

IN THE SUPREME COURT OF OHIO
CASE NO.

14-0942

STATE OF OHIO,	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, 8 th Judicial District
Plaintiff-Appellee,	:	
	:	
-vs-	:	
	:	
DAJHON WALKER,	:	
	:	
Defendant-Appellant.	:	

CROSS-APPELLANT'S MEMORANDUM IN OPPOSITION TO JURISDICTION

TIMOTHY MCGINTY
 Cuyahoga County Prosecutor
 1200 Ontario Street
 9th Floor Justice Center
 Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

LEIF B. CHRISTMAN (0070014)
 The Law Office of Leif B. Christman, Co.
 2000 Standard Building
 1370 Ontario Street
 Cleveland, Ohio 44113

ATTORNEY FOR APPELLANT

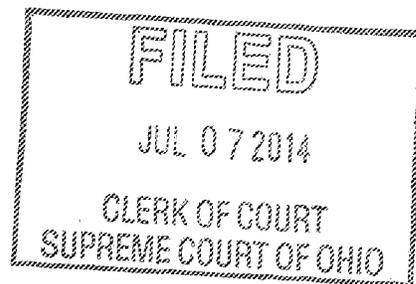


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BRIEF IN SUPPORT

I. EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF GREAT PUBLIC INTEREST, AND WHY THE DEFENDANT'S APPEAL DOES

This Court should decline to exercise jurisdiction on the State's Propositions of Law because they simply restate the law the Appellate Court relied upon. The State completely misunderstands the Appeals Court's ability to recognize the failure of the State's evidence on the crucial issue, whether there was prior calculation and design to kill the victim. It is not enough that there may have been evidence showing a prior intent to attack the victim. The Appellate Court applied the correct legal standard and correctly recognized that the State offered no evidence, only speculation, on the issue of prior calculation and design. The question was not whether there was a plan to attack the victim. The question is whether there was a prior calculated plan to kill the victim.

Contrary to the State's assertion, the Eighth District did not conduct a *de novo* review. This is pure hyperbole on the part of the State. The Eighth District did not ignore the evidence of the video, quite the contrary. During the entire span of the oral argument, the Eighth District had the video played and re-played, and asked abundant questions about the video. The video was silent. The video had no evidence of any intent to kill the victim. The video was considered and found lacking in this crucial detail.

The State further argues that during the short, chaotic brawl Walker left the brawl, then lay in wait for what would have been a few seconds, and that this is enough evidence to show prior calculation and design. The Appellate Court thoroughly reviewed the facts and correctly determined that the evidence demonstrated a short, chaotic event that quickly spiraled out of control. The shooting occurred during the chaos of a general melee as a spontaneous event that

was not thought through beforehand. Walker never left the brawl, which moved back and forth in a mob across the dance floor. The brawl involved numerous persons in a free for all, with no one singling anyone out after the first hit. The cases the State relies on all involved situations where there was evidence of planning and calm considered lying in wait. The State's assertion that Walker was lying in wait during the midst of a bar room brawl is simply unfounded and unsupported by the evidence.

The State further attempts to rely upon Walker's actions after the shooting. What Walker did subsequent to the event is not evidence of prior calculation and design. Walker left, along with everyone else. This is not surprising considering that a shot had been fired. Certainly this is not evidence that everyone in the bar was guilty.

This Court should exercise jurisdiction to consider Walker's Proposition of Law that the trial court erred in instructing the jury on flight. The only evidence presented was that Walker did not remain at the club after the shooting. He ran out when everyone else did. Simply leaving the scene of the crime does not justify a flight instruction, but that is all the State's evidence presented here showed.

II. STATEMENT OF THE CASE AND FACTS

Defendant Walker was charged with the murder of Antwon Shannon and other felonies relating to an incident that occurred on February 19, 2012 at the Tavo Martini Bar in Cleveland. Walker was charged along with co-defendant Derrell Shabazz. Walker and Shabazz pled not guilty and this case proceeded to trial on May 20, 2013.

On June 3, 2013 the jury returned a verdict. Walker was convicted by the jury on all Counts except a felonious assault charge relating to Eunique Worley. Walker was convicted by the Court on a weapon under disability charge.

Walker timely appealed. The Eighth District Court of Appeals reversed the conviction, finding that the State had failed to provide sufficient evidence of prior calculation and design to support an aggravated murder conviction. The conviction for murder was not reversed.

The events leading up to the shooting incident began in the early morning hours of February 19, 2012, Walker and co-defendant Shabaaz were at the Tavo Martini Bar in Cleveland. The bar was not well lit, and was described as being dark. Most of the patrons were drinking.

Sometime during the evening, an individual not charged in this case but later identified as Steele spilled champagne on Ivor Anderson. Anderson complained to this person and asked him to be more respectful of the other people on the dance floor.

After this incident, Steele went and spoke with Shannon, Walker and Otis Johnson, a person not charged. After about fifteen minutes, Shabazz ran up behind Anderson and struck him in the head with a champagne bottle. At this point a general altercation broke out amongst numerous persons in the bar. For a few brief moments, everyone seemed to be fighting everyone. Wild punches were thrown as the mob of combatants moved and tumbled back and forth across the dance floor. During the chaos, a shot was fired.

The shot may have been fired from behind a pillar. There is a flash, but no sound. Numerous persons, including Walker, can be seen going behind the pillar, and emerging from behind the pillar later. What is being done behind the pillar cannot be seen. Who is holding the device that made the flash cannot be seen. At no point in time can Walker be seen with a gun.

After the shot was fired, people ran out of the bar in panic. Walker and others emerge from behind the pillar. Walker and Shabaaz both leave the bar. Outside, they seem happy to be alive after the shooting incident.

Tragically, Shannon had been shot in the back. He died later that evening at MetroHealth Hospital.

III. LAW AND ARGUMENT

STATE'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

Simply reading the State's proposition of law demonstrates why jurisdiction is not warranted on this issue. The Eighth District Court of Appeals followed the law exactly as written by the State and did in fact draw all reasonable inferences in favor of the State. The appeals court did not accept the unreasonable inferences of the State, those that were not based upon any objective evidence. The State is challenging here purely fact based decisions by the Court of Appeals.

The video in questions shows Steele attack Anderson with a champagne bottle. Prior to the attack, he is seen standing with a group of people, which is not unusual in a nightclub. Immediately after this attack, the bar erupts into chaos and a general melee ensues. Walker is seen participating briefly in this melee, then retreating behind a pole where there are several other persons. Nothing can be seen behind the pole due to the camera angle. Two flashes are seen. No testimony conclusively established the either flash was actually a gunshot. Numerous people then run from the area behind the pole.

The State argues that Walker waited for Shannon's back to be turned. Walker cannot even be seen behind the pole. Shannon can only barely be made out. As noted by the Appellate Court, the chaos of the fight came to the area where Walker was spontaneously. There was no deliberate waiting. The incident is over in seconds. The State's reliance on this assertion is

simply an attempt to invent facts to cover for absence of evidence showing any prior calculation and design.

The State's cases involving lying in wait simply do not apply here, as there was no evidence of lying in wait. In *State v. McCrosky*, 5th Dist. No. 2007CA00089, 2008-Ohio-2534, the appellant was thrown out of a party after a fight and waited for the people to leave. Testimony established that he said over a cell phone "bring me the fire, bring me the fire because I am about to do this nigger." ¶ 10. The appellant then lay in wait at a location other than where the initial fight began. ¶13. The State incompletely quotes *McCrosky*, omitting language critical to a proper understanding of the holding. (State Memorandum pp. 7-8). The actual quote at ¶55 states, in full "*We find the time frame between the original altercation on the dance floor and the shooting (approximately 30 minutes) as well as Appellant's action of remaining on the premises in wait was sufficient for the jury to find he acted with prior calculation and design.*" (Emphasis on the critical language omitted by the State).

In *McCrosky*, there was a fight that was broken up. Testimony showed defendant made a direct threat to "do" the victim. Thirty minutes elapsed while defendant waited for the victim to appear, then defendant immediately ran up and shot him. In the present case, there was no pause between the general melee that ensued after Steele's attack on Anderson. Shannon was shot in the midst of that chaos.

In *State v. Gibbs*, 10th Dist. No. 00AP-1356, 2002-Ohio-2085, the defendant instructed his girlfriend lure the victims to an area. He then grabbed a gun and rushed out of his residence, stating he had to meet a deadline. He then went to the area and lay in wait until his girlfriend got there and immediately opened fire on the victims she had lured. There are no similarities to the situation in the present case. In *State v. Edwards*, 6th Dist. No. L-95-228, 1996 WL 402027, the

fact that the defendant had time to go to his vehicle to retrieve the weapon, then go to a location to lay in wait, shows a vastly different situation from the present case as well.

The Appellate Court did not over rely on any particular factor, but gave a clear and reasoned analysis of what the video actually showed. The Appellate Court did not ignore that Walker was the only person to attack Shannon, as the State now alleges, because this is not true. The video actually shows a general melee with no one focused on anyone, and everyone striking randomly at whoever happens to be nearby. At the time of the shooting, Shannon is hard to see, Walker cannot be seen. The fight is pure chaos. Based upon the actual facts shown in the silent video, there was simply no evidence whatsoever of prior calculation and design. The State's exercise of pure conjecture was properly rejected.

STATE'S PROPOSITION OF LAW NO. 2: 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 OF TIME PRIOR TO THE MURDER.

As with the State's first assignment of error, merely reading the proposition of law demonstrates that the State is again only challenging intensely fact specific findings by the Appeals Court relating to the lack of objective evidence presented by the State on this issue. The State does not even set forth a disagreement about the law applied, only how the facts of this case should have been interpreted pursuant to those facts.

The Appellate Court correctly and thoroughly considered this issue. It observed that "there was no audio of what these males were discussing, let alone audio of a plan to kill Shannon. The fact that Walker was speaking with the group that he came to the nightclub with does not indicate he planned to kill Shannon. It is not unusual for a group to stand together and converse while at a nightclub." (Opinion, ¶20). The Appellate Court applied the correct legal

standard and recognized the simple fact that the state offered no evidence to support speculation that murder was discussed by the group. The only support for the assertion would be that because the conversation happened before the shooting, it must have been about the shooting.

Pure speculation of this sort is unreasonable and illogical. Yet this is exactly what the State relies upon. The silent video shows a group of people, including Walker, talking to Steele in the fifteen minutes prior to Steele's attack on Anderson. No evidence exists regarding what was said. None of the uncharged persons who were involved in that conversation were called to testify. What was said can only be speculated upon. This type of speculation that the Appeals Court correctly recognized is not evidence, rather it is inferences stacked upon inferences.

DEFENDANT'S PROPOSITION OF LAW NO. 1: A FLIGHT INSTRUCTION IS NOT WARRANTED MERELY BECAUSE THE DEFENDANT LEFT THE SCENE OF A CRIME.

The Appellate Court did error in finding that a flight instruction was warranted. The decision represents a steady watering down of the standard used to evaluate this instruction, to the point where nothing more is required than the defendant did not wait around for the police to arrive. The correct legal standard is more stringent.

An instruction on flight is warranted only where the evidence shows that the defendants took additional affirmative steps to evade detection and apprehension by the police. Flight, as evidenced by the title of the instruction in OJI, is part of the concept of "consciousness of guilt." That was explained in *State v. Eaton*, 19 Ohio St.2d 145, 160 (1969), *vacated on other grounds sub nom. Eaton v. Ohio*, 408 U.S. 395 (1972), where the court, quoting Wigmore on evidence, opined:

"Flight from justice, and its analogous conduct, have always been indicative of a consciousness of guilt. It is to-day [sic] universally conceded that the fact of an

accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." (Internal ellipses omitted.)

Escape from custody, resistance to arrest, concealment, assumption of a false name, and "related conduct" (such as intimidation of witnesses, see *State v. Williams*, 79 Ohio St.3d 1, 11 (1997), are easily defined and clearly indicative of consciousness of guilt. Mr. Walker did none of these.

The only apparent basis for the judge's inclusion of a flight instruction was that Walker left the scene of the crime. To be sure, there have been occasions when the courts have held that an instruction on flight was warranted *because* the defendant left the scene of the crime. *Eaton*, indeed, was one of them. In that case, though, the defendant acknowledged being at the scene and killing the decedent; he claimed that the killing was accidental, but the court rightly noted that this claim was inconsistent with him having left the scene, and thus a flight instruction was warranted. Again, neither of those circumstances are present here.

Other courts have held that a flight instruction may be warranted if the defendant flees the jurisdiction. See *State v. Alexander*, 8th Dist. 1987 Ohio App. LEXIS 7187 (defendant had fled the State and was arrested outside the jurisdiction); *State v. McClurkin*, 12th Dist. 2010 Ohio 1938, ¶38 (defendant had told neighbors that he intended to leave town after learning police had begun investigation); *State v. Jeffries*, 182 Ohio App. 3d 459, 477 (11th Dist. 2009) (defendant ran when police went to store where he was at, escaping through fire door, and later gave false name and social security number to detective).

But again, none of that happened here. If a flight instruction is to be given any time a perpetrator does not remain on the scene until the police arrive, the giving of that instruction will become obligatory. This Court recognized that in *State v. Santiago*, 8th Dist. No. 95516 2011-

Ohio-3058, ¶30, holding that “a mere departure from the scene of the crime is not to be confused with a deliberate flight from the area in which the suspect is normally to be found.”

There was no evidence that Walker attempted to evade detection or engaged in any other conduct which would have warranted the giving of a jury instruction on flight. He simply left the scene of a shooting, running out when everyone else was running out.

The jury was instructed that testimony was introduced that Walker fled, when in fact the only testimony was that he left. Specifically, the instruction states:

Testimony has been admitted 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 a presumption of guilt but it may tend to indicate the defendant’s consciousness or awareness of guilt.

The subsequent admonition created a false choice for the jury: they were instructed that they could believe or disbelieve that Walker’s flight from the scene was evidence of guilt, when in fact he had not fled under the correct legal definition. He left the club at the same time everyone else did. The issue of flight never should have been injected into the case at all, and, given the closeness of the evidence, an instruction on that issue was error prejudicial to Walker.

IV. CONCLUSION

For the forgoing reasons, this Court should decline to accept jurisdiction on the State’s Propositions of Law but should accept jurisdiction to consider the Defendant’s Proposition of Law.

Respectfully submitted,

 LEIF B. CHRISTMAN / 10 # 0062932

LEIF B. CHRISTMAN (0070014)

2000 Standard Building

1370 Ontario Street

Cleveland, Ohio 44113

216-241-5019

216-241-5022 (fax)

Lbchristman@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2013, a copy of the foregoing Cross-Appellants Memorandum in Support of Jurisdiction was served via regular U.S. mail, postage prepaid upon:

TIMOTHY MCGINTY
Cuyahoga County Prosecutor
1200 Ontario Street
9th Floor Justice Center
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE


Leif B. Christman, Esq.
Attorney for Defendant