

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

11-0091

Appellant,

On Appeal from the
Wood County Court
of Appeals, Sixth
Appellate District

v.

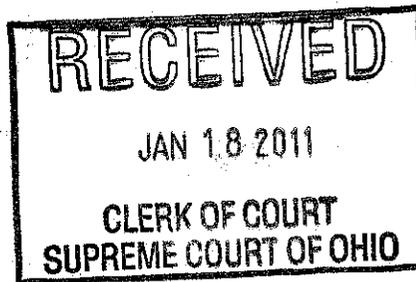
JOSHUA BAKER,

Court of Appeals
Case No. WD-09-088

Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
STATE OF OHIO

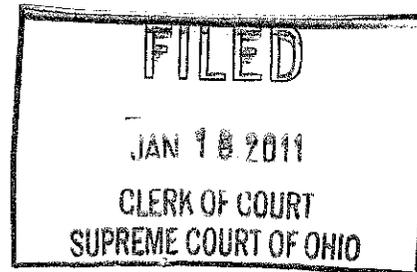
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**EXPLANATION OF WHY THIS CASE IS A CASE OF
GREAT PUBLIC OR GENERAL INTEREST**

The instant case presents a question of such great public interest as would warrant further review by this Court.

The State of Ohio, by and through the Wood County Prosecuting Attorney, asks this Court to weigh the evidence presented at trial to properly determine if the Sixth District Court of Appeals opinion which vacated Baker's eight year conviction for felonious assault was contrary to law.

If allowed to stand, the decision of the Sixth District would leave innocent persons across Ohio at risk, because the violent offenders whose actions cause certain results to unintended victims will no longer have a deterrent to acts.

STATEMENT OF WHY THIS COURT SHOULD ALLOW APPEAL

The case at hand represents a major injustice by a reviewing court that if allowed to stand would set a precedent in which the innocent general public will no longer be protected from violent acts perpetuated by identifiable and responsible persons. The Sixth District Court of Appeals improperly reviewed the evidence presented at trial and vacated the conviction of a violent offender after he was properly convicted in a bench trial by a competent trier of facts. Moreover, this Court in *State v. Post* held, "absent any evidence to the contrary, the trial court's conviction should not be overturned."¹

STATEMENT OF THE CASE AND FACTS

This case arises from the reversal of the Wood County Common Pleas Court Case No. 2009-CR-0129, conviction for felonious assault. In the Sixth District Court of Appeals Case No.

¹ *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, citing *State v. White* (1967), 15 Ohio St.2d 146, 151, 239 N.E.2d 65.

WD-09-088, the court ruled to vacate the judgment of the trial court based on a failure by the State to provide sufficient evidence to sustain the charge of felonious assault.²

The court of appeals overstepped its authority in ruling that there was insufficient evidence to support the State's charge when it reviewed the evidence, including witness testimony and video evidence, and substituted its opinion for that of the trial court. The appellate court specifically stated, * * * we conclude that the evidence was insufficient to establish that appellant acted knowingly, i.e. that he was aware that his conduct would probably cause a certain result or probably be of a certain nature * * *."³ Evidence at trial, including a rare two angle video recording, and witness testimony of the actions of appellant Josh Baker, striking another man in the face, then throwing a heavy glass at him, only to miss and seriously injure Carmen Oemig, standing directly behind the intended victim. Where intent must be determined from the facts and circumstances, the Sixth District may not utilize any of its talismanic powers to determine what the trier of fact believed, only *if* it believed the evidence, then was the conviction sustainable.

In support of its position on this issue, the appellant, State of Ohio, presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The court of appeals abused its discretion when it vacated Baker's conviction on a sufficiency of the evidence standard, by substituting its opinion for that of the trial court.

A reviewing court must strictly adhere to the standard of review afforded it by this Court. This Court has set forth the required test for a review of a sufficiency of the evidence argument;

² *State v. Baker*, Wood App. No. WD-09-088, 2010-Ohio-4053

³ *Baker* at ¶1.

“[a]n 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.”⁴

Where substantial credible evidence upon which a jury has based its verdict * * * a reviewing court abuses its discretion if it substitutes its judgment for that of the jury as to the weight and sufficiency of the evidence.⁵ Although the criminal case was decided by a bench trial, the State can find no case law that directs a reviewing court a contrary standard of review.

In the case at hand, an experienced common pleas judge, in a bench trial, examined all the presented evidence, including the rare video evidence that is unavailable in most cases because it shows two opposite views in close proximity to the event in dispute. The video was the key piece in identifying Baker's intent, as it allows the viewer to observe a throwing act in slow motion and freeze frame for clarity. The video presents the factfinder a means to identify all the actors and review their actions before, during and after the altercation which lead to the serious injuries to Carmen Oemig caused by a glass propelled across a crowded bar. This Court has held that “ * * * in a bench trial in a criminal case the judge is presumed to have considered only relevant, material and competent evidence in arriving at its judgment, unless it affirmatively appears to the contrary.”⁶

Although it is not ordinarily the function of this court to weigh evidence, it may do so in order to determine whether that evidence is of sufficient probative force to support a finding of

⁴ State v. Jenks (1991), 78 Ohio St. 3d 380, 387, 1997 Ohio 52.

guilt for conviction in a criminal case.⁷ It is fundamental that the weight to be given the evidence and credibility of the witnesses are primarily for the trier of the facts. Thus, in reviewing the legal sufficiency of evidence to support a jury verdict, it is the minds of the jurors rather than a reviewing court which must be convinced.⁸ A review of the Sixth District opinion paragraphs four through eleven, reveal its in depth analysis of the witness statements.

However, a review of the conclusion of the Sixth District clearly shows that it came to its own conclusions about what the evidence showed, rather than deciding if the evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt, as the law requires. It held,

In this case, after reviewing the testimony and video, we conclude that the state failed to present sufficient evidence that appellant *knowingly* caused the injuries to the victim. The videotape indicates conversation and then physical interaction between appellant and Long. In a quick succession of actions, the video shows Long abruptly turn around to face appellant, the splash of the drink, and appellant's punch to Long. Long stated that he did not see appellant throw a glass, even disputed that the glass hit or bounced off of him in any way, and was unaware that anyone else had been struck by a glass.

The whole incident took place in a matter of seconds. There is no audio to the blurry, grainy video, which indicates only that something was propelled and injured the victim. There was also no testimony which demonstrates that when he either splashed his drink or hit Long, appellant intended to throw the glass. Finally, there was no testimony or evidence that appellant was aware that his actions would probably cause a glass to fly across the room and then probably cause injuries to anyone. We certainly do not discount the serious injuries caused to the victim, Oemig, as a result of the propelled glass. Under the facts and circumstances of

⁵ *State v. Nicely* (1988), 39 Ohio St. 3d 147, paragraph two of the syllabus.

⁶ *Post* (1987), 32 Ohio St.3d 384.

⁷ *State v. Kulig, supra; State v. Murphy* (1964), 176 Ohio St. 385, 27 O.O. 2d 354, 199 N.E. 2d 884; *State v. Petro* (1947), 148 Ohio St. 473, 36 O.O. 152, 76 N.E. 2d 355; *Atkins v. State* (1926), 115 Ohio St. 542, 155 N.E. 189.

⁸ *State v. Thomas* (1982), 70 Ohio St. 2d 79, 80, where this Court reversed the court of appeals holding that it usurped the function of the jury by reversing its finding that defendant was guilty of committing the offenses and was not insane at the time. Citing, *State v. Petro* (1947), 148 Ohio St. 473, 501-502; *State v. DeHass* (1967), 10 Ohio St. 2d 230.

this particular case, however, the evidence presented simply was not sufficient to show that appellant knowingly caused her injuries.⁹

The 6th District added the following footnote, indicated at the end of its analysis:

1 The evidence may have showed negligent or reckless behavior at best. With regard to simple assault under R.C. 2903.13(B), a person acts *recklessly* when, "with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

This footnote is another sign that the appellate court was deciding what the evidence may or may not have shown, in its entirety, an erroneous review under the assignment of error which it claimed to be reviewing and the disposition it reached.

It is, however, well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence.¹⁰ "* * * [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. 1A Wigmore, Evidence (Tillers Rev. 1983) 944, Section 24 *et seq.*"¹¹ "Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable."¹²

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or

⁹ *Baker* at ¶25-26.

¹⁰ *State v. Kulig* (1974), 37 Ohio St. 2d 157, 309 N.E. 2d 897; *State v. Hankerson* (1982), 70 Ohio St. 2d 87, 434 N.E. 2d 1362, certiorari denied (1982), 459 U.S. 870; *State v. Kamel* (1984), 12 Ohio St. 3d 306, 466 N.E. 2d 860.

¹¹ *State v. Griffin* (1979), 13 Ohio App. 3d 376, 377, 460, 469 N.E. 2d 1329, 1331.

ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. * * *

[S]ufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' "State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed.1990) 1433. " In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." Id. In reviewing a challenge to the sufficiency of the evidence, " ' [t]he 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. Diar, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, quoting State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

"The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts."¹³ Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) Black's, *supra*, at 1594.

When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees

¹² *United States v. Andrino* (C.A.9, 1974), 501 F. 2d 1373, 1378.

with the factfinder's resolution of the conflicting testimony.¹⁴ The Sixth District's opinion shows a review of the record which it used to draw its own conclusions. Thus it disagreed with the factfinder's determination that Baker was in fact liable for his actions when he attempted to harm Long but in fact caused harm to the victim, Oemig.

Because the court engaged in a review of the evidence, and disagreed with the fact finder, then it has engaged in a manifest weight analysis, and cannot properly vacate the conviction.

Proposition of Law No. II: The doctrine of transferred intent is well held law in Ohio. Baker's actions, when viewed in light most favorable to the prosecution, allows his intent to cause serious physical harm to another, to be transferred to the victim.

The transferred intent rule of law in Ohio has been well settled. The doctrine of transferred intent provides:

“[w]here an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is liable as if he both intended to harm and did harm the same person.”

Restated, under the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim.¹⁵ It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.¹⁶ Intent “can

¹³ *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus.

¹⁴ *Tibbs*, 457 U.S. at 42, 102 S. Ct. at 2218, 72 L. Ed. 2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 20 Ohio B. Rep. 215, 219, 485 N.E.2d 717, 720-721

¹⁵ See *State v. Solomon* (1981), 66 Ohio St.2d 214, 217, 20 O.O.3d 213, 421 N.E.2d 139; *State v. Sowell* (1988), 39 Ohio St.3d 322, 332, 530 N.E.2d 1294.

¹⁶ *State v. Johnson* (1978), 56 Ohio St. 2d 35, 39, 10 O.O. 3d 78, 80, 381 N.E. 2d 637, 640; *State v. Thomas* (1988), 40 Ohio St. 3d 213, 217, 533 N.E. 2d 286, 290, certiorari denied (1989), 493 U.S. , 107 L. Ed. 2d 54, 110 S. Ct. 89.

never be proved by the direct testimony of a third person and it need not be. It must be gathered from the surrounding facts and circumstances * * *.”¹⁷

It is, however, well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence.¹⁸ “ * * * [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others.¹⁹ “Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.”²⁰

“Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. * * *.”

It is extremely rare for the State to provide such video evidence of a criminal act. The video, a complete recording from behind Baker, and another view from behind Oemig, establishes a prior strike to the head of a patron, a glass in the right hand of Baker, and a complete throwing motion towards his intended male victim. The fact remains that Baker’s poor aim resulted in “something” being propelled across the room (a fact that the Sixth District

¹⁷ *State v. Lott*, 51 Ohio St. 3d 160, 168 (Ohio 1990), citing *State v. Johnson* (1978), *supra*, at 38, 10 O.O. 3d at 80, 381 N.E. 2d at 640, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 5 O.O. 325, 1 N.E. 2d 313; *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E. 2d 517, paragraph five of the syllabus.

¹⁸ *State v. Kulig* (1974), 37 Ohio St. 2d 157, 309 N.E. 2d 897; *State v. Hankerson* (1982), 70 Ohio St. 2d 87, 434 N.E. 2d 1362, certiorari denied (1982), 459 U.S. 870; *State v. Kamel* (1984), 12 Ohio St. 3d 306, 466 N.E. 2d 860.

¹⁹ *State v. Griffin* (1979), 13 Ohio App. 3d 376, 377, 460, 469 N.E. 2d 1329, 1331, 1A Wigmore, Evidence (Tillers Rev. 1983) 944, Section 24 *et seq.*

²⁰ *United States v. Andrino* (C.A.9, 1974), 501 F. 2d 1373, 1378.

stated in its opinion), and serious injuries resulted to Oemig, directly in line behind the target.²¹ Here, the appellate court noted that such intent can be inferred from circumstantial evidence.²² Baker himself confirmed in his appellate brief that he struck the male patron once. Video footage shows that he was attempting to strike him again with the arm which was holding the glass.²³

Appellant contends that the State was required to prove that he knowingly caused serious physical harm to Oemig. However, under the doctrine of transferred intent, the State only had to prove he knowingly attempted to cause serious physical harm to another; the results then follow back to Baker for liability.²⁴

When the evidence presented at trial is supported by such clear and competent evidence, the proper conclusion is that Baker knowingly attempted to cause serious physical harm to the male bar patron, it then results in him being criminally liable for the resulting serious physical harm to Oemig.

²¹ *Baker* at ¶26.

²² *Baker* at ¶24.

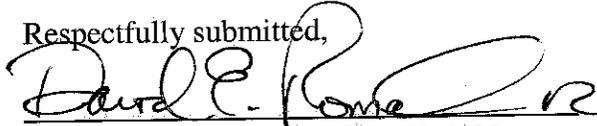
²³ Appellant Brief in Case NO. Wd-09-088, at page 6.

²⁴ Appellant Brief at page 7.

CONCLUSION

For the reasons discussed above, this case involves a matter of great public interest. The appellant requests this court accept jurisdiction in this case so that the important issues presented will be reviewed and justice in Ohio will protect innocent bystanders.

Respectfully submitted,



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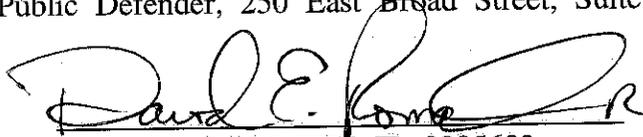
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, January 14, 2011, to counsel for Appellee, Mollie B. Hojinicki, 27457 Holiday Lane, Ste. G, Perrysburg, OH, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



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Assistant Prosecuting Attorney

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2010 SEP 30 A 8:49

SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFNER, CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio
Appellee

Court of Appeals No. WD-09-088
Trial Court No. 2009CR0129

v.

Joshua Baker
Appellant

DECISION AND JUDGMENT

Decided: SEP 30 2010

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicky, for appellant.

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COSME, J.

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{¶ 1} This is an appeal from a judgment issued by the Wood County Court of Common Pleas following a bench trial which found appellant, Joshua Baker, guilty of felonious assault. Because we conclude that the evidence was insufficient to establish that appellant acted knowingly, i.e., that he was aware that his conduct would probably cause a certain result or probably be of a certain nature, we reverse.

FACTS

{¶ 2} Appellant was indicted on March 19, 2009, on one count of felonious assault, in violation of R.C. 2903.11(A)(1). The charge stemmed from allegations that, during an altercation at a bar, appellant threw a glass which struck and injured someone across the room.

{¶ 3} At a bench trial held on October 13, 2009, the following evidence was presented. The victim, Carmen Oemig, testified that on February 1, 2009, she had been at the Clazel bar in Bowling Green, Ohio, celebrating a friend's birthday. Just after 1:30 a.m., while getting ready to leave, she stated that she was hit in the face by a hard force, which was later discovered to be a glass. She bled heavily from the blow which knocked out some teeth. Friends sat her down on nearby stairs to await medical assistance. Her injuries ultimately required surgeries and other medical treatment.

{¶ 4} During trial, a video recording was played showing the impact of the glass, as well as the moments leading up to the injury. The relevant video portions included clips from two vantage points. The first clip showed the area closer to the altercation between appellant and another male. The other clip was a view taken from the opposite side of the room, closer to Oemig's location. Oemig identified herself, standing with friends in the bar near a stairway. She verified that the video of the area where she was standing accurately represented what had happened to her that evening. She acknowledged that prior to being struck, she did not see the glass or where it came from

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and saw nothing of any activity between appellant and another man which were shown in the video.

{¶ 5} The next witness, Matthew Long, identified himself and appellant as the two men shown in the altercation on the video. Long claimed that he was about to leave the bar but was waiting for a friend when appellant confronted him, acting as if Long was someone he knew. The two exchanged words, and Long said he tried to walk away, but then turned back. Long denied being drunk or striking appellant, but acknowledged that he had also made confrontational statements to appellant.

{¶ 6} Appellant allegedly splashed Long with his drink, then punched Long. Long acknowledged that he did not actually see the glass thrown or where it landed. He stated that he was not hit by the glass and did not have any injuries from it. Long said the exchange with appellant was very quick and he was unaware that Oemig had been injured until he saw it on the video shown on television several days later.

{¶ 7} Banan Alkilani, a bar employee, then testified that he went to the two men during the altercation to defuse the situation. He claimed that he split up the parties and made appellant leave. He later assisted Oemig who was injured, but was unaware of how her injuries had occurred. He had employees clean up the broken glass, which was thrown away. Alkilani did not see the glass thrown or strike Oemig. The state then rested.

{¶ 8} Appellant presented several witnesses. Nicolas Boulis, Rick Wilson, and Phil Brown, friends of appellant, all testified that they were at the bar at the time of the

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altercation. Boulis and appellant had gone to the bar together that night. Wilson and Brown happened to be at the bar, observed the incident, but were not actually with appellant and Boulis.

{¶ 9} Nicolas Boulis, while watching the video, stated that Long confronted appellant and asked if he wanted "to go outside." As they were walking outside, Long abruptly turned and the two men bumped into each other. The men continued to argue, and appellant splashed Long with his drink in his left hand and then hit him with his right hand. At that point, Boulis went to appellant and said, "Let's get out of here." Boulis said the two then voluntarily left the bar and did not return. Boulis called a friend to pick them up. Boulis said neither he nor appellant were aware that the glass had been thrown or caused injuries to Oemig. Boulis stated that, after seeing the news broadcast, however, appellant had called him, was very upset about what had happened to Oemig, and decided to turn himself in to police.

{¶ 10} Rick Wilson testified that he was also at the Clazel that evening with Phil Brown, and identified himself and appellant in the video. As Wilson entered the bar with Brown, Wilson said Long looked over at him and confronted him, saying "What'd you say to me?" Wilson testified that Long acted drunk and seemed to be trying to pick a fight. Wilson and Brown went into the bar and moved up to a balcony area. Wilson was on his way back down to the first floor when he observed appellant and Long during the incident. Wilson testified that appellant splashed Long with his drink and then "slapped"

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him. Shortly after, appellant and Boulis left the bar. Wilson was unaware that a glass had been thrown or that Oemig had been injured.

{¶ 11} Phil Brown testified that, prior to entering the bar, he saw Long confronting another person outside the entrance, allegedly trying to start trouble. Brown said when Long turned to go inside the bar, Long then "got in Rick's face" trying to "talk trash to him." Brown said he and Wilson explained that nobody said anything to him, and Long finally turned and went into the bar. Brown and Wilson then also entered the bar. Brown also viewed the video, identifying appellant and Long, and indicated where he and Wilson had been during the incident. Brown had been up in the balcony lounge area and saw Long confront appellant. As Wilson came downstairs with Brown, Wilson saw appellant, who was facing him, splash his drink and then throw a right punch or slap. Wilson said he could not see if appellant had an open hand or closed fist. Wilson did not see anything thrown and was six to ten feet from the two men.

{¶ 12} After appellant left, Wilson did see Oemig after she was injured, but thought it was a completely separate incident, because she was so far away from where the altercation had occurred. Wilson also said when he went outside to check on appellant, he noticed Long had joined with a group of friends and was following after appellant who was a block away. Wilson called Boulis and appellant to warn them and tell them they needed to leave the area.

{¶ 13} Appellant also called Bowling Green Police Patrolman Chris Garman who investigated the incident. In a supplemental police report, someone from management

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had reported to him that Long had been struck by a glass that had bounced off his head and that Long had swelling to the left side of his face.

{¶ 14} Appellant then testified that he and Boulis had gone to the Clazel on the night of the incident. Appellant had been walking around looking at the bar renovations, since it had been a movie theater when he was there years before. Appellant was walking back to where Boulis was standing when Long looked over at him and said something to him. Appellant did not know Long, was unsure if he was speaking to him, and responded, "What?" When Long began confronting him, appellant said he told him, "I don't even know you." Long got "in his face" and acted very aggressively and threatening, asking if appellant had a "f-ing problem."

{¶ 15} Long then asked if appellant wanted to go outside and pointed. Appellant was nervous, but began to follow him outside. Appellant acknowledged that he wanted to just leave, but felt angry at being threatened. Long suddenly turned and bumped into appellant. Appellant said Long moved his hand up as if to punch him, so appellant splashed him with his drink and hit him. Appellant then remembered Boulis grabbing him and then they left the bar. They then called a friend who came and picked them up. Appellant was unaware that a glass hit Oemig or that she was injured. When he saw the news broadcast on television several weeks later, appellant said he was shocked about what had happened. He felt sorry for what had happened, but did not recall throwing any glass.

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{¶ 16} Appellant also identified himself and Long on the video and explained what had happened as the video played. He acknowledged that in the video it appears that he had a glass in his hand, but denied that he intended to throw a glass. Appellant then rested.

{¶ 17} The court found appellant guilty of felonious assault in the second degree and sentenced him to eight years incarceration, with three years of postrelease control.

{¶ 18} Appellant now appeals from that judgment, arguing four assignments of error.

SUFFICIENCY OF THE EVIDENCE

{¶ 19} In his first assignment of error, appellant asserts that:

{¶ 20} "The evidence at appellant's trial was insufficient to support a conviction and appellant's conviction is against the manifest weight of the evidence."

{¶ 21} We will first determine whether the conviction was supported by sufficient evidence. On appeal, the question of whether a conviction is supported by sufficient evidence is a question of law that is reviewed de novo. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Id.* at 390. In reviewing the evidence, an appellate court does not evaluate credibility and must make all reasonable inferences in favor of the state. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, superseded by constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89. Sufficient evidence is presented when viewing the evidence in a light

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most favorable to the prosecution, it allows a reasonable jury to conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Jenks*, supra, paragraph two of the syllabus.

{¶ 22} R.C. 2903.11(A)(1) provides that "[n]o person shall knowingly * * * cause serious physical harm to another * * *." "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." R.C. 2901.22(B).

{¶ 23} In other words, a defendant acts knowingly, when, although not intending the result, he or she is nevertheless aware that the result will probably occur. *State v. Edwards* (1992), 83 Ohio App.3d 357, 361. Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself. *State v. Huff* (2001), 145 Ohio App.3d 555, 563, citing to *State v. Adams* (June 8, 1995), 4th Dist. No. 94CA2041. "Because the intent of an accused person is only in his mind and is not ascertainable by another, it cannot be proven by direct testimony of another person but must be determined from the surrounding facts and circumstances." See *Adams*, supra; *State v. Paidousis* (May 1, 2001), 10th Dist. No. 00AP-1118.

{¶ 24} For example, the intentional firing of a firearm into a place where one or more persons are at risk of injury supports an inference that an assailant acted knowingly. *State v. Gregory* (1993), 90 Ohio App.3d 124, 131. Moreover, intent may be inferred

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from relevant circumstantial evidence, so long as such an inference is not based on the mere stacking of inference upon inference. *State v. Taylor* (Feb. 9, 2001), 7th Dist. No. 98-JE-31, citing *State v. Cowans* (1999), 87 Ohio St.3d 68, 78.

{¶ 25} In this case, after reviewing the testimony and video, we conclude that the state failed to present sufficient evidence that appellant *knowingly* caused the injuries to the victim. The videotape indicates conversation and then physical interaction between appellant and Long. In a quick succession of actions, the video shows Long abruptly turn around to face appellant, the splash of the drink, and appellant's punch to Long. Long stated that he did not see appellant throw a glass, even disputed that the glass hit or bounced off of him in any way, and was unaware that anyone else had been struck by a glass.

{¶ 26} The whole incident took place in a matter of seconds. There is no audio to the blurry, grainy video, which indicates only that something was propelled and injured the victim. There was also no testimony which demonstrates that when he either splashed his drink or hit Long, appellant intended to throw the glass. Finally, there was no testimony or evidence that appellant was aware that his actions would probably cause a glass to fly across the room and then probably cause injuries to anyone. We certainly do not discount the serious injuries caused to the victim, Oemig, as a result of the propelled glass. Under the facts and circumstances of this particular case, however, the

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evidence presented simply was not sufficient to show that appellant knowingly caused her injuries.¹

{¶ 27} Therefore, we conclude that the state failed to meet its burden, and that the evidence was insufficient to support appellant's conviction. The remainder of appellant's first assignment of error is moot.

{¶ 28} Accordingly, appellant's first assignment of error is well-taken. His second, third, and fourth assignments of error² are rendered moot.

{¶ 29} The judgment of the Wood County Court of Common Pleas is reversed. Appellant's conviction is vacated. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

¹The evidence may have showed negligent or reckless behavior at best. With regard to simple assault under R.C. 2903.13(B), a person acts *recklessly* when, "with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

²Second Assignment of Error: The trial court erred when it did not allow defendant to testify regarding admissible character evidence.

"Third Assignment of Error: The Court erred when it improperly questioned a witness.

"Fourth Assignment of Error: The trial court's imposition of the maximum sentence was contrary to law and constituted an abuse of discretion."

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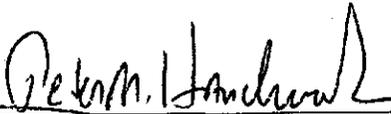
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State v. Baker
C.A. No. WD-09-088

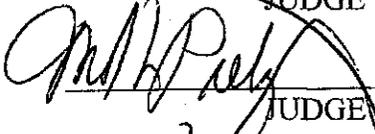
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.



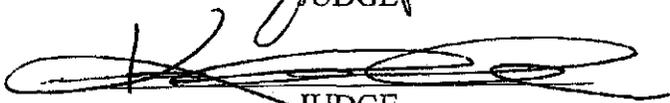
JUDGE

Mark L. Pietrykowski, J.



JUDGE

Keila D. Cosme, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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FILED
WOOD COUNTY, OHIO

2010 DEC -1 P 12: 58

SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFFMAN

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-088

Appellee

Trial Court No. 2009CR0129

v.

Joshua Baker

DECISION AND JUDGMENT

Appellant

Decided: DEC 01 2010

Appellee, the state of Ohio, has filed a motion to reconsider our decision in this case issued on September 30, 2010. Appellant opposes the motion.

An application for reconsideration must call "to the attention of the court an obvious error in its decision or [raise] an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, syllabus.

In its motion, appellee essentially sets forth the same arguments as in its brief. Therefore, we conclude that appellee has failed to point out any issues that were either

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not considered or fully considered by us in our decision. We also decline appellee's alternative request, submitted in reply to appellant's response in opposition, that we modify the judgment of the trial court.

Accordingly, appellee's motion for reconsideration is not well-taken and is denied.

Peter M. Handwork, J. _____

Mark L. Pietrykowski, J. _____

Keila D. Cosme, J. _____
CONCUR.

[Signature]

JUDGE
[Signature]

JUDGE
[Signature]

JUDGE

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