Case No. 2024-1770

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
Plaintiff-Appellant,	)	On Appeal from the Ohio Court of Appeals, Eighth Appellate District
v.	)	
	)	Court of Appeals Case No. 113158
LEANDER BISSELL,	)	
Defendant-Appellee.	)	

BRIEF OF AMICUS CURIAE CERTAIN OHIO CRIMINAL LAW PROFESSORS IN SUPPORT OF APPELLEE LEANDER BISSELL ON PROPOSITION OF LAW I

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STATEMENT OF AMICUS INTEREST

The undersigned are professors at Ohio law schools teaching in the area of Criminal Law and Criminal Procedure. Collectively, we do not represent a particular agenda or interest. Rather, we are concerned with the accurate and fair application of the fundamental principles of criminal law.

Given that our concern does not depend on a particular result reached in a particular case we wanted to write about mens rea and its importance to the law and Ohio's Criminal Code from a historical perspective. As such, our arguments below reflect a dispassionate review of the law as it exists in the context of its plain text, the history of the common law, and the intent of the legislature that wrote the law being applied in this case.

This is a hard case. The tragic death of Johnny Tetrick is a loss to his family, his colleagues, and the community. Though it is a centuries-old legal adage, even this Court has struggled with the notion that "[h]ard cases, indeed, often make bad law." *State ex rel. Carter v. Celebrezze*, 63 Ohio St.2d 326, 330 (1980) (Brown, concurring). Here, the Court should make the hard choice to avoid making bad law that destroys the distinction between knowledge and recklessness by either dismissing the case as improvidently accepted or affirming the Eighth District Court of Appeals decision

regarding the felony murder and felonious assault charges. *See id.* ("Herein, however, I must opt for the hard decision rather than the bad law.").

The following Criminal Law professors sign onto this brief in their individual capacity. Their views do not represent the views of their institution. This is also true of counsel, Professor Robert Barnhart

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STATEMENT OF FACTS

Amicus defers to this Court and its ascertainment of the facts. We only want to highlight some language from the trial court's announcement of the decision.

The trial court stated: "Much was made about the element of knowledge in this case. That the defendant did not knowingly cause the death of Johnny Tetrick. Under Ohio law, a person acts knowingly, regardless of his purpose, when he's aware that his conduct will probably cause a certain result or will probably be of a certain nature. It is

not necessary that the accused be in a position to foresee precise consequence of his conduct. Only that his consequences be foreseeable from the sense that what actually transpired was natural and logical and that it was within the scope of the risk created by his conduct."

In this statement, as outlined below, the trial court made the legal error of conflating proximate cause with knowledge.

ARGUMENT

1. Response to Proposition 1: Knowingly is not an enhanced form of recklessness. A person acts knowingly when one acts with the knowledge his or her behavior will probably cause a certain and specific result.

When Ohio began modernizing its Criminal Code in 1971 the Technical Committee to Study Ohio Criminal Law and Procedure started with the premise that, "[the rule that conduct is not criminal unless the perpetrator has the mens rea, the guilty mind, is the hallmark of civilized law." Ohio Legislative Service Commission, *Proposed Ohio Criminal Code* at x (1971) (hereinafter "Commission Report"). The Commission recognized that "[e]xisting Ohio law ha[d] an almost bewildering diversity of terms describing mental state." *Id*. The Commission elected to use the same four mental states outlined in the Model Penal Code, but "redefined them in language that does less violence to traditional Ohio concepts of these mental states." *Id*.

The Appellant's position would do violence to the text and concept of the knowingly standard and its existing jury instructions by collapsing it into recklessness. It also would compound the error made by the trial court in conflating the "natural and logical" doctrine from proximate cause with the requirement a knowing defendant foresee the probability of a *certain result*.

A. The text and legislative history of Ohio's knowingly standard do not support the idea it is an "enhanced" form of recklessness.

Ohio's current definition of knowingly states: "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will *probably* cause a certain result or will probably be of a certain nature." R.C. 2901.22(B)

The journey to this definition started in a different place. In 1971, the Commission suggested the following definition: "A person acts knowingly, regardless of his purpose, when he is consciously aware that his conduct is *likely* to cause a certain result or *likely* to be of a certain nature." Commission Report at 39.

The originally proposed definition of reckless gives context to this difference: "A person acts recklessly when he consciously and unjustifiable disregards a substantial risk that his conduct *may* cause a certain result or *may* be of a certain nature." *Id*.

The current definition of reckless is: A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is *likely* to cause a certain result or is *likely* to be of a certain nature." R.C. 2901.22(C).

Thus, a study of legislative history shows the Ohio legislature changed the language in each section to make it more strict. The knowledge standard changed from "likely" to "probable" and the reckless standard changed from "may" to "likely." The 1973 commentary when the law was passed is instructive: "'Knowingly' in the new code is the same as 'knowingly' in the former law." R.C. 2901.22, commentary.

Given that the legislature intended to codify the prior definition of knowing, a review of cases applying that standard reveals the Appellant's proposed reading of the knowledge standard is precisely what the legislature was trying to avoid. In *State v. Creech*, 5 Ohio App.2d 179 (3d Dist. 1964), the Court of Appeals reversed a conviction for second-degree murder and entered a conviction for first-degree manslaughter on sufficiency of the evidence grounds. The *Creech* court held that when the defendant "did not intend either to shoot or to kill the decedent, that although she aimed near to him or in his direction, she did not knowingly, purposely or intentionally aim at him, and his killing was therefore unintentional." *Id*. at 186. The *Creech* case demonstrates an understanding of the term knowingly in the former law much closer to intent than as an enhanced form of recklessness.

The First District used a similarly stringent knowingly standard in *City of Cincinnati v. Christy*, 7 Ohio App.2d 46 (1st Dist. 1966). In that case, the court reversed a conviction for knowingly permitting an unlicensed driver to operate a car. The reason for reversal was simple. The defendant asked the other driver if he had a license and the other driver said that he did. Without any discussion of probability or risk taking the court simply concluded the defendant's testimony "disprove[d] that the appellant knowingly permitted an unlicensed person to operate his car." *Id*. at 47.

This Court also highlighted a definition of knowingly closer to intent in *State v. Saylor*, 6 Ohio St.2d 139 (1966). There, the Court was interpreting a criminal statute that

stated, "no person shall knowingly sell, lend, give away, exhibit, or offer to sell, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet." *Id*. at 140 (quoting former RC 2905.34). Relying on *Jacobellis v. State of Ohio*, this Court explained that knowingly "include[s] 'scienter' (guilty knowledge) and 'mens rea' (guilty purpose), both of which must be established by proper evidence to sustain a conviction." *Id*. at 140 (quoting *Jacobellis v. State of Ohio*, 173 Ohio St. 22 (1962), syllabus. Again demonstrating that the historical understanding of knowledge Ohio sought to codify was closer to intent than recklessness.

These cases demonstrate that if the legislature meant what it said when it said its purpose was to codify Ohio's then-understanding of knowingly, then Appellant's position about enhanced recklessness defies precisely what the legislature was trying to do.

Beyond what the legislature said in its commentary when passing the definitions, the Committee's commentary on what constitutes knowledge versus recklessness reveals the Appellant's proposed definition does violence to Ohio's established mens rea concepts. The Committee's example of a person acting knowingly is that "[i]f in a barroom fight, an offender brains his antagonist with a bar stool and kills him, he is guilty of murder (the Committee had suggested that murder have a mens rea of knowledge) even though he had no intention of killing the mean, because he was

consciously aware that a bash with a bar stool is likely to result in death." Committee Report at 41. This would be akin to a criminal defendant driver actually seeing and being fully aware of a pedestrian in his immediate path yet choosing to ram his car into that person without stopping or slowing down.

It is telling that the Committee's examples for "reckless" all involve facts similar to this case. "In the Technical Committee's opinion, driving in excess of 100 mph on a freeway would be reckless, even in dry, clear weather[.]" *Id*. Other examples also involve unsafely operating a motor vehicle: "Similarly, the speed boat operator who goes flat out in a congested dock area or in a known shoal water is, in the Committee's opinion, reckless." *Id*. "The pilot who practices spins in an aircraft uncertified for aerobatics, is guilty of recklessness." *Id*. The Committee indicated all of these individuals would be guilty of aggravated vehicular homicide if someone was killed as a result. That offense has a mens rea of reckless.

Whether one looks to precedent, the Committee's goals, or the legislature's commentary, it is clear that knowledge is not an enhanced form of recklessness. This Court should reaffirm that knowledge is, in fact, closer to intent.

B. Ohio's current jury instructions do not support the position that knowledge is an enhanced form of recklessness.

If this case had been tried to a jury, the court would have instructed them that "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably (cause a certain result)." Ohio Jury Instruction, CR §

417.11 [Rev. Dec 7, 2024]. They would have been further told, "[b]ecause you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness of the *high probability* that another person would have been caused serious physical harm." *Id*. (emphasis added and alleged result described).

The instruction cited by the Appellant that "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact," is not applicable in this case. *See* Appellant's Brief at 23. The commentary to the instruction indicates that instruction should be given "only when knowledge of the existence of a particular fact is an element of the offense." Ohio Jury Instruction, CR § 417.11 [Rev. Dec 7, 2024]. Here, the existence of a particular fact is not an element of the felonious assault or felony murder offense.

Thus, a jury would have been asked to consider whether, at the time of the act, there existed in the mind of the defendant the knowledge that there was a high probability he would strike someone with his car. The idea that our action will have a high probability of achieving a specific result (in this case striking another human being

with a car) is not akin to disregarding a risk. It is more akin to intending an outcome because that outcome is the most probable one.

C. The Appellant's position compounds the trial court's error in conflating the standard for proximate cause with knowledge.

The trial court made a mistake when it announced its decision about the knowingly element. The court stated: "It is not necessary that the accused be in a position to foresee precise consequence of his conduct. Only that his consequences be foreseeable from the sense that what actually transpired was natural and logical and that it was within the scope of the risk created by his conduct."

That language is not about whether a person acts knowingly for a predicate felony. It appeared in *State v. Losey*, 23 Ohio App.3d 93 (10th Dist. 1985), as a rule for when a defendant's action can be said to be the proximate *cause* of a result. *Id*. at 96. *Losey* was about whether a defendant who committed the predicate felony of burglary had caused the death, and thus also committed involuntary manslaughter, of an elderly woman who died from heart failure after discovering an open door after the defendant had left the scene. *Id*. at 93-94. This language about proximate cause is to set limits for the culpability in unintended deaths as it relates to remote causes, not lower the stringent standard to prove knowledge for a predicate felony.

If the Appellant's position that this instruction states a standard for knowledge (here, for the predicate felony of felonious assault), then knowledge and recklessness

will collapse into a single mens rea of reckless by using a standard that judges unintended deaths as a substitute for knowledge.

D. This court should affirm the Eighth District on the basis of intent, text, tradition, and clarity.

The standard for knowledge is more akin to intent than it is an enhanced form of recklessness. This Court should either reaffirm that standard used by the Eighth District or dismiss this case as improvidently granted because a mere disagreement with the application of the correct standard will not provide any guidance to other courts. The Eighth District's explication and application of the knowledge standard is in harmony with the legislative intent, common law tradition, and jury instructions used around the State. Reversing the Eight District and sanctioning the trial court's importing proximate cause analysis into the mens rea of knowing will only cause confusion and defy the will of the legislature.

CONCLUSION

This Court should dismiss the State's appeal as improvidently granted or affirm the lower court's understanding of the standard for acting knowingly.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the BRIEF OF AMICUS CURIAE CERTAIN OHIO CRIMINAL LAW PROFESSORS IN SUPPORT OF APPELLEE LEANDER BISSELL ON PROPOSITION OF LAW I was served upon the following counsel:

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