

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellant,

vs.

Joshua Baker,

Appellee.

\* On Appeal from the Wood County  
 \* Court of Appeals, Sixth Appellate  
 \* District  
 \*  
 \* Ohio Supreme Court  
 \* Case No. 2011-0091  
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 \* Court of Appeals  
 \* Case No. WD-09-088  
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APPELLEE, JOSHUA BAKER'S MEMORANDUM IN RESPONSE

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ON BEHALF OF APPELLANT

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**EXPLANATION WHY THIS CASE IS NOT OF  
PUBLIC OR GREAT GENERAL INTEREST**

Contrary to the State's assertions, this case is not a case of public or great general interest, and therefore, no further review by this Court is necessary. The Sixth District Court of Appeals appropriately and in accordance with current law, reversed Appellee's conviction of Felonious Assault and vacated Appellee's eight year prison sentence. In it's opinion, the Court of Appeals determined that the State of Ohio failed to submit evidence at the trial sufficient to support the Appellee's conviction.<sup>1</sup> The Court of Appeals' opinion does not involve a constitutional issue, nor a novel issue of law. Rather, the decision addressed specifically whether the State produced sufficient evidence at the trial of this case to sustain the verdict.

The State's contention that the Sixth District's opinion "would leave innocent persons across Ohio at risk",<sup>2</sup> has no basis in fact. The opinion could not be used as precedent in any subsequent case because the Court of Appeals' Decision was entirely fact specific. The State failed to produce evidence at the trial sufficient to establish a required element of the crime of Felonious Assault, that being that Appellee acted knowingly.

**STATEMENT WHY THIS COURT SHOULD NOT ALLOW APPEAL**

The Sixth District Court of Appeals properly reviewed the evidence which the State presented at trial, and correctly and according to current law, determined that the State failed to produce evidence sufficient to support a conviction. There is no need to look into this matter any further. Again, the State's contention that the Sixth District established a precedent that leaves the public vulnerable to violent acts is meritless because the Appellate Court's decision was based on the lack of evidence produced at trial to establish the requisite intent of the crime. The Court of Appeals employed a fact specific analysis which could not be used as precedent in any

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<sup>1</sup>State v. Baker, Wood App. No. WD-09-088, 2010-Ohio-4053.

<sup>2</sup>Memorandum in Support of Jurisdiction of Appellant State of Ohio at 2.

future appeals. The Sixth District's opinion is supported by the record in the case, and relevant law, and should not be disturbed.

## ARGUMENT

### RESPONSE TO PROPOSITION OF LAW NO. I: THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION WHEN IT VACATED BAKER'S CONVICTION ON A SUFFICIENCY OF THE EVIDENCE STANDARD, AND DID NOT SUBSTITUTE ITS OPINION FOR THAT OF THE TRIAL COURT.

In its well reasoned opinion, the Sixth District Court of Appeals determined that, "the evidence was insufficient to establish that the 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."<sup>3</sup> A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law.<sup>4</sup> The proper test to apply to this inquiry is the one set forth by this Court:

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.<sup>5</sup>

The State of Ohio erroneously argues that because there is a video of incident, that the video alone is sufficient to establish that Appellee acted knowingly. It does not. By all accounts the video evidence is grainy and blurry. A review of the "rare" video shows that no glass can be seen leaving the Appellee's hand, nor can a glass be seen flying through the air.

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<sup>3</sup>Baker, supra.

<sup>4</sup>State v. Thompkins (1997), 78 Ohio St.3d 380, 386.

<sup>5</sup>State v. Jenks (1991), 61 Ohio St.3d 259.

Even if the glass which struck Ms. Oemig originated in the Appellee's hand, the State was required to establish that Appellant *knowingly* caused serious physical harm to Ms. Oemig at the trial. "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."<sup>6</sup> What the "rare" video evidence does show is that Appellee intended to strike or punch one individual, a Mr. Long. If in attempting to punch Mr. Long, Appellee inadvertently lost control of a glass that was in his hand, it cannot be said that he should be aware that his conduct (punching Mr. Long) would probably cause the certain result that an individual all the way across the room would be injured from that action. Ms. Oemig was no where near the Appellee during the altercation, and was in fact completely across the room. Appellee was not even aware that Ms. Oemig was at the Clazel. Appellee acted in a manner to punch someone in the face with his hand or fist, not to throw an object at another individual. That is what the video shows. No witnesses presented by the State at the trial saw Appellee throw a glass. The video evidence, by itself, is insufficient to allow the trier of fact to conclude that Appellee acted knowingly as a matter of law.

The State seems to be contending that a review of the Sixth's District's Decision and Judgment indicates that the Court of Appeals assessed the credibility of the witnesses and the video.<sup>7</sup> This assertion is without merit. Regarding the testimony of the witnesses, simply because the Court of Appeals reviewed in its Decision, at paragraphs four through eleven, the testimony given by the witnesses, it does not logically follow that the court made credibility assessments. In fact, the Appellate Court is obligated to review the testimony of all witnesses presented, and all evidence presented, to determine if the State has met its burden. The Court of Appeals simply summarizes the testimony each witness gave. Not once does the Court of Appeals state that it did or did not believe any portion of the testimony given by any witness. The conclusion the Court of Appeals made from this review of the witnesses' testimony is merely that not one witness to the events in question observed Appellee throw a glass. This is

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<sup>6</sup>Ohio Revised Code §2903.11(A)(1).

<sup>7</sup>Memorandum in Support of Jurisdiction of Appellant State of Ohio at pages 4-5.

not a credibility determination, but rather a conclusion that the evidence, if believed, established that no witness saw the glass being thrown, and as such, no evidence was submitted regarding Appellee's intent from the witnesses.

Regarding the video, one cannot assess the credibility of such demonstrative evidence. The State asserts that the Court of Appeals improperly came to its own conclusions about what the video showed. In the same way that the Court of Appeals summarized the evidence presented by the witnesses at the trial, the court is simply recounting in its Decision what the video evidence demonstrates. This is not improper, nor an abuse of discretion. The video shows what it shows, and it does not show the Appellant acting "knowingly." As stated by the Court of Appeals:

The video tape indicates conversation 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.<sup>8</sup>

At no point does the video show Appellee throwing a glass, let alone, knowingly throwing a glass. The Sixth District's conclusions were in accordance with the standards established by this Court when reviewing a case based on a sufficiency of the evidence standard.

The State argues that it was improper for the Court of Appeals to look at what the evidence showed in determining whether or not the State met its burden of proof.<sup>9</sup> Appellee asks how else is a court of review to determine whether the evidence submitted, if believed, establishes all of the essential elements of the crime of Felonious Assault beyond a reasonable doubt, if it does not first determine what the evidence showed? The Sixth District's conclusion in this case was that the evidence presented by the State, if believed, did not show the Appellee acting knowingly; at most, it showed the Appellee acting negligently or recklessly. Negligent or reckless intent is not sufficient to convict the Appellee of Felonious Assault. As a matter of law, the court was required to reverse the conviction.

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<sup>8</sup>Baker, supra, at ¶25.

<sup>9</sup>Memorandum in Support of Jurisdiction at 5.

The State spends a great deal of time reciting the current state of the law regarding circumstantial evidence. The State fails, however, to indicate how its case law supports this court accepting jurisdiction of its appeal.<sup>10</sup> Appellee does not dispute that the case law cited by the State regarding circumstantial evidence is the current law. However, the Sixth District Court of Appeals evaluated all the State's evidence, direct, circumstantial and demonstrative, when it correctly determined that the State failed to establish that Appellee acted knowingly.

Furthermore, the State's submission that the Court of Appeals acted as the thirteenth juror and really decided the appeal on a manifest weight of the evidence standard is baseless.<sup>11</sup> It is clear from the Sixth District's Decision and Judgment that it reviewed the evidence properly under the sufficiency of the evidence standard and made the proper conclusion that the State's evidence failed to establish the Appellee's requisite mental state beyond a reasonable doubt. The mere fact that the Court of Appeals "disagreed with the fact finder," does not mean that the Sixth District utilized a manifest weight standard.

Under a manifest weight of the evidence review the court considers:

the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.<sup>12</sup>

As demonstrated above, the Court of Appeals made no credibility determinations, and did not engage in resolving any conflicts in the evidence. The Sixth District accepted the entire case presented by the State as fact. The court concluded, as a matter of law, the evidence failed to prove beyond a reasonable doubt that the Appellee acted knowingly. In other words, that a rational trier of fact could have found that the element of "knowingly," an essential element of

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<sup>10</sup>Id. at 6-7.

<sup>11</sup>Id. at 7-8.

<sup>12</sup>State v. Martin (1983), 20 Ohio App.3d 172, 175.

the crime of Felonious Assault, was proven beyond a reasonable doubt. This is clearly a sufficiency of the evidence review, not manifest weight of the evidence as suggested by the State.

The Sixth District Court of Appeals made its ruling applying a sufficiency of the evidence standard. Reversal, not remand, was the proper and appropriate result, and as a matter of law Appellee's sentence was properly and appropriately vacated. The Decision of the Court of Appeals should remain undisturbed, and this Court should deny jurisdiction of the State's appeal.

**RESPONSE TO PROPOSITION OF LAW NO. II: WHILE THE DOCTRINE OF TRANSFERRED INTENT IS WELL SETTLED LAW IN OHIO, IN ORDER FOR INTENT TO TRANSFER, IT MUST EXIST IN THE FIRST PLACE. THE STATE FAILED TO ESTABLISH THAT APPELLEE ACTED KNOWINGLY, THEREFORE THERE IS NO INTENT WHICH CAN TRANSFER.**

The State of Ohio spends a great deal of time discussing the doctrine of transferred intent, and again addresses circumstantial evidence.<sup>13</sup> Appellee does not dispute the validity of the doctrine of transferred intent. However, intent can only transfer when it exists in the first place. As argued by Appellee above, the State failed to establish that Appellee knowingly threw a glass at anyone. He did not intend to throw a glass at all. The State again relies entirely on the video evidence, and claims that the video evidence shows Appellee attempt to throw a glass at Matthew Long. A review of the video confirms that in the seconds before Ms. Oemig was struck by a glass, the Appellee is moving his arm forward, towards Mr. Long, as if to strike Long in the face with his fist. Contrary to the State's contention that the video demonstrates the Appellee engaged in a "complete throwing motion,"<sup>14</sup> the movement in question can only be fairly described as that consistent with a punch. In addition, in reviewing the surveillance video no glass can be seen leaving the Appellee's hand, nor from any other source, nor can a glass be seen flying through the air. There is no evidence establishing that the glass which struck Ms. Oemig in the face originated from the Appellee's hand.

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<sup>13</sup>Memorandum in Support of Jurisdiction of Appellant State of Ohio at pages 8-9.

<sup>14</sup>Id. at 9.

The Court of Appeals concluded that, “something was propelled and injured the victim.”

<sup>15</sup> As previously stated above, if in attempting to punch Mr. Long, Appellee inadvertently lost control of a glass that was in his hand, it cannot be said that he should be aware that his conduct (punching Mr. Long) would probably cause the certain result that an individual clear across the room would be injured from that action. This is not akin to a case where a defendant shoots a gun at someone in a crowded room. The evidence which the State presented at trial confirms Appellee acted in a manner to punch someone in the face with his hand or fist, not to throw an object at another individual.

The State failed to produce any evidence to suggest that the Appellee knowingly threw a glass at Mr. Long. If there was no evidence presented which would demonstrate an intent to knowingly throw a glass at Mr. Long, it only logically follows that there is no intent which can be transferred to Ms. Oemig in this case.

It is worth noting that the State’s representation that “Appellant [sic] contends that the State was required to prove that he knowingly caused serious physical harm to Oemig<sup>16</sup>” is a complete misrepresentation. Appellee’s argument as cited to by the State in previous Briefs is the same argument that Appellee makes in this Memorandum, specifically the State could not establish as a matter of law any intent by the Appellee to knowingly throw a glass at all, let alone throw the glass at a person, be it Mr. Long or Ms. Oemig; therefore, no intent can transfer to Ms. Oemig.

Because the State failed to establish that Appellee knowingly threw a glass at all, the doctrine of transferred intent is irrelevant. The Decision of the Court of Appeals should be left undisturbed, and this Court should deny jurisdiction of the State’s appeal.

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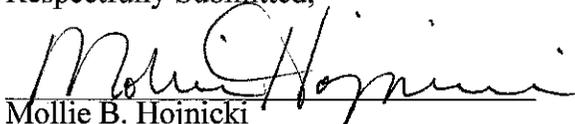
<sup>15</sup>Baker ¶26.

<sup>16</sup>Memorandum in Support of Jurisdiction at 10.

**CONCLUSION**

Based upon the authority and arguments presented herein, Appellee, Joshua Baker, submits that this case is not a case of public or great interest, and respectfully moves this court to decline jurisdiction of this appeal.

Respectfully Submitted,

  
Mollie B. Hojnicky  
Attorney for Appellee

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. mail 1<sup>st</sup> day of February, 2011 to:

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