge of that victim's substantial impairment. For example, in *Schmidt*, the victim recalled extensive details of the evening, and described her ability to walk, talk, and drive "normally." The other witnesses in *Schmidt* confirmed that the victim drove and parallel parked her car and did not appear to be overly intoxicated. In contrast, the victim in this case essentially has no recollection of the night or the sexual activities described by the defendant. Moreover, other witnesses recall that the victim here was very intoxicated, to the point that the bartender stopped serving her alcohol, and observed that she was "slumping" and "not sitting up straight. Not really aware." At least to some eyewitnesses, the victim was displaying signs of being too intoxicated to perform ordinary functions. The majority opinion is full of instances illustrating the victim's overtly high level of intoxication. The record, in my view, contains sufficient probative evidence indicating that the defendant knew or had reasonable cause to believe that the victim was substantially impaired.

I would, therefore, affirm the decision of the trial court that overruled defendant's motion for acquittal on the rape count.

2305.02 Wrongful imprisonment claim.

A court of common pleas has exclusive, original jurisdiction to hear and determine an action or proceeding that is commenced by an individual who satisfies divisions (A)(1) to (4) of section 2743.48 of the Revised Code and that seeks a determination by the court that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person. If the court enters the requested determination, it shall comply with division (B) of that section.

Effective Date: 03-17-1989

2743.48 Wrongful imprisonment civil action against state.

(A) As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

(B)(1) When a court of common pleas determines, on or after September 24, 1986, that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person's attorney of the person's rights under this section to commence a civil action against the state in the court of claims because of the person's wrongful imprisonment and to be represented in that civil action by counsel of the person's own choice.

(2) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall maintain in the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office for each such individual.

(3) Within sixty days after the date of the entry of a court of common plea's determination that a person is a wrongfully imprisoned individual, the clerk of the court of claims shall forward a preliminary judgment to the president of the controlling board requesting the payment of fifty per cent of the amount described in division (E)(2)(b) of this section to the wrongfully imprisoned individual. The board shall take all actions necessary to cause the payment of that amount out of the emergency purposes special purpose account of the board.

(C)(1) In a civil action under this section, a wrongfully imprisoned individual has the right to have counsel of the individual's own choice.

(2) If a wrongfully imprisoned individual who is the subject of a court determination as described in division (B)(1) of this section does not commence a civil action under this section within six months after the entry of that determination, the clerk of the court of claims shall send a letter to the wrongfully imprisoned individual, at the address set forth in the notice received from the court of common pleas pursuant to division (B)(2) of this section or to any later address provided by the wrongfully imprisoned individual, that reminds the wrongfully imprisoned individual of the wrongfully imprisoned individual's rights under this section. Until the statute of limitations provided in division (H) of this section expires and unless the wrongfully imprisoned individual commences a civil action under this section, the clerk of the court of claims shall send a similar letter in a similar manner to the wrongfully imprisoned individual at least once each three months after the sending of the first reminder.

(D) Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

(E)(1) In a civil action as described in division (D) of this section, the complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant's conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the claimant is a wrongfully imprisoned individual. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.

(2) In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, and for each part of a year of being so imprisoned, a pro-rated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;

(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;

(iii) The cost of supervision of the wrongfully imprisoned individual;

(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.

(F)(1) If the court of claims determines in a civil action as described in division (D) of this section that the complainant is a wrongfully imprisoned individual, it shall enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. In determining that sum, the court of claims shall not take into consideration any expenses incurred by the state or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for food, clothing, shelter, and medical services. The court shall reduce that sum by the amount of the payment to the wrongfully imprisoned individual described in division (B)(3) of this section.

(2) If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of the wrongfully imprisoned individual's own choice, the court of claims shall include in the judgment entry referred to in division (F)(1) of this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section.

(3) The state consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this section. However, this section does not affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in the state correctional institution.

(G) The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board.

(H) To be eligible to recover a sum of money as described in this section because of wrongful imprisonment, a wrongfully imprisoned individual shall not have been, prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment or have been the subject of an action before the former sundry claims board that resulted in an award of compensation for the wrongful imprisonment. Additionally, to be eligible to so recover, the wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of a court of common pleas that the individual is a wrongfully imprisoned individual.

Amended by 128th General Assembly File No. 52, HB 338, § 1, eff. 9/17/2010.

Effective Date: 04-09-2003