

NO.

IN THE SUPREME COURT OF OHIO

14-0942

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99998

STATE OF OHIO,

Plaintiff-Appellant

-vs-

DAJHON WALKER,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

CHRISTOPHER D. SCHROEDER (0089855)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

Counsel for Defendant-Appellee

LEIF B. CHRISTMAN
1370 Ontario Street, Suite 2000
Cleveland, Ohio 44113
(216) 241-5019
lbchristman@hotmail.com

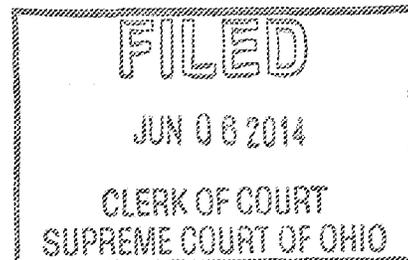
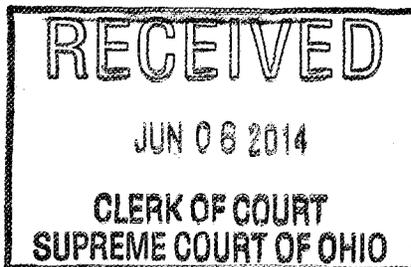


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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

Three times in two weeks, the Eighth District Court of Appeals has reversed an aggravated murder conviction based on its disagreement with the trier-of-fact that sufficient evidence existed to support a finding of prior calculation and design. In this case, Dajhon Walker struck the victim in the face with a beer bottle, threw the beer bottle at his head, tackled him to the ground, walked away and hid behind a pole, waited until the victim was exposed to Walker with his back turned, and then fatally shot the victim in the back. He did this after 15 minutes of planning and preparation with at least three other co-defendants to surround and attack the victim with beer bottles that the jury found to be deadly weapons. As the dissenting judge in the case involving Walker's co-defendant found, "This was no bar fight. This was a vicious, premeditated attack." *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 83. After Walker shot the victim, he fled the scene and celebrated outside with his friends. The entire incident was captured on video. The jury found Walker guilty of aggravated murder committed with prior calculation and design.

The Eighth District, however, disagreed with the jury's finding of prior calculation and design and modified Walker's conviction down to the lesser-included offense of Murder. In doing so, it failed to consider several significant pieces of evidence in the State's case that demonstrated that Walker and his co-defendants formed a plan deliberately attack the victim. First, the court failed to consider the testimony of the victim's friend that he knew that Walker and his group were planning to attack them and told the victim to be on guard. Second, the surveillance video shows one of the co-defendants, Otis Johnson, turning the beer bottle in his hand upside down to grip it by the neck approximately one

minute before the attack. Third, once Johnson turned the beer bottle to grip it as a weapon, he then moved away from the group to surround the victim on the opposite side of the dance floor, and as soon as the fight began, attacked from the side. Fourth, as a different panel found in the case involving Walker's co-defendant, Walker can be seen on video pulling the gun before he went behind the pole. *Shabazz*, at ¶ 39. Fifth, the surveillance video shows that once Walker left the club, he celebrated by jumping into the air, pumping both fists.

These pieces of evidence were the building blocks for the State's case for prior calculation and design. They demonstrated the existence of a premeditated and coordinated attack and they are inconsistent with the Eighth District's description of "an almost spontaneous eruption of events." *Walker*, at ¶ 19. But the Eighth District failed to discuss a single one of them in its decision. The court instead relied exclusively on the three factors this Court has identified as important to determining the existence of prior calculation and design: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost spontaneous eruption of events'?" *State v. Taylor*, 78 Ohio St.3d 15, 19, 1997-Ohio-243, 676 N.E.2d 82. The court analyzed the evidence in this case solely through the prism of those three factors and ignored the direct evidence, on video, of a plan to attack the victim. This violated the appellate court's duty to consider all of the evidence under a sufficiency challenge. "[O]n a claim of insufficient evidence, the reviewing court considers all the evidence admitted against the appellant at trial." *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, at ¶ 80.

This case, along with the other two recent cases in which the Eighth District reversed a jury's finding of prior calculation and design, demonstrates that the court has jettisoned its extremely limited role in reviewing criminal convictions for sufficiency of the evidence. Instead, the court has repeatedly conducted an improper de novo review of the State's evidence in which the court determines which inferences it finds to be the most persuasive. This heightened level of scrutiny usurps the jury's function as the finder-of-fact and renders its verdict a mere recommendation that the appellate court is free to accept or reject based solely on its view of what it believes the evidence does or does not say. An appellate court sitting in review to a challenge to the sufficiency of the evidence is not to draw those inferences that the defendant suggests, but rather, is required to draw all inferences in favor of the State.

S.Ct.Prac.R. 7.08(B)(3) allows this Court to accept an appeal and enter judgment summarily. Accordingly, the State of Ohio requests that this Honorable Court accept jurisdiction and summarily reverse the Eighth District's decision in this case. The State submits that the this Court has sufficient information before it to determine that the issue of prior calculation and design should at least have been submitted to the jury, which is all that is required to survive a sufficiency challenge. This appeal presents an ideal case for summary reversal because the facts relevant to the issue of prior calculation and design are undisputed – the entire murder was captured on video. This Court has jurisdiction over this appeal under S.Ct.Prac.R. 5.02(A)(1) because this case involves a substantial constitutional question and under S.Ct.Prac.R. 5.02(A)(2) because this case involves a felony.

STATEMENT OF THE CASE

On October 16, 2012, the Cuyahoga County Grand Jury indicted Dajhon Walker, the Defendant-Appellee herein, on nine counts related to the February 18, 2012 shooting death of Antwon Shannon. The indictment charged Walker with one count of Aggravated Murder, one count of Felony Murder, six counts of Felonious Assault, and one count of Having Weapons While under Disability. The case proceeded to a jury trial at which a jury found Walker not guilty of two of the counts of Felonious Assault and guilty of all remaining counts. The trial court sentenced Walker to 25 years to life imprisonment. On direct appeal, the Eighth District modified Walker's conviction for aggravated murder down to the lesser included offense of murder, finding insufficient evidence of prior calculation and design. *State v. Walker*, 8th Dist. No. 99998, 2014-Ohio-1827.

STATEMENT OF THE FACTS

On February 19, 2012, 27-year old Antwon Shannon went to the Tavo Martini Lounge in downtown Cleveland with his friend Ivor Anderson. Around 1:30 a.m., Shannon and Anderson were standing on the dance floor of the club when another man named Robert Steele spilled champagne onto Anderson. Anderson and Steele exchanged words before separating. Steele then walked over to his group of friends, which included Otis Johnson, Derrell Shabazz, and Dajhon Walker. Anderson testified that he continued to watch Steele's group because he believed they were plotting against him and Shannon. He also told Shannon to keep an eye on Steele's group because they were acting suspiciously. But after about 10 minutes went by and nothing happened, Anderson relaxed and stopping watching the group.

The Tavo Martini Lounge has nine surveillance cameras on the premises, including in the bar area. There is no audio. At 1:56 a.m., Robert Steele can be seen spilling champagne onto Ivor Anderson. Steele went back to his group, and for the next 15 minutes, Steele, Johnson, Shabazz, and Walker stood in the middle of the dance floor speaking with one another and watching Anderson and Shannon, who are barely visible on the far left of the screen. At 2:11:01 a.m., Otis Johnson, standing directly in the middle of the video, can be seen flipping over a bottle in his right hand so that he was holding it upside down by the neck. Johnson then conferred briefly with Shabazz and Walker, before separating from the group and walking over to the left of Anderson and Shannon.

At 2:11:52 a.m., Steele struck Anderson in the head, from behind, with a bottle. Otis Johnson immediately rushed in from the left and joined the attack, punching and kicking Anderson as he rolled around on the ground. Antwon Shannon went to break up the attack. Walker and Shabazz immediately walked up to Shannon and Walker struck Shannon in the face with a bottle. Shannon recoiled from the blow, ducked, and moved to his left away from Walker. Walker followed Shannon and threw the bottle at Shannon's head. The bottle missed Shannon and struck an unidentified man standing behind him. Shannon, who was still trying to break up the attack, fell down onto his back. As Shannon attempted to stand, both Walker and Shabazz tackled him to the ground. Walker then got up off of Shannon and left the fight, walking behind a pole several feet away. The pole was only wide enough for one person to hide behind and no one other than Walker walked behind it or emerged from behind it during the attack.

While this was going on, Shannon's friend Ivor Anderson was still trying to defend himself from a 5-on-1 assault by Steele, Johnson, Shabazz, and two unidentified women.

Shannon walked around the edges of the fight, trying to pull the attackers off of his friend. At no point during the attack did Shannon throw any punches or do anything other than act as a peacekeeper. Eventually, Anderson was pushed, kicked, dragged, and pulled over to an area on the edge of the dance floor to the left of where Walker was hiding behind the pole. Otis Johnson followed Anderson to continue the attack. Shannon wrapped Johnson up in a bear hug to try to restrain him from attacking Anderson, who was still lying on the ground. As Shannon struggled to hold onto Johnson, Shannon turned away from the pole and exposed his back to Walker. Walker shot Shannon once in the back with a .45 caliber handgun.

Immediately after firing the shot, Walker ran out from behind the right side of the pole, visibly stuffing an object into his waistband. Shabazz approached Walker, patted him on the chest and back, and then fled the club with him and the other attackers. Shannon stumbled down the hall into a restroom, where he died. Walker, Shabazz, and their group walked outside the club into the view of a different camera. Walker, who was walking quickly and ahead of his group, was captured on video jumping into the air and pumping his fists.

Now before this Honorable Court is the State's request that this Court accept discretionary jurisdiction and summarily reverse the Eighth District's decision.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW I: AN APPELLATE COURT, WHEN REVIEWING A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, IS REQUIRED TO DRAW ALL REASONABLE INFERENCES IN FAVOR OF THE STATE'S CASE AND MAY NOT ADOPT THE DEFENSE'S INFERENCES TO REVERSE A CONVICTION.

“When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court’s function is extremely limited.” *State v. Byerly*, 11th Dist. 97-P-0034, 1998 WL 637689, at *2.

“When the state has produced at least a modicum of evidence on each of the essential elements of the crime, the question on appeal is not whether we think the accused is innocent of the charge. Instead the question is whether the quantum of evidence produced by the state, when viewed in a light most favorable to the prosecution, is sufficient to allow any rational trier of fact to draw the conclusion that the accused is guilty beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560. We are not to inquire into the weight, or persuasiveness, of the evidence presented, for that is within the purview of the trier of fact. Therefore, a motion for acquittal should only be granted in those exceptional cases where reasonable minds must have reasonable doubt as to the defendant's guilt. *State v. Apanovich* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394. In other words, the motion should be granted where there is no need for formal deliberation on the evidence because a verdict of acquittal is, or should have been, a foregone conclusion.”

Id. Under the standard of review for a sufficiency challenge, the appellate court is to “draw all reasonable inferences in favor of the prosecution[.]” *State v. Waldrop*, 10th Dist. No. 98AP-102, 1998 WL 598112, at *5. But in this case, the Eighth District did the opposite, drawing all contested inferences in favor of the defendant. The State submits that this was an error that fundamentally misconstrued the role of an appellate court in a sufficiency review. Given the choice between a reasonable inference that is inculpatory reference and a reasonable inference that is not, the appellate court is required – in a sufficiency analysis - to choose the inference in favor of the State.

The video evidence shows that Walker left the attack, stood behind a pole, waited until Shannon’s back was turned, and then shot him. The State argued at trial that the inference to be drawn from this was that Walker was lying in wait for Shannon. That evidence is strongly indicative of prior calculation and design. See *State v. McCrosky*, 5th

Dist. No. 2007CA00089, 2008-Ohio-2534, at ¶ 55 (“Appellant’s action of remaining on the premises in wait was sufficient for the jury to find he acted with prior calculation and design”); *State v. Gibbs*, 10th Dist. No. 00AP-1356, 2002-Ohio-2085, at ¶ 23 (prior calculation and designed present where Gibbs “lay in wait near the parking lot where he knew his girlfriend was bringing the victims[,]” and then “almost immediately opened fire” as they walked past); *State v. Edwards*, 6th Dist. No. L-95-228, 1996 WL 402027, at *3 (prior calculation and design present where “appellant went to his vehicle, recovered his weapon and * * * laid in wait for his victims”).

The Eighth District, however, afforded this evidence no weight and instead drew the opposite inference. “The video then shows the fight spilling over to the area by the pillar Walker went behind. The fight could have just as easily spilled over into the other direction.” *Walker*, at ¶ 18. This is speculation that may be appropriate for a closing argument, but it is improper in a sufficiency analysis that requires the appellate court to draw all reasonable inferences in favor of the State.

The Eighth District further made what appears to be a de novo factual finding upon its own review of the video: “Walker did not choose the murder site or pursue Shannon. Rather the video shows that the murder site came to him instead.” *Id.* This fails to account for the fact that Walker was part of a group that actively discussed and planned the attack and that it was Walker who focused in on Shannon from the beginning of the attack, striking him in the face with a bottle, throwing the bottle at him, and tackling him to the ground. Walker followed Shannon throughout the attack and he was the only person during the entire course of the attack to strike Shannon at all. Walker voluntarily walked away from the attack and chose to hide behind the pole where he waited until Shannon’s

back was turned. The evidence in this case shows that the fight did not spill over into the other direction, but rather occurred near Walker, who without any provocation chose to shoot an innocent and unarmed man in the back.

The court also found that "Walker's actions were the result of an almost spontaneous eruption of events." *Id.*, at ¶ 19. But approximately 15 minutes passed between when Robert Steele spilled champagne onto Ivor Anderson and the two exchanged words and when Steele began the attack by striking Anderson from behind with a bottle. 15 minutes is more than sufficient time an opportunity to plan an act of homicide. See *State v. Taylor*, 78 Ohio St.3d at 22, 1997-Ohio-243, 676 N.E.2d 82 ("Even though most of the evidence indicates that the time between the jukebox incident and the shooting was only two or three minutes, there was more than sufficient evidence for the jury to reasonably have found that appellant, with prior calculation and design, decided to shoot Alexander in that space of time").

The Eighth District found the 15 minute period did not establish prior calculation and design, however, because "there is no audio of what these males were discussing[.] * * * It is not unusual for a group to stand together and converse while at a nightclub." *Id.*, at ¶ 20. This presented the jury with competing inferences. The State asked the jury to draw the inference that the group was discussing attacking and killing Shannon and Anderson. Multiple pieces of evidence in this case – Otis Johnson flipping of the bottle in his hand to use as a weapon, Johnson moving to the left to flank the victims, the immediate and coordinated nature of an attack by six people, Walker's repeated attacks on Shannon for no apparent reason, Shabazz patting Walker on the chest and back when he emerged from behind the pole, Walker exuberantly jumping into the air outside afterward – corroborated

the State's inference. The defense asked the jury to infer that the men were discussing something else. The jury agreed with the State's inference when it found Walker acted with prior calculation and design. On appeal in a sufficiency challenge, the appellate court was required to "draw all reasonable inferences in favor of the prosecution[.]" *State v. Waldrop*, 10th Dist. No. 98AP-102, 1998 WL 598112, at *5. The Eighth District refused to draw that inference.

In light of the evidence before the court, the State's inference was reasonable. As the dissenting judge in Shabazz's appeal argued:

"The jury was free to infer from the conversations involving Shabazz and the others that the group was going to exact retribution for Anderson making a comment after the drink was spilled on him. This reasonably included causing not only serious physical harm, but also the purposeful intent to kill. This fact is inferred by the subsequent conduct of Steele, Johnson, Shabazz, and Walker. This was no bar fight. This was a vicious, premeditated attack. The planning, followed by the orchestrated use of a multitude of deadly weapons in the form of champagne bottles by multiple participants, coupled with others like Shabazz offering direct physical support in the attack, was sufficient to establish not only the required purposeful intent for murder, but also the prior calculation and design for aggravated murder."

State v. Shabazz, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 83 (Gallagher, J., dissenting).

The standard for sufficiency of the evidence permits an appellate court to reverse only "where there is no need for formal deliberation on the evidence because a verdict of acquittal is, or should have been, a foregone conclusion." *State v. Byerly*, 11th Dist. 97-P-0034, 1998 WL 637689, at *2. In this case, the Eighth District could not even agree amongst itself what the verdict on prior calculation and design should have been. This was an issue that should have been submitted to the jury and deliberated upon. The jury deliberated and found prior calculation and design. The appellate court had no basis to interfere with that finding on the grounds that there was never a need for formal

deliberations at all. The facts of this case give rise to reasonable inferences supporting the existence of prior calculation and design. The jury was free to accept or reject the State's inferences; the appellate court was not. "[W]hen competing rational inferences can be made, there is not a valid sufficiency challenge." *State v. Thompson*, 7th Dist. No. 13 CO 20, 2014-Ohio-1225, at ¶ 24.

STATE'S PROPOSITION OF LAW II: THE STATE INTRODUCES SUFFICIENT EVIDENCE OF PRIOR CALCULATION AND DESIGN WHERE A JURY COULD REASONABLY INFER THAT THE DEFENDANT DISCUSSED PURPOSELY KILLING THE VICTIM OVER A FIFTEEN MINUTE PERIOD PRIOR TO THE MURDER.

This Court has defined prior calculation and design to require two elements: (1) "the presence of sufficient time and opportunity for the planning of an act of homicide[,]" and (2) "the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill." *State v. Cotton*, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978), at paragraph three of the syllabus. The State submits that, drawing all reasonable inferences in favor of the State, both elements are satisfied in this case. The Eighth District decision to reverse Walker's conviction was an error that this Court should summarily reverse.

In this case, there is prior calculation and design layered on prior calculation and design. The first layer comes from the 15-minute conversation Walker had with his co-defendants after Robert Steele spilled champagne onto Ivor Anderson. As explained above, the jury could reasonably infer – as the dissenting judge in *Shabazz* did – that the men were discussing "causing not only serious physical harm, but also the purposeful intent to kill." *Shabazz*, at ¶ 83 (Gallagher, J., dissenting). That inference is supported by the other evidence described above demonstrating a plan to surround and attack Shannon, as well as the actions of Walker and Shabazz afterward. 15 minutes is sufficient for a defendant to

plan an act of homicide. The video also shows a scheme among multiple defendants to implement the decision to kill – surrounding Shannon and preparing to use bottles as deadly weapons.

The second layer of prior calculation and design occurred when Walker voluntarily walked away and hid behind the pole. Walker did not kill Shannon in the midst of a heated fight. Walker left the attack and hid behind the pole, where he laid in wait for Shannon. And as a different panel of the Eighth District noted in Shabazz’s appeal, Walker pulled out his gun before he actually went behind the pole: “Walker is seen quickly pulling something from his waistband prior to going behind the pillar[.]” *Shabazz*, at ¶ 39. Walker thus formed the intent to kill before he even began lying in wait. Only when Shannon was within view with his back turned did Walker – who was under no threat from anyone – shoot Shannon in the back. By voluntarily withdrawing from the attack, Walker gave up any claim that his actions were somehow “spontaneous.” He formed an additional layer of intent to kill that required a new level of planning. The presence of either one of these two layers was sufficient to sustain the jury’s finding of prior calculation and design; the presence of both of them justifies summary reversal.

CONCLUSION

The State respectfully submits that Supreme Court Review is necessary to address the recent rash of Eighth District decisions affording no deference to the trier-of-fact’s decision and conducting a de novo review to apply those inferences it finds most persuasive. The State therefore submits that this case is worthy of Supreme Court review

and respectfully requests that this Honorable Court either summarily reverse the Eighth District's decision, or to accept jurisdiction to hear this case on its merits.

Respectfully submitted,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney



CHRISTOPHER D. SCHROEDER (#0089855)
Assistant Prosecuting Attorney
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by email this 6th day of June, 2014 to Leif B. Christman (lbchristman@hotmail.com), counsel for Defendant-Appellee.



Christopher D. Schroeder (0089855)
Assistant Prosecuting Attorney

[Cite as *State v. Walker*, 2014-Ohio-1827.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99998

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAJHON WALKER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-567946

BEFORE: Kilbane, P.J., Blackmon, J., and Stewart, J.

RELEASED AND JOURNALIZED: May 1, 2014

ATTORNEY FOR APPELLANT

Leif B. Christman
1370 Ontario Street
Suite 2000
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Kerry A. Sowul
Christopher D. Schroeder
Assistant County Prosecutors
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Dajhon Walker (“Walker”), appeals from his aggravated murder, murder, felonious assault, and having a weapon while under disability convictions. For the reasons set forth below, we vacate his aggravated murder conviction and sentence, affirm his remaining convictions, and remand for resentencing.

{¶2} In October 2012, Walker and codefendants, Otis Johnson (“Johnson”) and Derrell Shabazz (“Shabazz”), were charged in a ten-count indictment.¹ Count 1 charged each of them with the aggravated murder of Antwon Shannon (“Shannon”) and carried a one- and three-year firearm specification. Count 2 charged each of them with the murder of Shannon and carried a one- and three-year firearm specification. Counts 3-5 charged each of them with the felonious assault of Shannon, with Counts 3 and 5 carrying a one- and three-year firearm specification. Count 6 charged each of them with the felonious assault of Ivor Anderson (“Anderson”). Counts 7 and 8 charged each of them with the felonious assault of Eunique Worley (“Worley”). Count 9 charged Shabazz with having a weapon while under disability. Count 10 charged Walker with having a weapon while under disability.

{¶3} The matter proceeded to a jury trial on February 13, 2013. Defendants moved for a mistrial the next day. The trial court granted defendants’ motion based on

¹Codefendant Shabazz has filed an appeal with this court in *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021.

juror misconduct and rescheduled the trial for May 20, 2013.² The following evidence was adduced at trial.

{¶4} In the early morning hours of February 19, 2012, Shannon and Anderson were at the Tavo Martini Loft (“Tavo”) in Cleveland, Ohio. The two men met up with Worley and her three friends, Marvella Grant, Ashley Nix, and Asia Rudolph. At approximately 1:30 a.m., an unknown male, later identified as Robert Steele (“Steele”), spilled champagne on Anderson while he and Shannon were on the dance floor.³ Anderson looked at the man and moved his hands up and down to gesture “in a sense like I don’t care.” He told the man, “you’re doing too much.” This was the only verbal exchange between Anderson and Steele.

{¶5} After this incident, Anderson testified that he observed Steele walk over to two men, later identified as Shabazz and Johnson. He felt that they were plotting against him, so he continued to watch them for approximately ten minutes and then went about his business. Anderson told Shannon “to keep an eye out” because the group looked suspect. Anderson then went over to Worley to have a conversation. They spoke for approximately three minutes when Anderson heard someone yell out “yeah, nig***.” As he turned around, Steele struck Anderson in the head with a champagne bottle. Both men fell, where they tussled on the ground. Part of the bottle hit Worley in the head and

²Count 10, the having a weapon while under disability charge, was bifurcated and tried to the bench.

³Steele’s identity was unknown until the eighth day of trial. Steele pled guilty to one count of felonious assault and was sentenced to two years in prison.

she also fell to the ground. At this point, an altercation ensued among Shannon, Anderson, Walker, Shabazz, Johnson, and other persons in the nightclub. Anderson was tackled by a female while he fought with Steele. Anderson was on the ground again when he heard a gunshot.

{¶6} Tennison Malcolm ("Malcolm"), a medical school student, testified that he was at Tavo with some friends when he heard the gunshot. He then ran into the bathroom. While he was in there, Shannon came into the bathroom looking confused. Malcolm asked him if he was okay and if he was shot. Shannon replied that he did not know. Malcolm asked him to lift up his shirt. Malcolm observed blood coming from Shannon's chest. He put pressure on Shannon's chest and called 911. At one point, Shannon became unresponsive so Malcolm started chest compressions. The ambulance arrived shortly thereafter.

{¶7} Meanwhile, Anderson was still on the ground grabbing the female on top of him. A few minutes later, Johnson picked the female up off Anderson and then he exited the nightclub. Anderson later told police that the gunshot came from the area near the exit door. Upon exiting the building, Anderson waited outside for approximately five minutes looking for Shannon. He did not see Shannon so he went back inside the nightclub. Tavo's security guards escorted him back outside.

{¶8} While he was outside, two women approached him, one of which was the woman who attacked him in the nightclub. To avoid them, he went back into Tavo and checked on Worley. He escorted Worley to her car, and as he walked to his car he

noticed that Shannon's car was still in the parking lot. At that point, he determined that Shannon was the individual who got shot in the nightclub. Anderson then went to the Metro Health Hospital where he learned that Shannon had died.

{¶9} The incident was captured by surveillance video, which the jury was able view. The video shows Walker speaking with Johnson, Shabazz, and Steele after he spilled champagne on Anderson. The video also shows Steele dancing with a bottle in his hand and Johnson walking around with a bottle in his hand. The four men are standing by Anderson and Shannon. Steele strikes Anderson with the object in his hand and the fight begins. Anderson is fighting with Steele and then is tackled by a female who knocks him to the dance floor. Shannon is seen pulling a female back from the fight. Walker is seen punching Shannon and also hitting him with a bottle. The video then shows Walker pull an object out of his waistband and walk behind a pillar that is right next to the dance floor. At the same time, the fight continues on the dance floor and Shannon is trying to break up the fight by removing one of the females off of Anderson. The fight then spills over to the area next to the dance floor and the pillar where Walker walked behind. Shannon is seen bending forward, with his back in the direction of where Walker went behind the pillar. The video then shows two flashes — one small flash in front of Shannon, similar to one that would come from a cell phone camera, and a large flash directly behind Shannon, which was the gunshot. Within less than a second, the video shows particulate matter falling in front of the camera. Walker can then be observed running from behind the other side of the pillar and across the dance

floor toward an exit door. Shabazz was on the dance floor. He met up with Walker and they exited the nightclub together. As Walker was running, the video shows him fumbling with his waistband.

{¶10} At the conclusion of trial, the jury found Walker guilty of aggravated murder (Count 1), murder (Count 2), the felonious assault of Shannon (Counts 3-5), and the felonious assault of Anderson (Count 6). The jury found him not guilty of the felonious assault of Worley (Counts 7-8). The trial court found him guilty of having a weapon while under disability. The trial court sentenced Walker to life in prison, with the possibility of parole after serving 20 years, on the aggravated murder charge. The trial court merged the murder and felonious assault charges (Counts 2-5) with the aggravated murder for purposes of sentencing. The court also merged all the firearm specifications into one three-year specification to be served prior and consecutive to the aggravated murder charge. The trial court sentenced him to two years in prison on the remaining felonious assault charge (Count 6) and nine months in prison on the having a weapon while under disability (Count 10). The court ordered that Counts 1 and 10 be served concurrently and Count 6 be served consecutively to Counts 1 and 10.

{¶11} Walker now appeals, with his appellate counsel raising ten assignments of error for review. Walker filed a pro se supplemental brief in which he raises an additional assignment of error. The assignments of error will be discussed together, where appropriate.

Assignment of Error One

There was insufficient evidence to support a finding of prior calculation and design.

Assignment of Error Two

There was insufficient evidence that Walker fired the shot.

Assignment of Error Three

There was insufficient evidence to convict Walker of felonious assault.

Assignment of Error Four

There was insufficient evidence that Walker possessed a firearm.

Assignment of Error Five

The verdict finding prior calculation and design was against the manifest weight of the evidence.

Assignment of Error Six

It was against the manifest weight of the evidence to conclude Walker was the shooter.

Assignment of Error Seven

The verdict of felonious assault was against the manifest weight of the evidence.

Assignment of Error Eight

The court finding that Walker possessed a firearm was against the manifest weight of the evidence.

Assignment of Error Nine

It was prejudicial error to give a jury instruction on complicity based upon the evidence presented.

Assignment of Error Ten

It was prejudicial error to give jury instruction on flight based upon the evidence presented.

Pro Se Supplemental Assignment of Error One

Did * * * trial counsel prejudice appellant causing [a] guilty outcome verdict[,] due to the ineffective assistance of counsel [by failing] to successfully challenge [the] state[']s expert witness[.]

Sufficiency of the Evidence

{¶12} In the first, second, third, and fourth assignments of error, Walker challenges the sufficiency of the evidence with respect to his aggravated murder, murder, and felonious assault convictions.

{¶13} The Ohio Supreme Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, explained the standard for sufficiency of the evidence as follows:

Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, “[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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Aggravated Murder and Murder

{¶14} In the instant case, Walker was convicted of the aggravated murder of Shannon under R.C. 2903.01(A), which provides that “[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]” Walker argues the state failed to prove that the shooting was the result of prior calculation and design. He

maintains that the shooting was a spur-of-the-moment act. He further argues there was no reliable evidence that anyone attempted to purposefully cause Shannon's death.

{¶15} In *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 79, the Ohio Supreme Court noted that there is no bright-line rule to determine whether a defendant acted with prior calculation and design. The *Cassano* court acknowledged that “‘prior calculation and design’ is a more stringent element than the ‘deliberate and premeditated malice’ * * * required under prior law.” *Id.*, quoting *State v. Cotton*, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978), paragraph one of the syllabus. Specifically, prior calculation and design requires “‘a scheme designed to implement the calculated decision to kill.’” *State v. D’Ambrosio*, 67 Ohio St.3d 185, 196, 616 N.E.2d 909 (1993), quoting *Cotton* at 11. Walker claims there was insufficient evidence to support a finding of prior calculation and design. We agree.

{¶16} The Ohio Revised Code does not define the phrase “prior calculation and design,” but the Ohio Supreme Court has interpreted the phrase to require evidence of “more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill.” *Cotton* at 11. While “[n]either the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, * * * ‘momentary deliberation’ is insufficient.” *D’Ambrosio* at 196, quoting the 1973 Legislative Service Commission Comment to R.C. 2903.01. According to the committee comment, “the phrase ‘prior calculation and design’ [was employed] to

indicate studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim.” See also *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82.

{¶17} The existence of prior calculation and design is determined on a case-by-case analysis of the facts and evidence. *State v. Jones*, 91 Ohio St.3d 335, 345, 2001-Ohio-57, 744 N.E.2d 1163. Although there is no bright-line rule for determining prior calculation and design, the Ohio Supreme Court has found the following factors pertinent to determining the existence of prior calculation and design: “(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or ‘an almost spontaneous eruption of events’?” *Taylor* at 19, quoting *State v. Jenkins*, 48 Ohio App.2d 99, 255 N.E.2d 825 (8th Dist.1976). “These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide.” *Jenkins* at 102.

{¶18} In the instant case, when considering these factors and the totality of the circumstances, we find that, even construing the evidence in a light most favorable to the state, there is insufficient evidence of prior calculation and design. As to the first factor, there is no evidence in the record that Walker knew Shannon, let alone had a strained relationship with him. With respect to the second factor, the evidence fails to demonstrate that Walker gave thought in choosing the murder site. The state did not have any eyewitness testimony to the shooting, so it relied on the surveillance video to

present its case. The surveillance video shows Anderson and others fighting on the dance floor. Shannon gets caught in the fight while he is trying to break it up. Walker walks behind a pillar, which is next to the dance floor. The video then shows the fight spilling over to the area by the pillar Walker went behind. The fight could have just as easily spilled over into the other direction. Thus, Walker did not choose the murder site or pursue Shannon. Rather, the video shows that the murder site came to him instead.

{¶19} With respect to the third factor, we find that Walker's actions were the result of an almost spontaneous eruption of events. The evidence demonstrates that after the fight erupted, a group of people were tussling on the dance floor. The fight then happens to spill over to the area by the pillar where Walker was observed walking behind.

Shannon is seen bent forward and one gunshot is fired at his back. The video fails to demonstrate that "the act was drawn out." Rather, the video shows the entire sequence of events, which happened within minutes, as a chaotic situation that spiraled out of control.

{¶20} The state argues that because Steele spoke with Walker, Shabazz, and Johnson after he spilled champagne on Anderson, there was evidence of prior calculation and design. However, there is no audio of what these males were discussing, let alone audio of a plan to murder Shannon. The fact that Walker was speaking with the group that he came to the nightclub with does not indicate that he planned to kill Shannon. It is not unusual for a group to stand together and converse while at a nightclub.

{¶21} Based on the foregoing, we conclude that the evidence is insufficient to demonstrate that Walker planned a scheme to implement a calculated decision to kill. Rather, the evidence demonstrates that the act was the result of the sudden eruption of Anderson's fight. Accordingly, there was insufficient evidence to support Walker's conviction for aggravated murder. There was, however, sufficient evidence that Walker committed murder in violation of R.C. 2903.02, which provides that "[n]o person shall purposefully cause the death of another[.]" An individual acts purposefully when "it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶22} Walker argues there is no evidence that he fired the shot or that he had a gun. While there was no eyewitness testimony identifying Walker as the shooter, such evidence is not required in order to sustain a conviction. *State v. Lopez*, 8th Dist. Cuyahoga No. 94312, 2011-Ohio-182, ¶ 62, citing *Jenks*. The surveillance video shows Walker pull an object out of his waistband during the fight and walk behind a pillar that is right next to the dance floor. The fight then spills over to the area next to the pillar where Walker was standing. Shannon is seen bending forward, with his back to where Walker was standing. The video then shows a large flash, which was the gunshot that killed Shannon. Within seconds, Walker is the first person who can be observed running from behind the other side of the pillar and across the dance floor toward an exit door.

As Walker was running, the video shows him fumbling with his waistband. When viewing this evidence in a light most favorable to the state, we find sufficient evidence to support Walker's murder conviction.

{¶23} Accordingly, Walker's aggravated murder conviction is vacated and his murder conviction is affirmed. The first assignment of error is sustained and the second and fourth assignments of error are overruled.

Felonious Assault

{¶24} In the third assignment of error, Walker challenges the sufficiency of his felonious assault convictions. Walker was convicted of four counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2). The indictment lists Shannon as the victim in three counts and Anderson as the victim in the remaining count. R.C. 2903.11(A)(1) and (A)(2) provide in pertinent part:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another * * *;

(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.

{¶25} He argues that the convictions were "presumably based on a complicity theory based upon the lack of any actual assault by Walker." However, the surveillance video clearly shows Walker punching Shannon and also hitting him with a bottle before he shot Shannon. The video further shows Anderson getting hit in the head with a bottle by Steele. Steele, Johnson, Shabazz, and Walker all participated in the fight. Under R.C. 2923.03(F), an accomplice to a crime is subject to the same prosecution and

punishment as the principal offender. The trial court, in the instant case, instructed the jury on complicity. Based on the foregoing, when viewing this evidence in a light most favorable to the state, we find sufficient evidence to sustain Walker's felonious assault convictions.

{¶26} Therefore, the third assignment of error is overruled.

Manifest Weight of the Evidence

{¶27} In the fifth, sixth, seventh, and eighth assignments of error, Walker contends that his convictions for aggravated murder, murder, and felonious assault are against the manifest weight of the evidence. However, in light of our resolution of the first assignment of error, we will consider Walker's arguments as they relate to his convictions for murder and felonious assault.

{¶28} In contrast to a sufficiency argument, a manifest weight challenge questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 390, 1997-Ohio-52, 678 N.E.2d 541. The Ohio Supreme Court in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, has stated:

[T]he reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * "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 with the factfinder's resolution of the conflicting testimony." [*Thompkins* at 387], citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶29} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that “in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *Martin*.

{¶30} Walker argues that his convictions are against the manifest weight of the evidence because the video shows Walker and his group being patted down for weapons before they entered Tavo. The video also shows other patrons who were not searched before entering the bar. Therefore, he contends that it is highly probable that someone else brought the gun into Tavo.

{¶31} Despite Walker’s arguments, this is not the exceptional case where the evidence weighs heavily against his convictions. The video of the patdown does not override Walker’s actions during the fight. As discussed above, the video shows Walker punching Shannon and also hitting him with a bottle. The video then shows Walker pull an object out of his waistband and walk behind a pillar that is right next to the dance floor. The fight spills over to the area next to the dance floor and the pillar where Walker was standing. Shannon is bent forward, with his back to where Walker was standing. There is a large flash, which was the gunshot. Walker then is seen running

from behind the other side of the pillar and across the dance floor toward an exit door. As Walker was running, the video shows him fumbling with his waistband.

{¶32} Based on this evidence, we cannot say the jury clearly “lost its way” and created such a manifest miscarriage of justice that Walker’s murder and felonious assault convictions must be reversed and a new trial ordered.

{¶33} Therefore, the fifth assignment of error is moot and the sixth, seventh, and eighth assignments of error are overruled.

Jury Instructions

{¶34} In the ninth and tenth assignments of error, Walker challenges the trial court’s jury instructions on complicity and flight. “When reviewing a trial court’s jury instructions, the proper standard of review for an appellate court is whether the trial court’s issuance of the instruction constituted an abuse of discretion under the facts and circumstances of the case.” *State v. Williams*, 8th Dist. Cuyahoga No. 90845, 2009-Ohio-2026, ¶ 50, citing *State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989). Jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984.)

{¶35} Walker first argues that the trial court should not have given an instruction on complicity because the evidence did not support it. He contends there is no evidence that he conspired with Steele, Shabazz, and Johnson, and he did not have a gun, nor did he shoot the gun.

{¶36} In the instant case, the evidence adduced at trial was sufficient to warrant an instruction on complicity. Specifically, the video shows Steele, Shabazz, Walker, and Johnson all participating in the fight, attacking Shannon and Anderson. This testimony was sufficient for the trial court to properly exercise its discretion and give a complicity instruction.

{¶37} Walker next argues the flight instruction was unwarranted because it was a natural reaction for people to run out of a bar after a gunshot.

{¶38} In the instant case, the trial court instructed the jury that:

Testimony has been admitted indicating that the defendants fled the scene. You are instructed that the fact that any one or both of the defendants fled the scene does not raise presumption of guilt but it may tend to indicate the defendant's consciousness or awareness of guilt.

If you find that the facts do not support that any one or both of the defendants fled the scene, or if you find that some other motive prompted any one or both of the defendant[s'] conduct, or if you are unable to decide what any one or both of the defendant[s'] motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that any one or both of the defendants engaged in such conduct and if you decide that any one or both of the defendants was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether any one or both of the defendants is guilty of the crime charged. You alone will determine what weight if any to give to this evidence.

{¶39} In *Taylor*, the Ohio Supreme Court held that evidence of flight is admissible to show consciousness of guilt. *Id.*, 78 Ohio St.3d at 27, 1997-Ohio-243, 676 N.E.2d 82. This court has previously defined flight as "some escape or affirmative attempt to avoid apprehension." *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19. It has long been recognized that it is not an abuse of discretion for a trial court to

provide a jury instruction on flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension. *State v. Kilpatrick*, 8th Dist. Cuyahoga No. 92137, 2009-Ohio-5555, ¶ 16, citing *State v. Benjamin*, 8th Dist. Cuyahoga No. 80654, 2003-Ohio-281.

{¶40} In the instant case, the trial court instructed the jury that it may consider Walker's flight from Tavo after shooting Shannon as consciousness of guilt but that "flight does not in and of itself raise the presumption of guilt." Therefore, the instruction correctly advised the jury not to consider evidence of Walker's departure from the scene if they find that it was not motivated by consciousness of guilt. Because the trial court must presume that the jury followed that instruction, we cannot say that the trial court abused its discretion. *State v. Hamilton*, 8th Dist. Cuyahoga No. 86520, 2006-Ohio-1943, ¶ 39, *discretionary appeal not allowed*, 111 Ohio St.3d 1416, 2006-Ohio-5083, 854 N.E.2d 1094.

{¶41} Therefore, the ninth and tenth assignments of error are overruled.

Ineffective Assistance of Counsel

{¶42} In Walker's pro se supplemental assignment of error, he argues that he received ineffective assistance of counsel when trial counsel failed to challenge the state's expert witness on ballistics.

{¶43} In order to establish a claim of ineffective assistance of counsel, Walker must demonstrate that: (1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense. *Strickland v.*

Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In Ohio, an attorney properly licensed is presumed competent. *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶44} Walker argues trial counsel was ineffective for failing "to request a suppression hearing" on the state's second ballistic expert witness's evidence regarding the gun shell casing found at Tavo. We disagree.

{¶45} In the instant case, two detectives and a forensic scientist testified that they observed a spent bullet and a large casing at the crime scene. The state admitted into evidence pictures of both a spent bullet and a large casing. To establish ineffective assistance of counsel for failure to file a motion to suppress, the defendant must prove that there was a basis to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35. Here, there was no basis to suppress the evidence in question.

{¶46} Therefore, Walker's pro se supplemental assignment of error is overruled.

{¶47} Accordingly, we vacate his aggravated murder conviction and sentence, affirm his remaining convictions, and remand the matter for resentencing.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
MELODY J. STEWART, J., CONCUR