

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	
Appellant	:	On Appeal from the Wood County Court of Appeals, Sixth Appellate District
vs.	:	
JOSHUA BAKER	:	Court of Appeals Case Number WD-09-088
	:	
Appellee	:	

**AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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

The Ohio Prosecuting Attorneys Association (“OPAA”) supports Plaintiff-Appellant State of Ohio’s Memorandum in Support of Jurisdiction and urges this Court to grant jurisdiction. This case is of public and great general interest. The Sixth Circuit Court of Appeals has set a dangerous precedent in this Felonious Assault case, which, if allowed to stand, will undermine prosecutors’ ability to prosecute any crime in which the accused harms one person while intending to harm another. Until now, such offenders had been criminally liable for such acts under the well-settled doctrine of “transferred-intent.” Now, however, by a clear misapplication of the “sufficiency of evidence” standard of review, the Sixth Circuit has, inexplicably, judicially legislated the doctrine of transferred intent out of existence. The prosecuting attorneys from Ohio’s 88 counties require the doctrine be recognized and applied by the courts if they are to continue to effectively prosecute those who harm innocents in their attempt to harm others.

**STATEMENT OF THE CASE AND FACTS**

The OPAA joins in Plaintiff-Appellant’s Statement of the Case and Facts as presented in its Memorandum in Support of Jurisdiction.

**Amicus Curiae OPAA’s Proposition of Law No. 1:**

After correctly articulating the standard, the Court of Appeals misapplied the “sufficiency of evidence” standard of review and substituted its judgment – that the “knowingly” element was unproven. The proper analysis was to view the evidence in a light most favorable to the prosecution and determine whether any reasonable jury could conclude the “knowingly” element was proven beyond a reasonable doubt.

**Amicus Curiae OPAA's Proposition of Law No. 2:**

The Court of Appeals erred as a matter of law by failing to recognize, apply, or even discuss the doctrine of “transferred intent” in this case.

[ARGUED TOGETHER]

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

In its decision, the Sixth Circuit misapplied the standard of review for testing the sufficiency of the evidence to support the Felonious Assault conviction. And further, the court judicially legislated the time-honored doctrine of “transferred intent” out of existence.

The trial court below, in finding sufficient evidence to convict, was due deference in light of the extra-ordinary video evidence of Baker’s conduct at trial. Not only did the State present a rare two-angle video of the incident, it also presented eyewitness testimony of the altercation between Baker and Long. Baker threw his drink on Long, punched Long in the face and hurled a glass at Long – a glass which unfortunately struck and injured innocent victim Carmen Oemig. The facts and circumstances were certainly such that a rational trier of fact could reasonably find that Baker acted knowingly. As the Court of Appeals acknowledged, the “whole incident took place in a matter of seconds.” That being so, it is inexplicable how the Court could allow for Baker acting “knowingly” as to the splash and punch, but not in the hurling of the glass. The Court clearly erred as a matter of law by substituting its judgment for that of the trial court on this point.

“The test [for the sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any

rational trier of fact could have found all the essential elements of the offence beyond a reasonable doubt.”<sup>1</sup>

But the Court of Appeals, in reversing, did not apply this standard. It essentially sat as a “13<sup>th</sup> juror,” stating:

“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. 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 evidence presented simply was not sufficient to show that appellant knowingly caused her injuries.”<sup>2</sup>

This articulation of the court’s rationale clearly demonstrates its misapplication of the “sufficiency of evidence” standard of review (the court clearly employed the “weight of the evidence” standard of review in which the appellate court sits as a “13<sup>th</sup> juror” and simply disagrees with the fact-finder’s resolution of the conflicting evidence).

And the court actually stated that there was insufficient evidence that Baker knowingly injured the victim (Carmen Oemig), as though this had legal significance. Under the doctrine of “transferred intent,” the State need not demonstrate that Baker knowingly injured Carmen Oemig. His intent to injure Long (easily inferred by the surrounding facts and circumstances)<sup>3</sup> was enough.

Under the doctrine of transferred intent, where 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.<sup>4</sup> The rationale of this doctrine

rest[s] upon the common law theory which, in its principle application, establishes that one’s criminal intent follows the corresponding criminal act to its unintended consequences.<sup>5</sup>

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<sup>1</sup> *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E. 2d 717.

<sup>2</sup> See *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E. 2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S. Ct. 2211.

<sup>3</sup> *State v. Huff* (2001), 145 Ohio App. 3<sup>rd</sup>, 555, 563.

<sup>4</sup> See *State v. Robinson* (1999), 132 Ohio App. 3d 830, 839, 726 N E 2d 581.

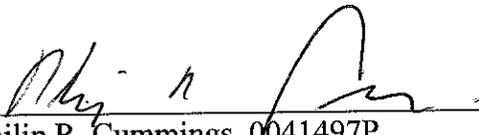
Disturbingly, the Court of Appeals did not recognize, discuss, or even acknowledge the existence of the doctrine in its decision. The OPAA is understandably concerned about prosecutors' ability now to prosecute those offenders who unintentionally injure unintended innocent Ohio citizens, while attempting to harm others.

### CONCLUSION

For the above reasons, this Court should grant jurisdiction in this case.

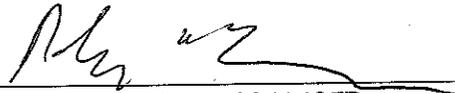
Respectfully,

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### PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Support, by United States mail, addressed to Paul A. Dobson, Wood County Prosecuting Attorney, One Court House Square, Bowling Green, Ohio 43402, and David E. Romaker, Jr., Assistant Prosecuting Attorney, Cincinnati, Ohio 45202, counsel of record, this 14 day of January, 2011.

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney

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<sup>5</sup> *State v. Matthew*(1979), 91 Cal. App. 3d. 1018, 154 Cal.Rptr. 628, relying on *State v. Clifton*, supra. See, e.g., Annotation. (1974), 55 A.L.R. 3d 620.