

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2014-0941

STATE OF OHIO,	)	
	)	
Appellant	)	On Appeal from the Cuyahoga County
	)	Court of Appeals, 8 <sup>th</sup> Judicial District
vs.	)	
	)	Court of Appeals
DERRELL SHABAZZ,	)	Case No. 10021
	)	
Appellee	)	

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APPELLEE'S MEMORANDUM  
IN OPPOSITION TO JURISDICTION

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**EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE  
A SUBSTANTIAL CONSTITUTIONAL QUESTION  
OR AN ISSUE OF GREAT PUBLIC INTEREST**

This appeal arises from two distinct arguments set forth by the State. In their first argument, the State posits that when reviewing a challenge to the sufficiency of the evidence, an appellate court is required to draw all reasonable inferences in favor of the State's case. While this position is correct, the reviewing court is not required to draw unreasonable inferences in the State's favor. As will be seen, in the present case the Eighth District applied the appropriate standard of review, and properly accepted their role. Quite simply, the inferences that the State wished for the Appellate Court to draw in their favor so strained credulity that they were disregarded, and after a thorough and correct analysis, the Court ruled that the evidence adduced at trial was insufficient to support the convictions.

Further, the State argues in their second proposition of law that, provided the victim's death was a proximate result of the underlying felony, an accomplice may be convicted of felony murder whether or not the accomplice knew that the victim had the firearm that was the actual cause of the victim's death. Here, the Eighth District did not create a new pre-requisite to a conviction for felony murder; rather, the Court applied a thoughtful analysis of the foreseeability prong of proximate cause, as instructed by the United States Supreme Court in their recent ruling in *Rosemond v. United States*, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). As the analysis conducted here by the Eighth District comports with precedent, and does not create a new burden for the State to meet, there is no Constitutional question or issue of great public interest for this Honorable Court to consider.

## STATEMENT OF THE CASE AND FACTS

Derrell Shabazz was tried in the Cuyahoga County Court of Common Pleas for aggravated murder, murder, six counts of felonious assault (three of which applied to the decedent, Antwon Shannon; two that applied to Ivor Anderson; and, one that applied to Eunique Worley), and one count of having a weapon while under disability. The latter count was bifurcated and tried directly to the trial court. Shabazz' trial was joined with that of his co-defendant, Dahjon Walker. A third co-defendant, Otis Johnson, entered a guilty plea to a single count of felonious assault prior to trial and was sentenced to a term of community control sanctions, and was not called to testify at trial. A fourth alleged co-conspirator, Robert Steele, was charged on a separate indictment, and ultimately entered a guilty plea to a single count of felonious assault and was sentenced to a five year term of incarceration.

The trial in this matter arose from incident that occurred at the Tavo Martini Loft in downtown Cleveland, on February 19, 2012. The entire incident, as well as the time frame directly proceeding and immediately following the incident, was captured by several video surveillance cameras both within and outside the bar. Based upon the video surveillance, it is clear that Shabazz, Walker and Johnson entered Tavo at 1:08 a.m., and that all three were thoroughly patted down for weapons by security staff prior to entering. Over the course of the hour that followed, that trio, like the other patrons in the crowded bar, proceeded to socialize, dance and interact with various people.

At 1:57 a.m., Steele, who had entered the bar separately from Shabazz, Walker and Johnson, appeared to spill champagne on Anderson. Anderson and Steele briefly exchanged words, then went their own separate ways. After continuing to dance and socialize with several bar patrons, Steele eventually did interact with Shabazz, Walker and Johnson. At 2:11 a.m.,

Steele is seen dancing in an area near Anderson, whose back is turned to Steele. Steele then strikes Anderson with a champagne bottle, setting off a bar fight. It is noteworthy that although it is clear that Steele hit Anderson with the bottle, Anderson told police that he was "100% sure" that Shabazz was the one who struck him.

As the fight between Anderson and Steele ensues, two females, who appear to be with Johnson, enter the fray and jump on Anderson. Johnson pulls Steele from the fight, as the two females continue to fight with Anderson. Walker then strikes Shannon with a bottle. At that time, Shabazz, who had been on the fringe of where the fight occurs, enters the fray for the first time and punches Shannon. As Shabazz walks away from Shannon, Walker is seen on the video walking behind a pillar near the dance floor. Shabazz and Walker do not converse during that time; in fact, Shabazz does not even look in Walker's direction. Instead, Shabazz is seen walking across the room toward Johnson. Shabazz then runs toward Anderson, who is in the middle of the melee, and punches him. The fight then proceeds to the area near the pillar, and as Shabazz begins walking in that general direction, it appears that a single gunshot is fired.

Just prior to the shot being fired, Shannon had moved toward that same pillar, and was seen attempting to pull the women off of Anderson. The gunshot hits Shannon in the lower back, causing his fatal injury. As the shot is fired, the crowd begins to run out of the bar, and amongst all of the patrons fleeing, Walker is seen struggling with his waistband. Although the State argues that he was placing a firearm back into his waistband, no weapon is visible to the camera.

Like virtually every other patron in the bar, Walker and Shabazz are seen on camera running out of the bar. They do meet up on their way out, and exit at the same time. The State argues that Walker is later seen pumping his fist in celebration outside the bar, although there is

no indication of the meaning of Walker's "fist pump" that the State suggests is evident from the surveillance video. Assuming there is a celebration, there is no indication that Shabazz joins in.

At trial, the State argued that Shabazz was guilty of the charges alleged on the basis of a theory of complicity, as it was clear that Shabazz was not the individual who fired the fatal shot. The jury convicted Shabazz of aggravated murder, murder, and three counts of felonious assault against Shannon on the theory of complicity, as well as one count of felonious assault against Anderson. Shabazz was acquitted of two counts of felonious assault against Worley. The trial court separately found Shabazz guilty of having weapon while under disability. Shabazz was sentenced to a prison term of 20 years to life on the aggravated murder count, with all other counts pertaining to Shannon merging into that sentence. He received a separate consecutive two year prison sentence for the felonious assault against Anderson, and a nine month concurrent sentence for having weapons under disability, resulting in an aggregate prison term of 22 years to life.

The 8<sup>th</sup> District Court of Appeals reversed Shabazz' convictions for aggravated murder, murder and having a weapon under disability, as well as the felonious assault counts relating to the use of a firearm. The Appellate Court upheld Shabazz' convictions for the two counts of felonious assault relating to the use of a champagne bottle. The State now seeks leave to appeal to this Court.

**APPELLANT'S PROPOSITION OF LAW NO. 1: 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.**

The State argues that the Eighth District, in conducting its review of a sufficiency challenge, failed to draw all reasonable inferences in favor of the prosecution. In its

Memorandum in Support of Jurisdiction, the State complains that, in fact, the Eighth District “did the opposite, drawing all contested inferences in favor of the defendant.” While the State is correct in its assertion that the standard of review for insufficiency of the evidence arguments does require all *reasonable* inferences to be drawn in favor of the State, it does not require a similar acquiescence for those inferences that are either unreasonable, or that rely upon the stacking of inferences. Where, as here, that is the nature of the contested inferences, there is no error when the reviewing court fails to adopt the strained inferences of the State.

“Whether a conviction is supported by sufficient evidence is a question of law that we review de novo.” *State v. Williams*, 9<sup>th</sup> Dist. No 24731, 2009-Ohio-6955, citing *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390. In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks*, (1991), 61 Ohio St.3d 259, 273. The evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows the factfinder to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id.*

In the present case, the State argues that the evidence produced at trial, when reviewed in a light most favorable to the prosecution, establishes the requisite prior calculation and design for aggravated murder through the acceptance of a multitude of strained inferences. At trial, despite the fact that two alleged co-conspirators, Johnson and Steele, received extremely favorable plea bargains without agreeing to testify, the State failed to produce any witnesses that directly linked Shabazz to the murder of Antwan Shannon. No witness was presented to offer testimony that Shabazz, or, for that matter, any of his alleged co-conspirators, were engaged in discussions that

rose to the level of “15 minutes of planning” as the State alleges. Memorandum in Support of Jurisdiction, at 1. As the majority noted in *State v. Shabazz*, 8<sup>th</sup> Dist. No. 100021, 2014-Ohio-1828 at paragraph 28, after an exhaustive review of the surveillance video from the period directly preceding the bar fight:

“The video shows Shabazz, Walker and Johnson looking at Shannon and Anderson, but they are also otherwise engaged with other people. They are seen talking to and hugging others during this supposed planning period. Although Anderson felt uneasy by the men talking and looking in his direction, more than dirty looks are necessary to prove the men were devising a plan to commit premeditated murder.”

The Eighth District, in reviewing the case for the sufficiency of the evidence, looked to a standard set forth by this Honorable Court in *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82, to determine whether prior calculation and design were proven. There, this Court delineated three factors to consider:

{1} Did the accused and the 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?”

The Eighth District, both in *Shabazz* and in the case concerning his co-defendant, *State v. Walker*, 8<sup>th</sup> Dist. Cuyahoga No. 99998 (May 1, 2014), concluded that there was no evidence offered that Shabazz and Walker knew the victim, let alone had a strained relationship with him. The Eighth District also noted that the surveillance video shows that the fight spilled over in the direction of the pillar from behind which the fatal shot was fired, but that it could have just as easily spilled in the opposite direction. As the Court wrote, “(Walker) did not choose the murder site or pursue Shannon. Rather, the video shows the murder site came to him instead.” Finally, based on a review of the video, the Court noted that this incident was far from a drawn out act, rather, it was “a chaotic situation that spiraled out of control.” *Shabazz*, at paragraph 27, citing

*Walker* at paragraphs 18-19. Thus the State fails to meet each prong set forth in *Taylor*.

Accordingly, the Eighth District properly overturned the aggravated murder convictions of both Shabazz and Walker due to insufficient evidence.

In an attempt to sidestep the ruling, the State argues prior calculation and design would be established were the reviewing court to accept several inferences that would support the idea that this was a coordinated attack intended to end with the murder of Shannon. These include inferences that the discussion between Shabazz, Walker and others involved were in fact plotting sessions dedicated to devising a plan to commit murder. Further, the State offers that these men then acted in a coordinated effort, based on those plans, to cause a bar fight involving approximately ten people on a crowded dance floor to break out, and then move in the exact direction necessary to allow Walker the opportunity to fire a shot at Shannon. The inferences that support this notion are based on no evidence adduced at trial, and are so incredulous that they defy reason. The reviewing court is therefore under no mandate to accept them as true when conducting their analysis. Similarly, inferences that there is some sort of celebration occurring after the fact is unsupported, unreasonable, and therefore, correctly disregarded by the reviewing court.

In their analysis, the Eighth District did abide by their role of reviewing the evidence in a light most favorable to the State and accepting all reasonable inferences set forth by the State in their Memorandum in Support of Jurisdiction. The Eighth District simply refused to accept unreasonable inferences and innuendo as true, and they were under no onus to do so. The State failed to produce evidence that supported a conviction for aggravated murder, and the reviewing court, following the guidelines set forth by this Honorable Court, acted accordingly. The result in

this case was therefore not an instance of a court overstepping their boundaries, rather, it was a court conducting a thoughtful analysis of the case and arriving at an appropriate conclusion.

What the State is essentially seeking is correction of what they deem to be an error. As no such error exists, this Court should deny jurisdiction.

**APPELLANT’S PROPOSITION OF LAW NO. 2: An accomplice may be convicted of felony murder where the victim’s death was a proximate result of the underlying felony. The accomplice does not need to know that the principal had a firearm that was the actual cause of the victim’s death.**

The State argues that the ruling of the Appellate Court has created a “new and additional requirement” that must be met in order to uphold a conviction under Ohio Revised Code 2903.02(B). Specifically, the State submits that the Eighth District now requires that “not only must (the defendant) be guilty of the felony that is the proximate cause of the victim’s death, but he also must be guilty of the felony that is the actual cause of the victim’s death.” This claim misstates the holding of the Eighth District’s opinion, as the focus of that Court’s analysis is clearly upon the issue of the foreseeability prong of the definition of proximate cause, as opposed to any indication that the State must be held to the burden their argument would suggest.

As the State correctly notes, RC 2903.02(B), which codifies the felony murder doctrine, provides that “no person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree.” Ohio case law has consistently held that a defendant can be held criminally responsible for the killing of a person, regardless of that individual’s identity or the identity of the person whose act directly caused the death, so long as the death is the “proximate result” of defendant’s conduct in committing the underlying offense. See, *State v. Robinson*, 8<sup>th</sup> Dist. No. 99290, 2013-Ohio-4375, citing, *State v. Tuggle*, 6<sup>th</sup> Dist. Lucas No. L-09-1313, 2010-Ohio-4162.; *State v.*

*Dixon*, 2d Dist. Montgomery No. 18582, 2002 Ohio App. LEXIS 472 (Feb. 8, 2002). “For criminal conduct to constitute the ‘proximate cause’ of a result, the conduct must have (1) caused the result, in that but for the conduct the result would not have occurred, and (2) the result must have been foreseeable.” *State v. Gibson*, 8th Dist. No. 98725, 2013-Ohio-4372.

In the present case, the events that precipitated the death of the victim, as well as those that follow immediately thereafter, were captured by security cameras. It is clear from viewing the security video that Shabazz and Walker entered the Tivo Martini Lounge together approximately one hour prior to the shooting. As Shabazz and Walker enter the bar each is present as the other is thoroughly patted down by security officers, who, according to the testimony of the bar owner, were well-trained in this practice. Each was therefore cognizant that the other was deemed to be unarmed at the time they arrived. Further, there is no indication from the video that Shabazz was made aware of Walker possessing a firearm at any time prior to the shooting.

When a fight broke out in the bar, and several bar patrons became involved, Shabazz and Walker did not remain unified in their actions. As Walker disengages from the fray and walks several feet to position himself behind a pillar on the outskirts of the fight, Shabazz remains in the area where the fight occurs, and is seen throwing a single punch at both the victim and the victim’s co-hort. Shabazz’ position relative to the pillar renders him unaware of the actions Walker is taking, which appear to include firing the fatal shot at the victim. Once the shot is fired, all bar patrons, including Shabazz and Walker, are seen running from the dance floor area where the fight had occurred, and toward the bar exit. Even then, there is no indication that Shabazz is aware that Walker may have fired the shot, or even that Walker is in possession of the firearm, as no gun is visible to the camera.

The ruling of the Eighth District clearly relies on the dearth of evidence showing that Shabazz aided and abetted Walker in the murder, or even that he was aware that Walker possessed a firearm. This paucity of evidence leads the court to the conclusion that Shabazz' actions did not rise to the level of proximately causing the victim's death, as his death was not a foreseeable result of Shabazz' actions. In *Rosemond v. United States*, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), the United States Supreme Court considered an issue directly analogous to the question at the heart of the Eighth District's ruling. There, the Supreme Court, citing Judge Learned Hand, held that "(t)o aid and abet a crime a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Rosemond*, citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). The *Rosemond* court added, "So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission."

In *Rosemond*, as here, the issue arose from the government's failure to prove the defendant's knowledge that his co-defendant possessed of a gun at the time the offense was committed. *Rosemond* was charged with aiding and abetting the offense of using or carrying a gun in connection with a drug trafficking crime. In overturning *Rosemond*'s conviction, the Supreme Court held:

"An active participant in a drug transaction has the intent needed to aid and abet a Sec. 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has chosen to join in the criminal venture, and share in its benefits, with full awareness of its scope – that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen...to align himself with the illegal scheme in its entirety – including its use of a firearm. And he has determined...to do what he can to 'make [that scheme] succeed. *Nye & Nissen*, 336 U.S. at 619. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have

brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so he intended the commission of a Sec. 924(c) offense, i.e., an armed drug sale.

For all that to be true, though, the Sec. 924(c) defendant's knowledge of a firearm must be advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding to go ahead with his role in the venture that shows his intent to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may have already completed his act of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.”

*Rosemond*, 134 S.Ct. at 1249.

This principle of foreknowledge concerning possession of a firearm as a necessary element for foreseeability and, therefore, proximate causation, has been applied repeatedly in Ohio jurisprudence to situations where the felony-murder doctrine was applied. Notably, in *State v. Chatmon*, 8<sup>th</sup> Dist. No. 99508, 2013-Ohio-5245 and *State v. Ayers*, 10<sup>th</sup> Dist. No. 13AP-18, 2013-Ohio-5601, the Courts wrote in each case that “(t)o sustain a conviction on the basis of complicity, the evidence must show that the defendant ‘supported, assisted, encouraged, cooperated with, advised or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.” Citing, *State v. Johnson*, 93 Ohio St.3d 240 (2001). Further, both the 8<sup>th</sup> and 10<sup>th</sup> District courts noted “Mere presence of an accused at the crime scene is not, of itself, sufficient to prove that the defendant was an aider and abettor under R.C. 2923.03(A)(2).” *Id.*

In both *Chatmon* and *Ayers*, the Court upheld the conviction on the basis of the defendant's foreknowledge of the firearm. In *Ayers*, testimony established that discussion occurred within a vehicle, prior to the shooting, wherein the primary shooter asked for and was

provided a gun in the defendant's presence. This testimony proved the defendant's foreknowledge that the shooter possessed a firearm. Similarly, in *Chatmon*, testimony established that both Chatmon and his co-defendant arrived on scene with weapons, and video showed that each had knowledge of the others weapon. Accordingly, given their foreknowledge of the weapons, both Ayers and Chatmon had the ability to withdraw from the enterprise or otherwise reconsider their participation, prior to the murder.

In the present case, Shabazz had no such opportunity to reconsider his actions on the basis of the presence of a firearm, as required by *Rosemond*. Not only is there no evidence that Shabazz was aware that Walker possessed a gun, there is evidence that Shabazz was a witness to Walker being frisked and deemed not to possess a weapon. As there was no foreknowledge that there was a weapon, and in fact there was evidence to the contrary, there was no way that Shabazz could have foreseen that that a simple bar fight would have resulted in the shooting death of the victim. Further, given the frisking, he would have been justified in a belief that no such shooting was possible. Had knowledge of the weapon existed, Shabazz would have had the choice to withdraw from the fight, or press forth with the ability to foresee the ultimate outcome and accept any consequences that might follow. As foreseeability is a pre-requisite to the establishment of proximate causation, and no such causation existed here, the State failed to meet its burden.

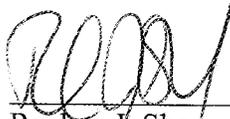
The opinion of the Eighth District in no way created the new and unprecedented requirement for a felony murder conviction that the State suggested. Rather, the opinion merely provides a well-developed application of the doctrine of proximate causation to the facts of this case in the light of the United States' Supreme Court's recent ruling in *Rosemond*. As any Constitutional question or issue of great public concern has been resolved by the Supreme Court

in *Rosemond* during the pendency of this matter, there is no need for this Honorable Court to accept jurisdiction.

### CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest or a substantial Constitutional question. Appellee submits that this Court should deny jurisdiction.

Respectfully submitted,



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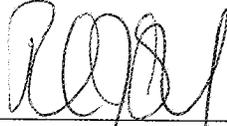
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**SERVICE**

The undersigned hereby certifies that a copy of the foregoing Memorandum in opposition to Jurisdiction was hand-delivered to the offices of the Attorney for Appellant.

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this 1 day of July, 2014.

  
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Reuben J. Sheperd