[Cite as *State v. Jones*, 2004-Ohio-512.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82978

STATE OF OHIO,	:	
	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
v.	:	
	:	OPINION
DANIEL JONES,	:	
	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: FEBRUARY 5, 2004

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. CR-434602.

JUDGMENT: REVERSED; DEFENDANT DISCHARGED.

DATE OF JOURNALIZATION:

APPEARANCES:

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TIMOTHY E. McMONAGLE, J.

{¶1} Defendant-appellant, Daniel Jones, appeals the judgment of the Cuyahoga County Common Pleas Court, rendered after a bench trial, finding him guilty of attempted rape and sentencing him to two years incarceration. For the reasons that follow, we reverse the conviction and discharge appellant.

{¶2} In March 2003, Jones was indicted on one count of attempted rape, in violation of R.C. 2923.02/2907.02, and one count of kidnapping, in violation of R.C. 2905.01. Appellant pled not guilty and waived a jury trial, so the matter proceeded to a bench trial.

{¶3} Deedra Armstrong testified at trial that in January 2003, she lived one house down from Jones, whom she had known for nearly 12 years. Armstrong testified that on the evening of January 7, 2003, she went to Jones' house, drank several beers with him, and then returned home. According to Armstrong, at approximately 2:00 a.m., as she was watching television, Jones telephoned her and asked for the telephone number to the food stamp hotline. Armstrong testified that she told Jones that she did not have the number but he kept calling and calling. When Armstrong refused to answer the

phone, Jones began knocking on her door and pounding on her window.

{¶4} Armstrong testified that when she finally opened the door and Jones asked her again for the number, she told him to wait in the hallway while she went to get the number from her purse. According to Armstrong, she was going to "just give him anything" to get rid of him.

{¶5} As Armstrong sat at one end of her couch, looking through her purse, Jones came in the house and sat down on the other end of the couch. According to Armstrong, when she told Jones to "get the fuck out," he suddenly came over to the middle of the couch, grabbed her by the back of her neck and put a knife to her throat. Armstrong testified that when Jones saw that she had a phone in her hand and was trying to call 911, he told her, "Bitch, put the phone down," and then started squeezing her throat so hard that she dropped the phone. According to Armstrong, Jones then let go of her, stood up and said, "Bitch, take your fucking clothes off." Armstrong testified that she replied, "I ain't taking shit off," told him to "get the fuck out of my house" and began dialing 911 again. As Armstrong was dialing, Jones called her a "lying bitch" and then walked out of her house.

{¶6} Cleveland Police Officer Thomas Barnes testified that he responded to Armstrong's 911 call at approximately

4:30 a.m. on January 8, 2003. According to Barnes, Armstrong was "very excited and very, very distressed." Barnes testified that after Armstrong named Jones as the alleged offender, he went to Jones' home and knocked on his door. Jones refused to answer the door, so Barnes telephoned him and talked him into opening the door. When Jones finally came to the door, he volunteered that he knew the police were there because Armstrong had "called the police on him." Upon questioning by the officers, Jones denied being at Armstrong's house at any time earlier that evening.

{¶7} Jones' version of the events that occurred that evening differed sharply from Armstrong's. According to Jones, Armstrong called him on the evening of January 7, 2003, and asked him if he had any money because she wanted to get high. When Jones told her that he "couldn't help her with that," she asked if he had any beer. Armstrong then went to Jones' house and stayed for approximately 45 minutes, drinking beer with him. She left, but later returned at approximately 10:00 p.m. and asked Jones for $10.00. He told her that he would not lend her any more money because she already owed him $50.00. According to Jones, Armstrong then offered him oral sex, but Jones told her, "I'm not going to mess with you no more. You already sent me to the clinic." Jones' comment was in reference to an incident that had occurred approximately

two weeks earlier, when Armstrong had propositioned Jones for sex but then told him after he slept with her that he should go to a clinic to be checked for sexually transmitted diseases. Jones told Armstrong that he was going to tell her boyfriend about these incidents and Armstrong left.

{¶8} Jones testified that Armstrong called him again, however, at approximately 1:00 a.m. and asked him to come over. She told him that a friend was coming over and would pay him some of the $50 that she owed him. She also told him that her friend wanted him to get her some crack.

{¶9} When Jones arrived at Armstrong's house, he put three rocks of crack cocaine on the table and then shared several beers with Armstrong while they were waiting for her friend to arrive. Jones testified that as he came out of the bathroom, he saw Armstrong smoking one of his rocks of crack. Jones objected, and an argument ensued. Jones told Armstrong that she either needed to pay him the money she owed him or he was going to tell her boyfriend that he and Armstrong had recently had sex.

{¶10} Jones testified that as he opened the door to leave, he heard Armstrong on the telephone, saying, "Help, help, he got a knife to my throat and he's trying to rape me." Jones told Armstrong to stop lying and went home.

{¶11} After denying Jones' Crim.R. 29 motion for acquittal, the trial court found Jones guilty of attempted rape but not guilty of kidnapping and then sentenced him to two years incarceration.

{¶12} Timely appealing, Jones has raised three assignments of error for our review.

{¶13} In his first assignment of error, Jones contends that the State failed to present sufficient evidence to sustain his conviction for attempted rape and, therefore, the trial court should have granted his motion for acquittal. We agree.

{¶14} Crim.R. 29(A) provides, in part:

{¶15} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶16} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, 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, paragraph two of the syllabus.

{¶17} R.C. 2923.02(A) provides that a person is guilty of an attempt to commit a crime if he or she "purposely or knowingly *** engages in conduct that, if successful, would constitute or result in the offense." Jones was convicted of attempted rape pursuant to R.C. 2907.02(A)(2), which provides:

{¶18} "***No person shall engage in sexual conduct[1] with another when the offender purposely compels the other person to submit by force or threat of force."

{¶19} The Ohio Supreme Court has held that a criminal attempt occurs when the offender commits an act constituting a substantial step toward the commission of an offense. *State v. Buchanan*, Cuyahoga App. No. 80098, 2003-Ohio-6851, at ¶28, citing *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus, overruled on other grounds by *State v. Downs* (1977), 51 Ohio St.2d 47. The act "must be strongly corroborative of the actor's criminal purpose" in order to constitute a substantial step toward the act, but need not be

[1]Sexual conduct is "***without privilege to do so, the insertion, however slight, of any part of the body *** into the vaginal or anal cavity of another." R.C. 2907.01(A).

the last proximate act prior to the commission of the offense. *Woods*, supra, at paragraph one of the syllabus. This standard directs attention to overt acts of the defendant which "convincingly demonstrate" the defendant's firm purpose to commit the offense. Id.

{¶20} Here, the State produced evidence that Jones grabbed Armstrong by the back of her neck and put a knife to her throat. He ordered her to put the phone down when she tried to call 911, and then released her, stood up, and told her to take her clothes off. When Armstrong refused to do so, Jones left her house.

{¶21} In *State v. Buchanan*, supra, this court recently held that evidence that a defendant repeatedly ordered the victim to take off her clothes while he pointed a gun at her did not "convincingly demonstrate" that the defendant intended to rape the victim. In that case, the victim was seated at a bus stop in the middle of the day, visible to passing motorists, when the defendant approached her, grabbed her arm and pulled her back. The defendant then hit the victim in the face with the gun and ordered her to take her clothes off. After the victim unsuccessfully attempted to obtain help from passing motorists, she escaped by running across the street.

{¶22} In finding this evidence insufficient to support the defendant's conviction for attempted rape, we noted that the

defendant "never attempted to engage in any sexual conduct with [the victim] nor did he ever state his intention to rape her." *Buchanan,* supra at ¶29. We stated further:

{¶23} "The Ohio Supreme Court has held that evidence of the victim's pants being pulled down and her blouse opened, without more, is insufficient to convict a defendant of attempted rape. See *State v. Heinish* (1990), 50 Ohio St.3d 231. Moreover, we agree with [the defendant] that his ordering [the victim] to undress could have been a step in a course of conduct planned to culminate in an offense other than rape. Compare *State v. Powell* (1990), 49 Ohio St.3d 255 (defendant's order for victim to undress was strongly corroborative of his intent to rape her because he confessed he was going to have sex with her). The State produced no evidence indicating that [the defendant] desired to engage in sexual conduct with [the victim]." Id. at ¶30.

{¶24} Likewise, in this case, the State produced no evidence that Jones desired to engage in sexual conduct with Armstrong. Moreover, the State produced no evidence that Jones attempted to engage in sexual conduct with Armstrong or that he expressed any intention to do so. There were no "sexual advances" toward Armstrong and no evidence that Jones performed any "overt act," such as unzipping his pants or removing his clothes, that would indicate his intent to rape

her. In short, there was no evidence that "convincingly demonstrate[d]" Jones' "firm purpose" to rape Armstrong.

{¶25} Moreover, as in *Buchanan*, supra, we find that Jones' order to Armstrong to remove her clothing could have been a step in a course of conduct planned to culminate in an offense other than rape. To sustain a conviction for attempted rape, "there must be evidence indicating purpose to commit rape instead of some other sex offense, such as gross sexual imposition, R.C. 2907.05, which requires only sexual contact." *State v. Davis* (1996), 76 Ohio St.3d 107, 114.

{¶26} Viewing the evidence in a light most favorable to the prosecution, we find that the State failed to produce evidence as to the requisite elements of attempted rape and, therefore, no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The trial court erred, therefore, in denying Jones' Crim.R. 29(A) motion for acquittal.

{¶27} Jones' first assignment of error is sustained. His conviction is reversed and he is hereby ordered discharged.

{¶28} Our resolution of appellant's first assignment of error renders assignments of error two and three moot and, therefore, we need not consider them. See App.R. 12(A)(1)(c).

{¶29} Reversed; defendant discharged.

PATRICIA A. BLACKMON, P.J., and COLLEEN CONWAY COONEY, J., concur.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to 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.

TIMOTHY E. McMONAGLE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).