

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-018
DANIEL EDWARD KOVACIC,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000546.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Kenneth D. Myers, 6100 Oak Tree Boulevard, Suite 200, Cleveland, OH 44131 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Daniel Edward Kovacic, appeals the judgment of the Lake County Court of Common Pleas. A jury convicted Kovacic of assault, a violation of R.C. 2903.13(A). The victim was a peace officer in the performance of his official duties. Kovacic was sentenced to a 15-month term of imprisonment, as the violation was a fourth-degree felony.

{¶2} On appeal, Kovacic argues that the trial court erred when it instructed the jury on the doctrine of transferred intent. Kovacic claims that intent to assault a non-peace officer victim cannot be transferred to intent to assault a victim who is a peace officer. For the following reasons, we affirm the judgment of the trial court.

{¶3} Kovacic's assault charge stems from an incident occurring on the evening of June 5, 2009, at the St. Mary Magdalene Festival. Officer Pyle, Officer Neibecker, and Sergeant Stanek, all of the Willowick Police Department, were on detail at the festival. The officers were dressed in full uniform.

{¶4} A fight ensued between Kovacic and Chad Gourley. Sergeant Stanek approached the incident and grabbed Kovacic around the chest. He then radioed for assistance. As Sergeant Stanek restrained Kovacic, Gourley began punching Kovacic. Sergeant Stanek released Kovacic and attempted to secure Gourley, which was done by means of a TASER. Sergeant Stanek testified that, at this point, he lost sight of Kovacic. Sergeant Stanek next saw Kovacic in handcuffs.

{¶5} Within moments of Sergeant Stanek's arrival, Officers Pyle and Neibecker approached the scene. Officers Pyle and Neibecker secured Gourley. Officer Pyle testified that both he and Officer Neibecker escorted Gourley away from the scene, as a large crowd had congregated at the fight. They walked Gourley towards a trailer where no one was present. Officer Pyle then stated: "out of the corner of my eye, I saw [Kovacic] come by, swing, and punched me, hit me right down, dead center side of my head ***." Officer Pyle testified that Kovacic then cocked back to punch Gourley, but, "when he couldn't get a punch off at Gourley," he turned around to run. Officers Pyle and Neibecker tackled Kovacic, and he was arrested.

{¶6} Officer Pyle described Kovacic's punch as follows:

{¶7} "It was a direct hit. Obviously I was what he was aiming for and it was hard. Looked like he was hitting as hard as he could. I have been a police officer a long time. And it was an intentional strike which is why I probably reacted vocally the way I did. I was kind of shocked at it."

{¶8} Officer Neibecker testified that he assisted Officer Pyle in escorting Gourley away from the crowd. As they were attempting to place Gourley into custody, "another man had come from behind one of the tents and ran up and punched Officer Pyle in the head." Officer Neibecker identified this man as Kovacic.

{¶9} Nick Bencivenni and Randy Walsh testified for the defense. Walsh testified that he was at the festival when the fight ensued. He stated that he did not witness Kovacic punch Officer Pyle, but perhaps Kovacic accidentally struck Officer Pyle when Officer Pyle was securing Gourley.

{¶10} The jury found Kovacic guilty of assault, a felony of the fourth degree, in violation of R.C. 2903.13(A), with an additional finding that the victim was a peace officer in the performance of his official duties. Kovacic was sentenced to a 15-month term of imprisonment.

{¶11} Kovacic filed a timely notice of appeal and asserts the following assignment of error for our review:

{¶12} "The trial court erred by giving the 'transferred intent' instruction to the jury, to appellant's prejudice."

{¶13} Kovacic maintains that the instruction to the jury on transferred intent was error, “because in the case of assault, the jury instruction was an incorrect statement of law.”

{¶14} The doctrine of transferred intent provides, “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, and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the second person.” *State v. Reese*, 1st Dist. Nos. C-060576 and C-060577, 2007-Ohio-4319, at ¶21. (Citations omitted.)

{¶15} “Generally, the trial court should give requested instructions if they are a correct statement of the law applicable to the facts in the case.” *Zappola v. Leibinger*, 8th Dist. Nos. 86038 and 86102, 2006-Ohio-2207, at ¶86, citing *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. The trial court gave the following instructions:

{¶16} “An offender who intentionally acts to harm someone but ends up harming another is criminally liable as if the offender had intended to harm the actual victim.”

{¶17} This court will review the giving of jury instructions under an abuse of discretion standard. *State v. Martens* (1993), 90 Ohio App.3d 338, 343. “If the jury instruction incorrectly stated the law, then a *de novo* review must be performed to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” *Humphrey v. Belmont* (Sept. 24, 1998), 7th Dist. No. 95-BA-51, 1998 Ohio App. LEXIS 4573, at *5-6. (Citation omitted.)

{¶18} The trial court’s instruction was a correct statement of law, and, therefore, we need not perform a de novo review. We determine whether the trial court abused its discretion by instructing the jury on the doctrine of transferred intent.

{¶19} Kovacic was charged with assault, a violation of R.C. 2903.13, which provides:

{¶20} “(A) No person shall knowingly cause or attempt to cause physical harm to another or to another’s unborn.

{¶21} “***

{¶22} “(C) Whoever violates this section is guilty of assault ***. Except as otherwise provided *** assault is a misdemeanor of the first degree.

{¶23} “***

{¶24} “(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.”

{¶25} Under the Ohio Revised Code, 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). This court has affirmed a finding that a defendant acted knowingly when he struck a teacher with a book. *In re R.A.M.*, 11th Dist. No. 2010-L-011, 2010-Ohio-4198, at ¶14. See, also, *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, at ¶38 (holding that the

appellant was aware that swinging at an officer would probably result in hitting and injuring the officer and, thus, the appellant acted knowingly).

{¶26} On appeal, Kovacic argues that “there was testimony from Walsh that while Gourley was being restrained by [Officer] Pyle, [Kovacic] may have accidentally hit [Officer] Pyle while attempting to hit Gourley.” And, based on this evidence, Kovacic maintains that the instant case is analogous to *In re A.C.T.*, 158 Ohio App.3d 473, 2004-Ohio-4935, an opinion issued by the Second Appellate District. Therefore, Kovacic asserts that the “state must prove the defendant knowingly assaulted the person who was actually struck, and not the person who was accidentally struck.”

{¶27} *In re A.C.T.* involved a juvenile, A.C.T., who became involved in an argument with another student at school. *In re A.C.T.*, supra, at ¶2. A physical encounter ensued, and a teacher attempted to stop the fight. *Id.* The teacher “quickly inserted herself between the two students.” *Id.* A.C.T., who had her arm cocked back to punch the other student at the time the teacher attempted to break-up the fight, struck the teacher in her back. *Id.* A.C.T. was charged with assault, a felony of the fifth degree. *Id.* at ¶3.

{¶28} On appeal, the juvenile argued that the “trial court erred in applying the doctrine of transferred intent to find that [her] intent to strike another student could be transferred and meet the statute’s requirement of intent to strike a school teacher.” *Id.* at ¶21. The Second District reversed the trial court’s finding of guilty, noting:

{¶29} “In this case, A.C.T. claims that she did not hear [the teacher] tell the students to stop fighting. Rather, it was not until A.C.T. had struck [the teacher] that A.C.T. realized [the teacher] was present. Thus, this was not a situation in which A.C.T.

continued flailing and punching without any regard for the teacher's presence. On the contrary, A.C.T. had already cocked her arm back to strike the fellow student before [the teacher] inserted her body between the fighting students." *Id.* at ¶27.

{¶30} We decline to apply *In re A.C.T.*, *supra*, to this case. The holding of *In re A.C.T.* suggests that the mental culpability of "knowingly" is not met when contact is incidental or accidental. *Id.* The facts of *In re A.C.T.*, *supra*, are undisputed. Both the state of Ohio and A.C.T. agreed that A.C.T. "knowingly attempted to strike her fellow student when she accidentally struck [the teacher.]" *Id.* at ¶26.

{¶31} Based on the evidence presented at trial, *In re A.C.T.*, *supra*, is inapposite to the instant case. In this case, the state and the defense presented two different versions of how Officer Pyle was struck by Kovacic.

{¶32} The state presented evidence that Kovacic intentionally hit Officer Pyle. Officer Pyle testified as follows:

{¶33} "Q: You're certain the person that punched you is the person that you took into custody and arrested?

{¶34} "A: He is. Absolutely one hundred percent.

{¶35} "Q: How are you so certain of that?

{¶36} "A: I saw him punch me. Felt him punch me. Arrested him immediately afterward.

{¶37} "***

{¶38} "Q: And you testified that you're absolutely one hundred percent certain that not only did Mr. Kovacic hit you, but that he intended to hit you; correct?

{¶39} “A: Correct. I don’t see how it would have been possible to make that mistake with the distance between me and Mr. Gourley. And such a direct strike. Wasn’t grabbing, it wasn’t just barely nick. It was directly to the side of my head and my head was right next to or anywhere between probably two feet from Mr. Gourley.

{¶40} “Second to that, he is a lot taller than me. So he had to actually be coming after me to strike me that squarely to the side of my face.”

{¶41} The defense’s theory was that Kovacic did not intentionally strike Officer Pyle, but that Officer Pyle was accidentally hit by Kovacic. In fact, as observed by the trial court, it was not until Walsh testified to the following events that the doctrine of transferred intent became applicable. The following colloquy occurred:

{¶42} “Q: Did you see police officers separating both of them or was it that they were pushing one aside leaving the other free?

{¶43} “A: One officer took [Gourley] first, then [Kovacic] second. And then [Kovacic] was able to break free shortly after and I seen him punch [Gourley] a couple times before he was restrained again.

{¶44} “Q: Now when you saw [Kovacic] punch [Gourley], was [Gourley] being restrained by an officer?

{¶45} “A: Yes.”

{¶46} Although the facts of the instant case are in dispute, Kovacic was aware of the police officers’ presence when the blow was struck, under either version of the events. In fact, at one point, Kovacic was secured by an officer. Based on the evidence, Kovacic’s actions were not incidental or accidental.

{¶47} Additionally, case law is well-established that knowledge of the victim's status as a peace officer is not required. "[T]here is no indication whatsoever that the General Assembly intended to impose anything other than strict liability for the peace officer penalty enhancement contained in R.C. 2903.13(C)(3)." See, e.g., *State v. Wilcox*, 160 Ohio App.3d 468, 2005-Ohio-1745, at ¶7 (it is irrelevant whether the appellant knew that those stopping his car were peace officers); *State v. Watson*, 12th Dist. No. CA2005-12-038, 2007-Ohio-129, at ¶11.

{¶48} "(T)he State is not required to demonstrate that the accused kn(ew) or (was) aware of the fact that the victim was a peace officer, in order to elevate the offense of assault (from a misdemeanor to a fourth-degree felony under) R.C. 2903.13(C). (***) "The General Assembly has articulated the elements of R.C. 2903.13 with sufficient clarity to indicate that the victim's status as a police officer shall elevate the criminal offense of assault from a misdemeanor of the first degree to a felony of the fourth degree regardless of whether or not the accused specifically knows of the victim's status as a peace officer." *Id.* at ¶10." *Watson*, *supra*, at ¶8, quoting *State v. Carter*, 9th Dist. No. 21474, 2003-Ohio-5042.

{¶49} Appellant further suggests the enhancement under R.C. 2903.13(C)(3) is inapplicable when the actor's intent was not to strike a police officer, but another individual. We decline to adopt such a rule. The enhancement is to be viewed from the standpoint of the victim, i.e., if the defendant has committed an assault, and the victim is a police officer, the enhancement at issue is applicable. Therefore, the instruction on transferred intent was proper. This is consistent with the intent of the legislature and

prior case law establishing strict liability to the enhancement provision under R.C. 2903.13(C)(3).

{¶50} We hold that the trial court did not abuse its discretion, as the above jury instruction was applicable to the facts in the case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d at 591. (Citation omitted.) We overrule Kovacic's sole assignment of error and affirm the judgment of the Lake County Court of Common Pleas.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.