

NO. 2014-0941

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 100021

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

DERRELL SHABAZZ,

Defendant-Appellee

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**MERIT BRIEF OF APPELLANT**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Derrell Shabazz and Dajhon Walker attacked and murdered an innocent 27-year old man. The evidence showed that Shabazz, Walker, and other members of their group engaged in 15 minutes of planning before they surrounded the victims and attacked them with bottles. “This was no bar fight. This was a vicious, premeditated attack.” *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 83 (Gallagher, J., dissenting). That attack culminated in Walker shooting the unarmed victim in the back while Walker hid behind a pole. Shabazz was captured on video congratulating Walker as they fled the scene together. After a jury trial, Shabazz and Walker were found guilty of aggravated murder, felony murder, and four counts of felonious assault.

On appeal, however, a divided panel of the Eighth District found that there was insufficient evidence to sustain the jury’s unanimous verdicts. In doing so, the court failed to consider several significant pieces of evidence in the State’s case and refused to show any level of deference to jury’s verdict. The Eighth District instead conducted a de novo review in which two of the three judges discounted the evidence they either could not see themselves or simply chose not to believe. *Id.*, at ¶ 40. “Simply put, the jury in this case saw it differently than the majority sees it here.” *Id.*, at ¶ 81 (Gallagher, J., dissenting).

This case, along with two other recent decisions by the Eighth District in which the court reversed a jury’s finding of prior calculation and design, demonstrates that the court has abandoned its extremely limited role in reviewing criminal convictions for sufficiency of the evidence.<sup>1</sup> Instead, the court determines for itself 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

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<sup>1</sup> See *State v. Nathaniel Woods*, Case No. 2014-0940, and *State v. Dajhon Walker*, Case No. 2014-0942.

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. This is manifest weight review disguised as sufficiency of the evidence.<sup>2</sup>

Additionally, the Eighth District's decision fundamentally changed Ohio's felony murder rule, which – until this case – has only required the State to prove that the defendant was guilty of a felony that was a proximate cause of the victim's death. But here, the Eighth District added a new requirement: the defendant must be guilty of the felony that was the *actual* cause of the victim's death. In this case, the court believed that Shabazz could not be found guilty of felony murder unless he knew the principal co-defendant had a firearm. This requirement confuses the elements of the felony murder rule. Ohio law only requires the State to prove that Shabazz was guilty of any felony that was the proximate cause of the victim's death.

The State therefore respectfully asks this Honorable Court to reverse the Eighth District's opinion in this case and hold that (1) when reviewing a challenge to the sufficiency of the evidence, an appellate court is required to review the entire record and adopt all reasonable inculpatory inferences in favor of the State's case, and (2) the State is not required to introduce direct testimony that a defendant knows his accomplice has a firearm to be guilty of felony-murder as long as the defendant is guilty of a felony that is a proximate cause of the victim's death.

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<sup>2</sup> The Eighth District could not have reversed this case on manifest weight grounds because the court itself could not unanimously agree on what the verdict should have been. Ohio Constitution, Article IV, Section 3(B)(3) mandates the unanimous concurrence of all three judges on the reviewing panel to reverse a defendant's conviction based upon manifest weight.

**STATEMENT OF THE CASE**

A Cuyahoga County jury found Derrell Shabazz, the Defendant-Appellee herein, guilty of aggravated murder, felony murder, and four counts of felonious assault relating to a vicious 6-on-1 attack in a nightclub that ended when Shabazz’s co-defendant shot one of the unarmed victims in the back. “This was no bar fight. This was a vicious, premeditated attack.” *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 83 (Gallagher, J., dissenting). On appeal, the Eighth District reversed nearly all of Shabazz’s convictions based on its erroneous belief that there was insufficient evidence to support the jury’s verdicts. This Court accepted discretionary jurisdiction over the State’s appeal.

On October 16, 2012, the Cuyahoga County Grand Jury indicted Derrell Shabazz, the Defendant-Appellee herein, and Dajhon Walker on nine counts each related to the February 18, 2012 shooting death of Antwon Shannon. The indictment charged Shabazz 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 as follows:

<b>Count</b>	<b>Offense</b>	<b>Victim</b>	<b>R.C. Section</b>	<b>Conduct</b>
Count 1	Aggravated murder	Antwon Shannon	R.C. 2903.01(A)	Aggravated Murder of Antwon Shannon with prior calculation and design
Count 2	Felony-murder	Antwon Shannon	R.C. 2903.02(B)	Caused the death of Antwon Shannon as a proximate result of committing or attempting to commit felonious assault
Count 3	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(1)	Did knowingly cause serious physical harm
Count 4	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon,

				to wit: <u>champagne bottle</u>
Count 5	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>firearm</u>
Count 6	Felonious assault	Ivor Anderson	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>champagne bottle</u>
Count 7	Felonious assault	Eunique Worley	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>champagne bottle</u>
Count 8	Felonious assault	Eunique Worley	R.C. 2903.11(A)(1)	Did knowingly cause serious physical harm
Count 9	Having weapons while under disability	n/a	R.C. 2923.13(A)(3)	Did knowingly acquire, have, carry, or use a firearm

Counts 1, 2, 3 and 5 each included one and three-year firearm specifications.

Shabazz and Walker’s case proceeded to a joint jury trial at which a jury found Shabazz guilty of aggravated murder (with one and three-year firearm specifications), felony-murder, four counts of felonious assault (Counts 3, 4, 5, and 6), and having weapons while under disability. The jury found Shabazz not guilty of Counts 7 and 8 – the two counts of felonious assault against Eunique Worley. The jury also found Shabazz not guilty of the firearm specifications on Count 2, Count 3, and Count 5. (Tr. 1272-1277).

The jury found Shabazz’s co-defendant, Dajhon Walker, guilty of the same counts. The jury also found Walker, the shooter and principal offender, guilty of the one and three-year firearm specifications attached to Counts 1, 2, 3, and 5. The trial court sentenced Shabazz to life

imprisonment, with the possibility of parole after 22 years.<sup>3</sup> The trial court sentenced Walker to life imprisonment, with the possibility of parole after 25 years.

On direct appeal, the Eighth District modified Dajhon Walker's conviction for aggravated murder down to murder, finding insufficient evidence of prior calculation and design, and affirmed his remaining convictions. *State v. Walker*, ---Ohio App.3d ---, 10 N.E.3d 200, 2014-Ohio-1827. By a 2-1 vote, the Eighth District reversed Derrell Shabazz's convictions for aggravated murder, murder, felonious assault, and having a weapon while under disability, based on its mistaken belief that there was insufficient evidence that Shabazz knew Dajhon Walker had a gun. "Simply put, the jury in this case saw it differently than the majority sees it here." *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 81 (Gallagher, J., dissenting). The court thus reduced Shabazz's convictions to two counts of felonious assault, Counts 4 and 6, for causing serious physical harm to Antwon Shannon and Ivor Anderson by means of a champagne bottle. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828.

This Court accepted this case on the following two propositions of law:

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.

STATE'S PROPOSITION OF LAW II: 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.

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<sup>3</sup> The Eighth District's opinion incorrectly states that the trial court ran Shabazz's two-year sentence on Count 6 consecutive to his nine-month sentence on Count 9, both of which were concurrent to Count 1 for a total of life imprisonment with parole eligibility after 20 years. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 18. The trial court's sentencing entry actually reflects that it ordered Shabazz to serve his two year sentence on Count 6 consecutive to his sentence on Count 1, and that Count 9 ran concurrent to Count 1 for a total of life imprisonment with parole eligibility after 22 years.

This Court also accepted the State's appeals in *State v. Nathaniel Woods*, Case No. 2014-0940, and *State v. Dajhon Walker*, Case No. 2014-0942, in which the Eighth District also reversed convictions for aggravated murder on sufficiency grounds, and held both cases for this appeal.

### **STATEMENT OF THE FACTS**

#### **1. Derrell Shabazz and his group planned to attack Ivor Anderson and Antwon Shannon over a champagne spill.**

On February 19, 2012, 27-year old Antwon Shannon went to the Tavo Martini Lounge in downtown Cleveland with his friend Ivor Anderson. (Tr. 686). They arrived between 11:30 p.m. and 12:00 midnight. (Tr. 688). While at Tavo, Anderson and Shannon met up with Anderson's friend Eunique Worley, as well as her friends Asia Rudolph, Ashley Nix, and Marvella Grant. (Tr. 688, 749). Tom Ciula, a forensic video specialist with the Cleveland Division of Police, testified that there are 16 surveillance cameras at the Tavo Martini Lounge. (Tr. 574). There is no audio on any of those cameras. (Tr. 583). At trial, the State introduced the video from Camera 9 as State's Exhibit 3, which best captured Derrell Shabazz and Dajhon Walker's criminal actions.

At 1:56 a.m., Shannon and Anderson were standing on the dance floor of the club near a man named Robert Steele. (Tr. 692-693, 1044). Steele, who was dancing wildly and twirling his champagne glass in the air, spilled champagne onto Anderson. (Tr. 692-693). Anderson looked at Steele and said "you're doing too much" before they separated. (Tr. 693). Steele then walked over to his group of friends, which included Otis Johnson, Derrell Shabazz, and Dajhon Walker. (Tr. 693-694). Anderson testified that he began watching Steele's group, fearing an attack:

"After the champagne was spilled onto me, he [Steele] went over and whispered to the two gentlemen, and at that point I continued to watch the gentlemen

because there wasn't nothing that serious to take it that far I felt, so I felt at that point they were plotting against me and Mr. Shannon.”

(Tr. 693-694).

Anderson later identified Otis Johnson and Derrell Shabazz as the “two gentlemen” in Steele’s group. (Tr. 694, 702). Anderson did not know Shabazz personally, but the women in the group – Eunique Worley, Marvella Grant, and Ashley Nix – all did. (Tr. 761, 794, 804). Anderson “stood there and watched them for the next five to ten minutes,” because “I didn’t want to get attacked with my back turned[.]” (Tr. 694). Anderson told Shannon “to keep an eye out because they’re looking suspect[.]” (Tr. 694). After about 10 minutes went by and nothing happened, Anderson lowered his guard and stopped watching Steele’s group. (Tr. 695).

**2. Shabazz, Walker, and a group of four other people launched a premeditated and coordinated deadly attack on Shannon and Anderson.**

At 1:56 a.m., Camera 9 – which is positioned in the lounge area – recorded Steele spilling champagne on Anderson. (Tr. 576, 1043-1044; see State’s Exhibit 3-A). Steele and Anderson exchanged words and Steele moved towards the center of the dance floor to talk to the other members of his group. For the next 15 minutes, Camera 9 recorded Steele, Johnson, Shabazz, and Walker as they 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., Camera 9 captured Otis Johnson, standing prominently in the center of its view, flipping over a bottle in his right hand so that he was holding it upside down by the neck. (Id.). At 2:11:19 a.m., Robert Steele moved to the center of the dance floor adjacent to Anderson’s position and began dancing from side-to-side, holding a champagne bottle, and looking to his left at Anderson. (Id.) Otis Johnson conferred with Shabazz and Walker before separating from the group and walking over to the left of Anderson and Shannon, towards the top of Camera 9’s view. (Id., at 2:11:37).

At 2:11:52 a.m., Steele suddenly yelled out, “yeah, nigger” and struck Anderson in the head, from behind, with a bottle. (Tr. 697). The bottle glanced off Anderson’s head and also struck Eunique Worley in the forehead. (Tr. 697, 756). Anderson initially believed that it was Shabazz who struck him. (Tr. 695). Otis Johnson immediately rushed in from the left and joined the attack, punching and kicking Anderson as he rolled around on the ground. (State’s Exhibit 3-A; camera 9, at 2:11:55).<sup>4</sup> Antwon Shannon went to break up the fight. (Id., at 2:11:56). It was uncontested at all levels of this case that Shannon acted only as a peacekeeper and that neither Shannon nor Anderson ever made any aggressive or hostile moves towards Shabazz’s group prior to the shooting.

Walker and Shabazz immediately walked up to Shannon. Walker struck Shannon in the face with a bottle. (Id., at 2:11:58). Shannon recoiled, ducked, and moved to his left away from Walker. (Id., at 2:12:00). Walker followed Shannon and threw the bottle at Shannon’s head. (Id., at 2:12:01). The bottle missed Shannon but struck an unidentified man standing behind him. (Id.). Shannon, who was still trying to break up the fight, fell down onto his back. (Id., at 2:12:03). As Shannon attempted to stand, Shabazz approached him from behind, threw a punch with his left hand towards Shannon’s head, and shoved Shannon to the ground with Walker on top of him. (Id., at 2:12:05). Walker got up off of Shannon and left the fight, walking behind a pole several feet away. (Id., at 2:12:07).

As Walker moved behind the pole, Shannon’s friend Anderson was still trying to defend himself from a 5-on-1 assault by Shabazz, Steele, Johnson, and two unidentified women. Shabazz walked around the perimeter of the attack, visibly directing the other members of his group as to how to proceed. (Id., at 2:12:10). Shabazz approached Anderson and threw two

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<sup>4</sup> No witness described the events depicted on the video at trial because the defense twice objected to any witnesses providing narrative testimony. (Tr. 591, 1037).

punches at Anderson's head. (Id., at 2:12:19). Anderson was pushed back behind the left side of the pole where Walker lay in wait, falling to the ground as Shabazz's group continued to punch and kick him. (Id., at 2:12:24).

Johnson followed Anderson behind the pole. (Id.). Shannon, who had been trying to restrain one of the female attackers, wrapped Johnson up in a bear hug to stop him from attacking Anderson. (Id., at 2:12:25). As Shannon struggled to hold onto Johnson, Shannon turned away from the pole and exposed his back to Dajhon Walker. (Id.). At 2:12:27 a.m., Walker shot Shannon in the back with a .45 caliber handgun. (Tr. 598, 1056). Lisa Przepyszny, a forensic scientist with the Cuyahoga County Regional Forensic Science Laboratory, testified that Walker fired the shot from a distance of "approximately one to two feet or so" into Shannon's back. (Tr. 892). Police later found a .45 caliber shell casing on the dance floor behind the pole. (Tr. 1005).

### **3. Shabazz and Walker celebrated as Shannon died.**

Shabazz, who had followed Shannon towards the left side of the pole, was standing mere feet in front of Walker's gun when it went off. (State's Exhibit 3-A, Camera 9, at 2:12:27). Although nearly everyone in the club visibly ducked at the sound of the gunshot, Shabazz had *no* reaction. (Id.) Walker then ran out from behind the right side of the pole, visibly stuffing an object into his waistband. (Tr. 597; State's Exhibit 3-A, Camera 9, at 2:12:31-33). Shabazz approached Walker, congratulated him by patting him on the chest and back, and then fled the club with him and the other attackers. (ID., at 2:12:31). Walker, Shabazz, and their group ran outside into the view of Camera 6 on Rockwell Avenue.

Det. Ray Diaz, with the Homicide Unit of the Cleveland Division of Police, testified that he followed Shabazz's group on Camera 6 as they exited Tavo. (Tr. 1063). Walker, who was walking quickly and ahead of his group, jumped into the air and pumped his fists. (State's

Exhibit 3-D, Camera 6, at 2:13:29). Det. Diaz identified both Shabazz and Walker on the video and in court as the individuals on the video. (Tr. 1068).

Tennison Malcolm, a medical school student at Case Western, ran into the men's bathroom when he heard the gunshot. (Tr. 821). Within a few seconds, Shannon walked into the bathroom looking confused. (Tr. 822). Malcolm asked Shannon if he was okay, to which Shannon replied that he did not know. (Tr. 822). Malcolm asked Shannon to lift up his shirt and saw blood coming from a gunshot wound to Shannon's chest. (Tr. 822). Shannon lay down on the ground where Malcolm attempted to put pressure on the wound. (Tr. 822). Shannon soon became unresponsive. (Tr. 823). He died later that night at the hospital. (Tr. 971).

Anderson ran outside after he heard the gunshot. (Tr. 697). He waited three to five minutes, looking for his friend Shannon. (Tr. 697-698). One of the female attackers from inside the club followed Anderson outside and tried to attack him again. (Tr. 713). Anderson identified Shabazz's girlfriend as one of the two women who attacked him on the dance floor. (Tr. 703; State's Exhibit 11).

On October 10, 2012 – eight months after the shooting –Dajhon Walker gave a statement while under arrest at the Cleveland Division of Police, Homicide Unit. Walker remembered that there had been a fight at the Tavo Martini Lounge but denied knowing anything about the gunshot that killed Antwon Shannon. (Tr. 1059). Walker also could not recall who accompanied him that night or who left the club with him. (Tr. 1059). Once the detectives showed him the video, Walker identified himself, Otis Johnson, and Derrell Shabazz entering the club. (Tr. 1060).

## 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 a challenge to the sufficiency of the evidence, an appellate court is required to draw all reasonable inculpatory inferences in favor of the State’s case and the jury’s verdict. The evidence in this case showed that Robert Steele exchanged words with Anderson after spilling champagne on him. Steele then walked over to his group, which included Derrell Shabazz, Dajhon Walker, and Otis Johnson. For the next 15 minutes between 1:56 a.m. and 2:11 a.m., Shabazz’s group stood in the middle of the dance floor speaking to one another and staring at Anderson and Shannon. Anderson was sufficiently worried by this behavior that he told Shannon to watch Shabazz’s group because he was afraid they would attack him when his back was turned. At the end of that 15 minutes, Steele, Shabazz, Walker, and Johnson launched a coordinated attack on Anderson and Shannon that culminated in Walker shooting Shannon in the back.

This case centers around the evidentiary significance of the video showing Shabazz’s group conversing for 15 minutes before the attack. The Eighth District found the 15-minute period did not establish prior calculation and design because there was no audio of what the group was discussing and “it was not unusual for a group to stand together and converse while at a nightclub.” *Shabazz*, at ¶ 28. If the State had indeed presented the jury with nothing but a silent video that merely depicted Shabazz’s group speaking to one another before a fight spontaneously broke out, this would have been insufficient evidence to convict Shabazz of complicity to aggravated murder. But that is not what happened in this case.

The State presented numerous pieces of evidence that showed Shabazz's group planning the attack and celebrating in its aftermath. As this Court has recently noted, "[a]n appellate court must review 'all of the evidence' admitted at trial." *State v. Tate*, ---Ohio St.3d ---, 2014-Ohio-3667, --- N.E.3d ----, at ¶ 18 (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When all of the evidence in this case is included in a properly-applied sufficiency review, the State provided clear evidence to support all of Shabazz's convictions.

**1. The legal standard for sufficiency of the evidence review is extremely deferential.**

The relevant question in a sufficiency-of-the-evidence review 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "The standard of review governing sufficiency-of-the-evidence challenges is extremely deferential to the underlying guilty verdict and raises a high bar for a defendant to overcome[.]" *U.S. v. Wells*, 646 F.3d 1097, 1102 (8th Cir.2011).

As one Ohio appellate court held: "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.*

In this case, the Eighth District not only failed to show the requisite level of extreme deference to the jury’s verdict – the court failed to show any deference at all. Instead, the court conducted its own de novo review of the evidence, limited that review to the video, and failed to consider the rest of the State’s case. Two members of the court decided that they could not see what the jury, the judge, the prosecution, and the dissenting judge all saw, and thus drew all contested inferences in favor of the defendant. This included new inferences that neither Shabazz nor Walker had ever tried to make at trial or in their appeals.

The lower court thus fundamentally misconstrued its role in a sufficiency challenge. The court’s treatment of the State’s case was a manifest weight review disguised as sufficiency of the evidence. The court’s complete lack of deference to the jury evidences its belief that only it could properly investigate and decide the facts of this case. But an appellate court presiding over a cold record is ill-equipped to investigate the crime at issue, and particularly so when the court chooses to ignore significant portions of the record.

A sufficiency review must be more deferential to the jury’s verdict. The court cannot sua sponte create its own exculpatory inferences to explain away the State’s case simply because it believes those inferences to be the most persuasive. “If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.” *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio

Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Given the choice between a reasonable inference that is inculpatory 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.

**2. Sufficient evidence existed to support the jury’s finding that Shabazz was complicit in the aggravated murder of Antwon Shannon with prior calculation and design.**

The State presented numerous pieces of evidence that supported its claim that Shabazz’s group discussed a premeditated, violent assault on Anderson and Shannon:

- 1) Anderson directly testified that he believed Shabazz’s group was “plotting against me and Mr. Shannon[,]” that he told Shannon “to keep an eye out because they’re looking suspect[,]” and that he watched them for “the next five to ten minutes” because “I didn’t want to get attacked with my back turned[.]” (Tr. 693-694).
- 2) At 2:11:01 a.m., Camera 9 captured Otis Johnson flipping over a bottle in his right hand so that he was holding it upside down by the neck, consistent with use as a weapon.
- 3) At 2:11:37 a.m., Otis Johnson walked away from his group and over to the left side of where Anderson and Shannon were standing, flanking them. But despite separating from his group, Johnson joined in the attack on Anderson within just four seconds of when Steele initially struck Anderson with the bottle. (State’s Exhibit 3-A, Camera 9, at 2:11:56).
- 4) Six people – Robert Steele, Derrell Shabazz, Dajhon Walker, Otis Johnson, and two women – immediately launched a coordinated attack on Anderson and Shannon despite the fact that neither Anderson nor Shannon acted aggressively at any point.
- 5) Dajhon Walker repeatedly attacked Antwon Shannon and actually followed him around the dance floor, striking him in the face with a beer bottle and then throwing the bottle at him.
- 6) Everyone in the bar except for Shabazz ducked when Walker fired the shot. Shabazz, despite standing mere feet in front of the gun when it went off, had no visible reaction.
- 7) Shabazz knew to walk over to the right side of the pole as Walker came running out from behind it. Shabazz congratulated Walker by patting him on his chest and on his back, consistent with a congratulatory gesture.
- 8) As Walker ran outside the club and across Rockwell Avenue, he jumped into the air and pumped his fists in celebration.

“An appellate court must review ‘*all of the evidence*’ admitted at trial.” *State v. Tate*, ---Ohio St.3d ---, 2014-Ohio-3667, --- N.E.3d ----, at ¶ 18 (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Anderson’s testimony is especially significant because it is direct evidence that Shabazz’s group was discussing a plan to attack Anderson and Shannon during that 15 minutes. At that point, the jury was not required to draw an inference at all. An eyewitness testified to the existence of a plan. In a sufficiency analysis, the reviewing court was required to accept that testimony as true, particularly where – as here – the defense made no attempt to dispute Anderson’s testimony on that point.

The Eighth District, however, dismissed Anderson’s testimony and found that Walker and Shabazz did not act with prior calculation and design: “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.” *Shabazz*, at ¶ 28. Anderson did not testify that he felt “uneasy” or that Shabazz’s group was giving him “dirty looks.” He testified that he believed they were “plotting against me and Mr. Shannon” and that he told Antwon Shannon to watch the group because he was afraid they would attack him when his back was turned. (Tr. 693-694). That is exactly what happened. There is a fundamental disconnect between what Anderson testified to and how the Eighth District treated that testimony in its sufficiency review. That review was not “extremely deferential[.]” *U.S. v. Wells*, 646 F.3d 1097, 1102 (8th Cir.2011).

The State also presented the jury with numerous pieces of evidence that demonstrated Shabazz knew Walker had a gun. Immediately after the shot, Shabazz walked over to Walker as Walker ran out from behind the right side of the pole and patted him on the chest and back.

Shabazz and Walker then fled the club together. “[P]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.” *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336, 754 N.E.2d 796.

Once outside, Walker jumped into the air and pumped his fists in a display of celebration. This is also consistent with the successful execution of a pre-conceived plan to shoot Shannon. “[C]ourts have found that the *Jenkins* totality-of-the-circumstances test renders a defendant’s conduct both before and after the victim’s death pertinent to prior calculation and design.” *State v. Young*, 7th Dist. No. 96-BA-34, 1999 WL 771070, at \*13. At all times before, during, and after the shooting, Shabazz behaved consistently with someone who knew the shot was coming.

The Eighth District also dismissed this evidence. “We reviewed the footage referenced by the state; our review showed people in the distance with no way of knowing who they were or what they were doing.” *Shabazz*, at ¶ 40. This analysis makes it clear that the Eighth District conducted a de novo review of the video and did not consider any evidence from the video that it did not see for itself.

The Eighth District’s de novo review was improper in a sufficiency analysis and failed to account for the testimony in this case. Det. Ray Diaz testified that he testified that he followed Shabazz’s group on Camera 6 as they exited Tavo. (Tr. 1063). He identified both Shabazz and Walker on the video and in court as the individuals on that video. (Tr. 1068). The Eighth District was not free to watch the video, decide that it could not see who was on the video or what they were doing, and then ignore Det. Diaz’s identification testimony. The court was required to accept that testimony as true.

Each of these pieces of evidence – which the lower court was required to view in the light most favorable to the State – is consistent with and indicative of a preconceived plan to attack

and kill. The jury agreed with the State’s view of the evidence and found that both Walker and Shabazz acted with prior calculation and design. “Simply put, the jury in this case saw it differently than the majority sees it here.” *Shabazz*, at ¶ 82 (Gallagher, J., dissenting). The Eighth District was not free to disregard those facts or to sua sponte create its own explanations as to why it believed the evidence was not really indicative of guilt. Doing so is beyond the scope of a sufficiency review.

### **3. Prior calculation and design was present under the three-part test from *Taylor*.**

This Court has previously articulated the following factors to consider in determining the existence of prior calculation and design:

“(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?”

*State v. Taylor*, 78 Ohio St.3d 15, 19, 1997-Ohio-243, 676 N.E.2d 82. This Court nevertheless cautioned in *Taylor* that “it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of ‘prior calculation and design.’” *Id.*, at 20. Rather, each case “turns on the particular facts and evidence presented at trial.” *Id.*

As to the first factor, there is no evidence that Shabazz knew either Ivor Anderson or Antwon Shannon. It is notable, however, that the women who were at the club with Anderson – Eunique Worley, Marvella Grant, and Ashley Nix – all knew Shabazz. (Tr. 761, 794, 804). And Shabazz did know of Anderson and Shannon after Steele exchanged words with Anderson. The reason this Court found this factor significant in *Taylor* is because a defendant is less likely to form prior calculation and design to kill a stranger than someone the defendant knows. Here, Anderson and Shannon were strangers to these defendants when they entered the bar but not at

the time the attack began. Shabazz and Walker had formed a motive by that point based on the interactions from earlier involving the champagne spill.

Under the second factor, the court should look to whether the accused gave thought or preparation to choosing the murder weapon or murder site. In the appeal involving Shabazz's co-defendant, Dajhon Walker, the Eighth District found this factor weighed particularly heavily against the State's case:

“The video then shows the fight spilling over to the area by the pillar where 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.”

*Shabazz*, at ¶ 27, quoting *Walker*, at ¶ 18. There are two problems with the Eighth District's treatment of the record on this point.

First, this characterization misconstrues the evidence. This was not a “fight” and it did not simply “spill over[.]” As the dissenting judge noted:

“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.”

*Shabazz*, at ¶ 83 (Gallagher, J., dissenting). The Eighth District used a variation of the word “fight” 19 times in its majority opinion. This characterization makes it appear as though Anderson bore some level of culpability for participating in the fight and that he was somehow on an equal footing with the other combatants. This is not true. The attack did not simply “spill over” towards the left side of the pole. Anderson's five attackers – Johnson, Shabazz, Steele, and the two women – punched, kicked, dragged, and pulled him over to the left side of the pole as he attempted to defend himself, lying on the ground. Neither Shabazz nor Walker ever

attempted to make this “inadvertent spill over” argument, either at trial or in their appeals to the Eighth District.

Second, Walker did chose both the murder weapon and the murder site. He chose to bring a gun to the Tavo Martini Lounge that night. He chose to involve himself in a 6-on-1 attack over a perceived insult that had nothing to do with him. He chose to strike Antwon Shannon in the face with a beer bottle and then throw the bottle at him, despite the fact that Shannon had shown no aggression towards anyone. He chose to walk behind the pole and draw his gun, knowing that the fight was mere feet in front of him. And he chose, while standing behind that pole, to shoot an unarmed and defenseless Shannon in the back under no provocation. The fact that Walker did not know exactly where Shannon would be standing at the time he shot him does not indicate a lack of prior calculation and design. Every aggravated murder victim could have, at some point, gone in the other direction and not been where their killers needed them to be in order to kill them.

Finally, the act was drawn out and not an almost spontaneous eruption of events. 15 minutes elapsed between when Steele spilled the champagne on Anderson and when the attack began. The evidence outlined above was sufficient to allow the jury to find that Shabazz’s group spent those 15 minutes discussing a plan to attack and kill Shannon and Anderson. The dissenting judge correctly found that:

“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.

*Shabazz*, at ¶ 83 (Gallagher, J., dissenting).

This Court has affirmed jury findings of prior calculation and design in killings that involved far less than 15 minutes of planning. In *State v. Palmer*, 80 Ohio St.3d 543, 1997-Ohio-312, 687 N.E.2d 685, this Court found prior calculation and design where the defendant killed two strangers in a road rage incident where the defendant exited his vehicle with a revolver that he only needed time to cock before it would fire. *Id.*, at 568-569.<sup>5</sup> In *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82, this Court found prior calculation and design where the defendant shot an acquaintance after a brief argument in a bar over a juke box. “[T]wo or three minutes \* \* \* 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.” *Id.*, at 22. Consequently, “prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes.” *State v. Coley*, 93 Ohio St.3d 253, 264, 2001-Ohio-1340, 754 N.E.2d 1129.

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 the trial court correctly submitted to the jury for their deliberations. The jury deliberated and found prior calculation and design. The Eighth District 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

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<sup>5</sup> The Sixth Circuit affirmed this Court’s finding of prior calculation and design in federal habeas. See *Palmer v. Bagley*, 330 Fed.Appx. 92, 107 (6th Cir.2009) (prosecutor’s claim in closing argument that “it is legally possible for the defendant to have in his mind sufficient prior calculation and design in [10 to 15 seconds]” were neither erroneous nor improper).

was free to accept or reject the State’s inferences; the Eighth District 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.

The Eighth District’s de novo re-investigation of the fatal shooting of Antwon Shannon was beyond the scope of a sufficiency review and factually wrong in a number of areas. The State therefore respectfully requests that this Honorable Court reverse the Eighth District’s decision and hold that in a sufficiency review, the appellate court is required to adopt all reasonable inferences in favor of the State’s case and to show extreme deference to the jury’s verdict. Under that properly-announced standard, this Court should hold that sufficient evidence existed to affirm Shabazz’s convictions.

***STATE’S PROPOSITION OF LAW II: 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.***

Until this case, Ohio law defined felony murder as causing the death of another as the proximate result of a felony. The only issue regarding Shabazz’s felony murder charge thus should have been whether any of the felonious assaults were a proximate cause of Shannon’s death. But in this case, the Eighth District added a new requirement to Ohio’s felony-murder rule by holding that Shabazz could not be convicted of felony-murder unless he was guilty of the felony that was the actual cause of Shannon’s death – Count 5 – rather than simply the proximate cause. The court thus refused to consider any of the other counts of felonious assault in its felony-murder analysis. The court’s decision to limit the State to a single count of felonious assault through the addition of an “actual cause” requirement was contrary to the trial court’s jury instructions, the State’s presentation of its own case, the jury’s verdict, and Ohio law. This

Court should reverse the Eighth District's invention of an unprecedented limitation on the felony-murder rule.

**1. Ohio's felony-murder rule applies to any person who causes the death of another as a proximate result of felonious assault.**

R.C. 2903.02(B) provides that “[n]o 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 \* \* \*.” The felony-murder statute does not require the State to present any evidence that the defendant intended to kill the victim. “The felony-murder statute imposes what is in essence strict liability. Though intent to commit the predicate felony is required, intent to kill is not.” *State v. Nolan*, --- Ohio St.3d ---, 2014-Ohio-4800, --- N.E.3d ---, at ¶ 9.

The predicate felonies in this case were three counts of felonious assault against Antwon Shannon and one count of felonious assault against Ivor Anderson. Count 3 alleged that Shabazz “did knowingly cause serious physical harm” to Shannon in violation of R.C. 2903.11(A)(1). Count 4 alleged that Shabazz “did knowingly cause serious physical harm by means of a deadly weapon, to wit: champagne bottle” in violation of R.C. 2903.11(A)(2). Count 5 alleged that Shabazz “did knowingly cause serious physical harm by means of a deadly weapon, to wit: firearm” in violation of R.C. 2903.11(A)(2). And Count 6 alleged that Shabazz “did knowingly cause serious physical harm by means of a deadly weapon, to wit: champagne bottle” against Ivor Anderson in violation of R.C. 2903.11(A)(2). Any one of these four counts could have properly been the basis for a conviction for felony murder if the conduct alleged in each count was a proximate cause of the victim’s death.

The culpable mental state for felonious assault is “knowingly.” Under R.C. 2901.22(B): “A person acts *knowingly, regardless of his purpose*, when he is aware that his conduct will

probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” (emphasis added). Thus, to support the count of felony-murder, the State had to present sufficient evidence that Shabazz caused Shannon’s death as a proximate result of felonious assault. The State met its burden if it produced sufficient evidence that Shabazz knowingly caused serious physical harm to Antwon Shannon or Ivor Anderson and that Shannon’s death occurred as a proximate result of that harm.

**2. Because the Eighth District upheld Shabazz’s convictions for felonious assault by means of a deadly weapon, the court should have affirmed his conviction for felony-murder.**

In this case, the Eighth District upheld the jury’s finding that Shabazz was guilty of two counts of felonious assault by means of a deadly weapon, to wit: champagne bottles. The only question was thus whether Shannon’s death was a proximate result of the felonious assaults with the bottles. Under that standard, the court should have affirmed Shabazz’s conviction for felony-murder.

“[F]or 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. Muntaser*, 8th Dist. No. 81915, 2003-Ohio-5809, at ¶ 38, citing *State v. Lovelace*, 137 Ohio App.3d 206, 738 N.E.2d 418 (1st Dist.1999).

“Foreseeability is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience. *Id.* It is not necessary that the defendant be able to foresee the precise consequences of his conduct; only that the consequences be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by the defendant.”

*Id.*

The jury found, and the Eighth District agreed, that Shabazz was guilty of two acts of felonious assault against Antwon Shannon and Ivor Anderson (Counts 4 and 6). The jury found, and the Eighth District agreed, that the champagne bottles used in each act were deadly weapons. R.C. 2923.11(A) defines a “deadly weapon” as “any instrument, device, or thing capable of inflicting death, and designed or specifically adapted for use as a weapon, or possessed, carried, or used as a weapon.”

Once the Eighth District affirmed the jury’s finding that Shabazz “possessed, carried, or used” the bottles as weapons, and that the weapons were “capable of inflicting death,” the court should have found that Shabazz’s use of the bottles proximately caused Shannon’s death. “No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause death when it is wielded with the requisite intent and force.” *State v. Moody*, 5th Dist. No. 09 CA 90, 2010-Ohio-3272, at ¶ 41. The attack with the bottles was the but-for cause of Shannon’s death because it was only during and as a part of that attack that Walker shot Shannon. The shooting occurred on a crowded dance floor in which Walker did not have a line-of-sight until his group cleared the floor by attacking Shannon and Anderson with bottles. Without the 6-on-1 attack on Anderson, Shannon would not have turned his back to Walker when he attempted to restrain Johnson, giving Walker the opportunity to shoot him. And the chaos created a distraction that allowed Walker to draw his gun in an otherwise crowded nightclub without being seen by any witnesses. Without the attack with the bottles, none of this would have been possible.

Moreover, Shannon’s death as a result of the attack was foreseeable. The shooting that killed Shannon was within the scope of the risk Shabazz and Walker created when they attacked Shannon with deadly weapons in a 6-on-1 assault, while Walker was armed with a gun. Shabazz

was an active participant in the attack. He threw punches, he directed his accomplices how to proceed, he was complicit in the felonious assaults with the bottles, and he congratulated Walker and fled the club with him after Walker shot Shannon. The felonious assaults with a deadly weapon, in and of themselves, were reasonably likely to produce death. See *State v. Tilley*, 2d Dist. No. 19198, 2002-Ohio-6776 (expert testified that empty bottle, when used as a weapon, was capable of inflicting death). Shabazz should not receive a windfall from the fact that the initial assault with a deadly weapon failed to cause death but the subsequent assault with a different weapon succeeded.

The Eighth District, however, appears to have treated the fact that Shabazz's co-defendant shot Shannon in the back as a sort of intervening/superseding cause that relieved Shannon of culpability. But killings by persons other than the defendant are within the scope of the felony-murder rule – even where the actual killing is done by a third party who the defendant has no reason to know is armed. The only requirement is that the death be a proximate result of the felony.

Ohio courts have upheld felony-murder convictions even in cases where the actual killing was done by a victim of the underlying felony. For example, in *State v. Burt*, 8th Dist. No. 99097, 2013-Ohio-3525, a victim of an attempted robbery shot and killed one of the robbers. There was no evidence that either of the robbers knew any of the victims were armed. Burt argued that the “the intervening act of [the victim] shooting [the co-defendant] caused [the co-defendant's] death.” *Id.*, at ¶ 22. The Eighth District upheld Burt's conviction for felony murder, finding that, “[t]he fact that [the co-defendant's] death was not part of the plan, however, does not prevent the jury from convicting Burt for his brother's death.” *Id.*, at ¶ 22. Under the new rule the Eighth District announced *Shabazz*, killings by a victim or a third party could never

be felony-murder because the defendant would never have reason to know the victim or third party had a gun. This would result in the adoption of the “agency theory” of felony-murder, which Ohio courts have rejected. See *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, at ¶ 32 (because “the statute does not provide that the defendant or an accomplice must be the immediate cause of death, it is clear that Ohio has adopted the proximate cause theory”).

**3. The Eighth District improperly limited its felony-murder analysis to the felony that was the actual cause of the victim’s death, rather than a proximate cause.**

In this case, the Eighth District created a new element of Ohio’s felony-murder rule: not only must Shabazz be guilty of the felony that is the proximate cause of the victim’s death, but he must also be guilty of the felony that was the *actual* cause of the victim’s death. The court’s decision to require the State to prove Shabazz was guilty of the felony that was the actual cause of Shannon’s death ignored the proximate cause rule of felony-murder and improperly limited the State’s case to a single felony and a theory of the case that the judge, the prosecutor, and the jury all rejected at trial.

The Eighth District refused to consider any of the felonious assaults as underlying felonies to support the count of felony-murder except for Count 5, the felonious assault against Antwon Shannon with the firearm. The court did this by claiming that, “Shabazz was expressly indicted for using a firearm in committing the felony murder.” *Shabazz*, at ¶ 36. This is not true. Count Two of the indictment, felony-murder, alleged that Shabazz:

“did cause the death of Antwon P. Shannon, as a proximate result of the offender committing or attempting to commit an offense of violence that is a felony of the first or second degree, to wit: felonious assault, in violation of Section 2903.02 of the Revised Code.”

Count 2 did not specify which subsection of the felonious assault statute applied as the predicate offense, nor did it say anything about a firearm. Nothing in that count required the jury to find that the murder occurred as a proximate result of the particular count of felonious assault relating

to Walker's use of a firearm. Any felonious assault that was the proximate cause of Shannon's death should have sufficed.

Moreover, both the trial court and the prosecutor told the jury that any of the counts of felonious assault could be a predicate offense to felony-murder. The trial court instructed the jury: "The underlying offense in this case is felonious assault. That offense is defined in Counts 3 through 8." (Tr. 1143). And the prosecutor stated in closing argument:

"Count 2, murder. Did cause the death of Antwon P. Shannon as a proximate result of the offender committing or attempting to commit an offense of violence, that is, a felony of the first or second degree, to wit: felonious assault.

We saw the fight. We saw the bottles. We saw them going in with the bottles to injure these individuals. That is felonious assault."

(Tr. 1182-1183).

The Eight District, however, refused to consider the counts of felonious assault with the champagne bottles in its felony-murder analysis. The court instead held that only Count 5 – felonious assault against Antwon Shannon by means of a firearm – could be a predicate offense for felony-murder. The court appears to have believed that the fact that the felony-murder count in the indictment included one and three-year firearm specifications required the State to prove the use of a firearm in the underlying count of felonious assault. See *Shabazz*, at ¶ 36 ("The dissent emphasizes that the use of the bottles by Shabazz's co-defendants was sufficient to support the felony-murder charge. However, Shabazz was expressly indicted for using a firearm in committing the felony-murder").

The Eighth District's belief that it could not consider the other counts of felonious assault because of the firearm specifications was erroneous. The inclusion of a firearm specification does not add an additional element to the offense itself. The specification is simply a sentencing

enhancement. The jury can find the defendant guilty of the substantive offense and yet acquit the defendant of the firearm specification. As the dissenting judge found:

“It appears the majority considers the firearm specifications as controlling which count of felonious assault is the predicate felony offense underlying the felony-murder count, the felonious assault with the firearm or the felonious assault with the bottle. The specifications, however, serve to enhance the penalty, and the felony-murder count can be proven independent of the firearm specifications.”

*Shabazz*, at ¶ 73, fn. 5 (Gallagher, J., dissenting). This is because “firearm specifications are strict liability offenses.” *State v. Greene*, 8th Dist. No. 91104, 2009-Ohio-850, at ¶ 126. Thus, the fact that the felony-murder count included firearm specifications did not require the State to prove that Shabazz knew Walker had the firearm to convict him of the felonious assault. The State only had to prove that Shabazz acted knowingly with regard to the underlying felonious assault and that Shannon’s death was the proximate result of that felonious assault.

Most importantly – and ignored by the Eighth District in its opinion – is the fact that the jury found Shabazz not guilty of the firearm specifications on the felony-murder count. The jury thus rejected any argument that Shabazz possessed or used a firearm in the commission of the underlying felony. The logical conclusion from this is that the jury found Shabazz guilty of felony-murder based on the felonious assaults with the bottles, not with the firearm. By looking only to Count 5 as a predicate offense, the Eighth District tried to view the State’s case through a lens that the judge, the prosecutor, and the jury all rejected at trial.

The availability of numerous predicate offenses not requiring use of a firearm also distinguishes this case from *Rosemond v. United States*, --- U.S. ---, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). In *Rosemond*, the Supreme Court held that a defendant could not be convicted of complicity to using a gun in connection with a drug trafficking crime in violation of 18 U.S.C. 924(c) unless the defendant knew the principal offender had a gun. *Id.*, at 1249. *Rosemond* adds

nothing to this case. If this Court finds that the State introduced sufficient evidence that Shabazz knew Walker had a gun, then Shabazz's conviction on Count 5 (felonious assault against Antwon Shannon by means of a firearm) and his subsequent conviction for felony-murder will stand. If this Court finds that there was insufficient evidence that Shabazz knew Walker had a gun, then Shabazz's conviction on Count 5 will be vacated. The only question then is whether any of the other felonious assaults were the proximate cause of Shannon's death. Either way, *Rosemond* is irrelevant.

Moreover, Ohio courts have found that such knowledge of the actual cause of the victim's death is not required. See *State v. Wynn*, 2d Dist. No. 25097, 2014-Ohio-420, at ¶ 69 ("evidence purporting to show that [the accomplice] did not know that [the principal] had a gun *could* also be relevant to whether [the accomplice] knowingly aided and abetted [the principal]") (emphasis added); *State v. Tuggle*, 6th Dist. No. L-09-1317, 2010-Ohio-4162, at ¶ 111 ("Appellant did not need to know that a gun would be used; rather all that is necessary is that he be involved in the fight").

Even assuming that there was no evidence Shabazz knew Walker had a gun, such a finding should still have only resulted in the Eighth District vacating Shabazz's conviction on Count 5. The court should then have considered whether any of the other felonious assaults were the proximate cause of Shannon's death. The evidence in this case established that they were. Thus, even if this Court does not agree with the State's First Proposition of Law that Shabazz acted with prior calculation and design and knew Walker had a gun, the Court should still find exactly what the jury found and reinstate Shabazz's conviction for felony-murder based on the remaining counts of felonious assault.

The Eighth District's adoption of a new element to Ohio's felony-murder rule has once again "sent a message of chaos and confusion to all common pleas court judges in Cuyahoga County that is truly troubling." *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, at ¶ 8. The State therefore respectfully requests that this Honorable Court reverse the Eighth District's decision and hold that a defendant is guilty of felony-murder where the defendant commits a felony that is a proximate cause of the victim's death. In making this determination, the State is not limited to only the felony that is the actual cause of the death.

### **CONCLUSION**

In this case, the Eighth District improperly utilized a de novo review to reverse a conviction on sufficiency of the evidence grounds. In doing so, it failed to consider several significant pieces of evidence in the State's case that demonstrated that Shabazz and his co-defendants formed a plan to deliberately attack and kill the victim. This case, along with its two companion cases, demonstrate 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. The State therefore respectfully asks this Honorable Court to reverse the

Eighth District's decision and reinstate Shabazz's convictions for aggravated murder, felony-murder, felonious assault, and having weapon while under disability.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Merit Brief of Appellant was sent by email this 2<sup>nd</sup> day of December, 2014 to Reuben J. Sheperd (reubensheperd@hotmail.com), counsel for Defendant-Appellee.

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ORIGINAL

NO. 14-0941

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 100021

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

DERRELL B. SHABAZZ,  
Defendant-Appellee

**NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**

Now comes the State of Ohio and hereby gives Notice of Appeal to this Supreme Court of Ohio from a Journal Entry of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District journalized May 1, 2014 which affirmed in part, vacated in part and remanded the trial court's decision for resentencing.

This cause did not originate in the Court of Appeals, it is a felony that it involves a substantial constitutional question, and it is of great general and public interest.

Respectfully submitted,  
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CUYAHOGA COUNTY PROSECUTOR

BY:

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SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

**CERTIFICATE OF SERVICE**

A foregoing copy of the Notice of Appeal has been mailed via U.S. regular mail  
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CHRISTOPHER SCHROEDER (0089855)  
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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100021

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DERRELL B. SHABAZZ**

DEFENDANT-APPELLANT

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

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

**BEFORE:** Blackmon, J., Jones, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** May 1, 2014

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Derrell B. Shabazz (“Shabazz”) appeals his convictions for aggravated murder, murder, felonious assault, and having a weapon while under disability. He assigns six errors for our review.<sup>1</sup>

{¶2} Having reviewed the record and pertinent law, we vacate Shabazz’s convictions for aggravated murder, murder, felonious assault with a gun, and having a weapon while under disability; we affirm his sentence for two counts of felonious assault with a champagne bottle; we reverse and remand for resentencing. The apposite facts follow.

### Facts

{¶3} The Cuyahoga County Grand Jury jointly indicted Shabazz and his codefendants, Dajhon Walker (“Walker”) and Otis Johnson (“Johnson”), for aggravated murder, murder, and three counts of felonious assault against Antwon Shannon. Shabazz, Walker, and Johnson were also indicted for one count of felonious assault against Ivor Anderson, and two counts of felonious assault against Eunique Worley. Shabazz was separately indicted for having a weapon while under disability. Prior to trial, Johnson entered a plea to one count of felonious assault and was placed on community control. Shabazz and Walker proceeded to a joint trial where the following evidence was presented.

{¶4} During the early morning hours of February 19, 2012, Shabazz, Walker, and Johnson were seen on a security camera entering the Tavo Martini Loft, a downtown

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<sup>1</sup> Shabazz’s codefendant, Dajhon Walker, also filed an appeal. *State v.*

Cleveland bar and lounge. The bar had security cameras that filmed various areas of the bar. The surveillance video shows the trio being patted down by security at 1:08 a.m. when they entered the bar. Once in the bar, the video shows Robert Steele<sup>2</sup> joining them.

{¶5} At 1:57 a.m., the surveillance video shows Robert Steele dancing and appearing to spill champagne on or near Ivor Anderson, who was at the bar with his friend Antwon Shannon, the victim who later died from a gunshot wound. There is no audio on the video, but it appears Anderson said something to Steele after the spill.

{¶6} Anderson testified at trial that Steele had spilled champagne on him while dancing. He told Steele, "You are doing too much." He clarified at trial that he meant he should not have been dancing with the champagne glass. According to Anderson, Steele rejoined Shabazz's group and began whispering to Johnson, Walker, and Shabazz. He said the men continued to watch him. Anderson testified he told Shannon to watch out for the group because he felt something was going to happen. Anderson stated that he did not know any of the men in the group.

{¶7} A review of the video does show the group looking in the direction of Anderson; however, they are also seen dancing and interacting with others. Also, Steele is not seen immediately going to the group, but continues to dance. When he eventually

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*Walker*, 8th Dist. Cuyahoga No. 99998 (May 1, 2014).

<sup>2</sup>Steele's identity was unknown until the eighth day of Shabazz and Walker's trial. He entered a plea to one count of felonious assault and was sentenced to two years in prison.

stops dancing, he speaks to a female and an unknown male wearing a jacket. He then talks to Shabazz, Johnson, and Walker.

{¶8} Anderson testifies that about 15 minutes after Steele spilled the champagne, he turned his back to talk to a friend, Eunique Worley, when “Shabazz” hit him in the head with a champagne bottle. Worley testified that part of the bottle hit her in the head, but she did not see who hit her.

{¶9} Because the incident was captured by surveillance video, it is clear that Anderson was mistaken. Shabazz did not hit him with the champagne bottle, it was Steele. At 2:11 a.m., Steele is shown dancing near Anderson prior to swinging his arm with a bottle in Anderson’s direction. During this time, Shabazz and Walker were on the fringe of the group.

{¶10} The surveillance video shows that after Steele swings the bottle, Steele and Anderson begin to fight and two females, who appeared to be with Johnson, immediately jumped on Anderson. Johnson is seen pulling Steele out from the fray, and the two females continue to beat Anderson. Shabazz is seen pacing on the fringe of the fight; however, when Walker hits Shannon with a bottle, Shabazz runs around the group and punches Shannon in the face.

{¶11} After Shabazz punches Shannon, Shabazz walks away. Walker is seen pulling an object from his waistband and running behind a pillar that is right next to the dance floor. The shot is eventually fired from behind this pillar. Before the shot is fired, Shabazz is not looking in Walker’s direction and does not join him; instead, he walks

across the room towards Johnson and watches the women fighting with Anderson on the dance floor. This is fully seen on the surveillance video.

{¶12} After being punched by Shabazz, Shannon returns to the dance floor to again try to pull the women off of Anderson.<sup>3</sup> He successfully pulls one of the women off, and Anderson is then able to stand. Shabazz then runs up to Anderson and punches him in the face and then walks away from Anderson. One of the females jumps on Anderson and brings him to the floor by the pillar. The fight then spills over to the area next to the dance floor and pillar where Walker is standing. Because the fight has now proceeded to the area by the pillar, Shabazz is seen walking towards the pillar. As he does so, a shot is fired, as indicated on the video by a flash and dust falling from the ceiling.

{¶13} Before the shot is fired, the video shows Shannon move towards the pillar in an attempt to remove the women from on top of Anderson. Shannon bends over with his back towards the pillar and is shot in the lower back area. Thereafter, the crowd begins to run. On the video, Walker is seen running from behind the pillar after the shot is fired, and Shabazz joins him as they run out of the bar. Walker is seen fumbling with his pants, which the state argued showed him putting his gun in his waistband, although no weapon is visible.

{¶14} Shannon made his way to the bathroom. A medical student hiding in the bathroom saw Shannon and asked him if he was okay. Shannon lifted his shirt, and the

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<sup>3</sup>In spite of the fact the women on the video were later identified, they were not indicted.

medical student saw blood. Shannon dropped to the ground, and the medical student attempted to help him until the EMS arrived. Shannon died in transit to the hospital.

{¶15} Anderson testified that when he gave his statement to police several days later, he told them he had “heard” that Shabazz was the one that shot Shannon. He also told police that he was 100% sure that Shabazz was the one that hit him with the champagne bottle, which the surveillance video contradicts.

{¶16} Officer Edens was called to the scene. He testified that one .45 shell casing was found on the dance floor. No weapon was recovered from the scene except for a gun found in Shannon’s vehicle. Detective Diaz testified that Johnson, Walker, and Shabazz became persons of interest because their names were mentioned by witnesses. According to Diaz, Shabazz turned himself in to the police.

{¶17} The jury found Shabazz guilty of the following offenses against Antwon Shannon: aggravated murder, murder, and three counts of felonious assault. The jury also found Shabazz guilty of one count of felonious assault against Ivor Anderson. The jury found Shabazz not guilty of the two counts of felonious assault against Worley. The trial court separately concluded Shabazz was guilty of having a weapon while under disability.

{¶18} The trial court sentenced Shabazz to 20 years to life in prison for the aggravated murder, and merged all the other counts dealing with Shannon into this count. The court also sentenced Shabazz to two years in prison for the felonious assault against Anderson and nine months in prison for having a weapon while under disability. These

two sentences were to be served consecutive with each other, but concurrent with the aggravated murder term.<sup>4</sup>

### **Insufficient Evidence and Manifest Weight**

{¶19} We address Shabazz’s fifth and sixth assigned errors together for ease of discussion. Shabazz argues that the evidence was insufficient to support his convictions and that they were also against the manifest weight of the evidence.

{¶20} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state’s evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and a sufficiency of the evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386.

{¶21} In analyzing whether a conviction is supported by sufficient evidence, the reviewing court must view the evidence “in the light most favorable to the prosecution” and ask whether “any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965.

#### 1. Aggravated Murder

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<sup>4</sup>We note that the trial court failed to sentence Shabazz for the firearm specifications. However, this does not render the judgment nonfinal. *Jones v. Ansted*, 131 Ohio St.3d 125, 2012-Ohio-109, 961 N.E.2d 192.

{¶22} Shabazz argues the evidence was insufficient to support an aggravated murder conviction because there was no evidence showing that he was part of a plan to murder Shannon.

{¶23} Aggravated murder pursuant to R.C. 2903.01(A), provides that “[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]” Shabazz did not fire the gun; therefore, the state’s case against Shabazz was predicated on his aiding and abetting Walker.

{¶24} R.C. 2923.03(A)(2) states that no person, “acting with the kind of culpability required for the commission of an offense” shall “[a]id or abet another in committing the offense[.]” A person aids or abets in a crime when the evidence shows 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.” *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. Criminal intent “can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed.” *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, citing *Johnson*, 93 Ohio St.3d at 245.

{¶25} Thus, the state must prove two criminal intents for the accomplice: first that the accomplice had the same criminal intent as the principal offender and, second, that the accomplice also intended to help the principal commit the offense. *State v. Mendoza*, 137 Ohio App.3d 336, 343, 2000-Ohio-1689, 738 N.E.2d 822 (3d Dist.) citing *State v.*

*Lockett*, 49 Ohio St.2d 48, 61-62, 358 N.E.2d 1062 (1976), *overruled on other grounds by Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

{¶26} This court in *State v. Walker*, 8th Dist. Cuyahoga No. 99998 (May 1, 2014), held that construing the evidence in the light most favorable to the state, the state failed to provide evidence that Walker's murder of Shannon was premeditated. In so holding, we held that the Ohio Supreme Court has provided the following factors to consider in determining whether prior calculation and design were proven:

(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?"

*State v. Taylor*, 78 Ohio St.3d 15, 19, 1997-Ohio-243, 676 N.E.2d 82.

{¶27} We then concluded in *Walker*:

As to the first factor, there is no evidence in the record that Walker knew Shannon, let alone had a strained relationship. 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 where 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.

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.

*Id.* at ¶ 18, 19.

{¶28} We agree with the *Walker* decision that the state failed to show evidence of prior calculation and design. This court stressed in *Walker* that it was not unusual for a group to stand together and converse while in a nightclub. *Id.* at ¶ 20. We agree. 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.

{¶29} We agree with the *Walker* decision that there was no evidence of prior calculation and design. Therefore, insufficient evidence was presented to support Shabazz's conviction for aggravated murder. The evidence was also insufficient because, as we will discuss further below, there was no evidence that Shabazz was aware that Walker had a gun. *State v. Scott*, 61 Ohio St.2d 155, 165, 400 N.E.2d 375 (1980), citing *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976) (“a jury can infer an aider and abettor’s purpose to kill where the facts show that the participants in a felony entered into a common design and either the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony or the felony and the manner of its accomplishment would be reasonably likely to produce death.”)

## 2. Murder

{¶30} We also find no evidence to support the complicity to murder charge against Shabazz. For this count, Shabazz was indicted pursuant to the felony-murder provision in R.C. 2903.02(B). R.C. 2903.02(B) states:

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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

The underlying act was felonious assault with a deadly weapon.

{¶31} Although the court in *Walker* found sufficient evidence that Walker murdered Shannon, we find no evidence that Shabazz aided and abetted Walker in the murder. There was no evidence that Shabazz was aware that Walker had a gun until the shot was fired. The men are seen on the security video being patted down upon entering the establishment, and there is no evidence what the men said or did prior to coming to the club that would indicate Walker had a weapon.

{¶32} The U.S. Supreme Court in *Rosemond v. United States*, 572 U.S. \_\_\_, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), recently addressed the issue of complicity when the principal offense is committed with a firearm. The facts in *Rosemond* were that Rosemond accompanied two codefendants to sell drugs to a designated purchaser. One of Rosemond's codefendants drove the car to the exchange. Instead of paying money in exchange for the drugs, the purchaser punched one of Rosemond's codefendants in the face and ran off. Someone in the car began shooting at the fleeing purchaser.

{¶33} Rosemond was indicted under the federal statute regarding using a gun while committing a drug trafficking offense. Because it was undetermined who fired the gun, the government argued that Rosemond was the principal offender, but in the alternative argued he at least aided and abetted the crime. The jury convicted Rosemond without indicating if it was for being the principal offender or for aiding and abetting.

{¶34} Rosemond appealed based on the jury instructions the court gave the jury on aiding and abetting. The court instructed that the jury could convict Rosemond if “(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime.” *Id.* at 1244. The Supreme Court found the instruction erroneous because it did not instruct the jury that it must find that the accomplice had knowledge that his codefendant had a gun in sufficient time to withdraw from the crime. The Court held as follows:

[D]efendant’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 instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when the accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts 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. \* \* \* For the reasons just given, we think that means knowledge at a time that the accomplice can do something with it — most notably, opt to walk away. (Emphasis sic.)

*Id.* at 1249.

{¶35} The dissent distinguishes *Rosemond* based on the fact the knowledge of the firearm was a necessary element to the federal drug trafficking offense at issue. However, Shabazz was indicted for felony-murder with the underlying offense of shooting Shannon with a firearm. Therefore, his “knowledge” of the firearm was necessary because “knowingly” is the mens rea for felonious assault. Felonious assault is defined as knowingly causing, or attempting to cause, physical harm to another by means of a deadly weapon. R.C. 2903.11(A). A person acts knowingly, regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B). Here, without knowing that Walker had a weapon, Shabazz did not know that there was a risk that the death of one of the victims could result from the altercation.

{¶36} The dissent emphasizes that the use of the bottles by Shabazz’s co-defendants was sufficient to support the felony-murder charge. However, Shabazz was expressly indicted for using a firearm in committing the felony-murder. Also, the bottle throwing was not the proximate cause of Shannon’s death. Shannon continued to help Anderson after being hit, and security footage of Anderson outside of the club after the fight shows he is physically ready to continue fighting.

{¶37} Moreover, the Supreme Court applied common law principles in discussing the “intent” needed for an accomplice. Additionally, a review of Ohio case law shows that foreknowledge of the gun has generally been applied in cases in which a defendant is found to be complicit in felony-murder with a firearm. *See also State v. Wynn*, 2d Dist. Montgomery No. 25097, 2014-Ohio-420 (evidence purporting to show that accomplice did not know that shooter had a gun would be relevant to whether he knowingly aided and abetted the shooter; however, evidence was presented gun was observable); *State v. Ayers*, 10th Dist. Franklin No. 13AP-18, 2013-Ohio-5601, ¶ 17 (witness heard the shooter ask the accomplice for a gun and was observed returning the gun to the accomplice after the shooting); *State v. Chatman*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245, ¶ 13, 14 (accomplice and shooter both had guns; shooter told the accomplice that he intended to shoot the victim); *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, ¶ 63 (accomplice operated car in manner to allow shooter better angle to shoot; shooter known to carry gun); *State v. Hall*, 10th Dist. Franklin Nos. 08AP-939 and 08AP-940, 2009-Ohio-2277 (accomplice helped plan the robbery and drove the robbers to the scene of the crime, knowing one was going to use a firearm to rob a man); *State v. Hudson*, 5th Dist. Stark No. 2007-CA-00176, 2009-Ohio-456 (accomplice supplied shooter with the gun); *State v. Hickman*, 5th Dist. Stark No. 2003-CA-00408, 2004-Ohio-6760 (accomplice present when shooter loaded the rifle).

{¶38} The dissent references the *Wynn* decision from the second district, cited above, to support the argument that knowledge of the gun by the accomplice is unnecessary. Showing that an accomplice “knowingly” engaged in the act with the same

intent as the principal is a prerequisite for the conviction of an accomplice to felony-murder. In *Wynn*, security footage is shown depicting the principal offender pointing a gun at the victim who is trying to get the gun away. According to the opinion, Wynn is seen punching the victim to stop him from getting the gun. In that case, the video alone was enough to convict Wynn as an accomplice because he obviously saw the gun and chose to continue to participate. The court held as follows regarding the court's failure to allow the defense to call Wynn's codefendant as a "court's witness":

In addition, evidence purporting to show that Wynn did not know that Turner had a gun could also be relevant to whether Wynn knowingly aided and abetted Turner. However, our review of the video interview, which was proffered as Defense Exhibit A, indicates that Turner never told the police that Wynn was unaware that he (Turner) had a gun. In fact, Turner said during the video interview that he took his gun out of the car when the two men pulled up to the store and went inside. Turner also stated that he took his gun out of the car because he knew that Beans kept a gun. And finally, Turner indicated that he kept his gun on the side and that it was out (meaning it would have been visible to others, including Wynn). This testimony would not have assisted Wynn in proving his lack of knowledge that Turner had a gun.

*Id.* at ¶ 69. Thus, *Wynn* acknowledges the importance of knowledge of the weapon in order for the defendant to "knowingly" aid and abet in the crime of felony-murder with a firearm.

{¶39} There was absolutely no evidence that Shabazz was aware that Walker had a gun. The evidence, both direct and circumstantial, indicates that Shabazz would not have been aware of the gun until the gun was fired. There is absolutely no evidence upon which the jury could “infer” that he did have this knowledge. Although Walker is seen quickly pulling something from his waistband prior to going behind the pillar, Shabazz’s attention is directed to the fight on the floor not Walker. Walker also puts his hand down by the side of his leg after reaching for the waistband. By the time the gun was shot, Shabazz had completed his participation in the fight. Moreover, given that the shot was fired from behind the pillar, it is debatable if Shabazz knew that Walker was the one that fired the shot. Thus, the evidence was insufficient to convict him as an accomplice to the murder.

{¶40} Although the dissent references a celebration outside the club, as did the prosecution in its brief, we found no evidence of this in our review of the surveillance footage of the outside of the club, and no testimony regarding the celebration was presented at trial. At oral argument, when the panel inquired where this footage appeared, the prosecution referred to where to look on the video. We reviewed the footage referenced by the state; our review showed people in the distance with no way of knowing who they were or what they were doing.

{¶41} Although the dissent disagrees, the video shows Shabazz participated by throwing two punches, one for each victim. Shannon resumed helping Anderson after being punched and Anderson remained standing after being punched until one of the females jumped on him. After each punch Shabazz retreated. Although we agree with

the dissent that Shannon's murder was tragic and senseless, the state should not be relieved of its burden because of this tragedy.

### 3. Felonious Assault

{¶42} Given our above discussion, the felonious assault counts involving Shannon that have to do with a firearm are also vacated. This leaves two counts of felonious assault committed with a "champagne bottle."

{¶43} To convict Shabazz under these two counts, the state had to show that Shabazz "knowingly cause[d] or attempt[ed] to cause physical harm to" Shannon and Anderson "by means of a deadly weapon or dangerous ordnance, to wit: champagne bottle." The evidence does not show that Shabazz himself committed felonious assault with a bottle because Shabazz's actions consist of his punching each man once; therefore, the state had to present evidence that Shabazz aided and abetted the principal offenders.

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{¶44} The video shows that after observing Anderson being hit in the head with a bottle, Shabazz chose to engage in the fight and, in fact, punched Anderson. Shabazz also punched Shannon after observing Walker hit him with a bottle. By joining in on the fight, he showed his encouragement and support of the principal offenders' actions. Thus, we cannot say he was not complicit in committing the two counts of felonious assault with a champagne bottle.

### 4. Having a Weapon While under Disability

{¶45} Due to our discussion regarding the murder, we also conclude that Shabazz's conviction for having a weapon while under disability should be reversed. As

we stated, there is no evidence that Shabazz was aware that Walker had brought a gun. There was also no evidence that Shabazz had a gun.

{¶46} Shabazz also contends his convictions were against the manifest weight of the evidence because there was no evidence of a conspiracy. In doing so, he simply reiterates his arguments from his sufficiency of the evidence argument. But, because we found insufficient evidence to support his conviction, his manifest weight of the evidence argument is moot. *See* App.R. 12(A)(1)(c).

{¶47} Accordingly, we conclude that Shabazz's fifth assigned error has merit in part and is sustained in part and his sixth assigned error is moot. Shabazz's convictions for aggravated murder, murder, three counts of felonious assault with a firearm, and having a weapon while under disability are vacated. His two convictions for felonious assault with the champagne bottle are affirmed.

{¶48} The trial court has already sentenced Shabazz to two years in prison for the felonious assault of Anderson; however, the felonious assault of Shannon was merged with the aggravated murder count. Therefore, the matter must be remanded for the trial court to sentence him on the felonious assault of Shannon.

#### **Ineffective Assistance of Counsel**

{¶49} In his first assigned error, Shabazz argues that his counsel was ineffective. To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will

only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶50} When reviewing counsel's performance, this court must be highly deferential and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.* at 694.

{¶51} Shabazz argues that counsel was ineffective for filing a motion to suppress "any testimony from [the] newly disclosed witness." The new witness was Robert Steele, the person seen on the video hitting Anderson on the head with the bottle. Shabazz argues that in Steele's statement to police, he stated that he had "acted alone" and "did not know anyone [at the bar] other than his cousin Otis Johnson." Shabazz argues these statements would have assisted him in defeating the state's theory that the men planned the assault upon the victims that ultimately led to Shannon's death.

{¶52} In its motion, counsel acknowledges that Steele told police he acted alone and only knew Johnson. Thus, in spite of Shabazz's contention otherwise, counsel did review the statement. In his motion, counsel's concern was that the police while interrogating Steele had made suggestive remarks to Steele about what was depicted on the video, which unduly influenced Steele to the point any testimony would be unreliable. Thus, counsel's refusal to have Steele testify was a tactical move because Steele's testimony might differ from his statement after hearing about the video from police. It is well-established that "counsel's decision whether to call a witness falls within the rubric

of trial strategy and will not be second-guessed by a reviewing court.” *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 118.

{¶53} Moreover, we concluded in addressing Shabazz’s fifth assigned error that the evidence did not support the state’s allegation that the men premeditated the attack; therefore, Steele’s statement he acted alone in deciding to hit Anderson with the bottle would not have mattered. We have found Shabazz is guilty of felonious assault not based on a plan, but based on his decision to participate in the fight each time one of the victims was hit with a bottle. Accordingly, Shabazz’s first assigned error is overruled.

#### **Prosecutorial Misconduct**

{¶54} In his second assigned error, Shabazz argues that the state committed prosecutorial misconduct by referring to evidence not substantiated by the record. Specifically, Shabazz argues that the prosecutor stated in closing argument that the video showed the men discussing and planning the attack and that Shabazz stayed away from the pillar because he knew that Walker had a gun.

{¶55} We conclude our resolution of Shabazz’s fifth assigned error moots this assigned error. We have already concluded there was insufficient evidence that the men planned the crime and that there was no evidence that Shabazz knew that Walker had a gun. Accordingly, because it is moot, Shabazz’s second assigned error is overruled.

#### **Jury Instructions**

{¶56} In his third and fourth assigned errors, Shabazz challenges the trial court’s instructions on flight, conspiracy, and complicity.

{¶57} In reviewing a trial court's jury instruction, the appellate court must affirm the trial court's instruction unless the instruction constituted an abuse of discretion under the facts and circumstances of the case. *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).

{¶58} In the instant case, the trial court instructed the jury as follows:

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 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.

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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 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.

Tr. 1154-1155.

{¶59} The trial court instructed the jury that fleeing from "the scene does not raise a presumption of guilt but it may tend to indicate the defendants' consciousness of guilt."

Shabazz contends that the flight instruction was improper because everyone was running to get out of the bar once the gun was shot. He also argues that no police were at the scene when he left so there was no evidence he was avoiding apprehension.

{¶60} The Ohio Supreme Court has held that evidence of flight is admissible to show consciousness of guilt. *State v. Taylor*, 78 Ohio St.3d 15, 27, 676 N.E.2d 82 (1997). We find no abuse of discretion on the part of the trial court. Flight from justice “means some escape or affirmative attempt to avoid apprehension.” *State v. Spraggins*, 8th Dist. Cuyahoga No. 99004, 2013-Ohio-2537, ¶ 24, citing *State v. Benjamin*, 8th Dist. Cuyahoga No. 80654, 2003-Ohio-281. It is not error for a trial court to give a flight instruction when there is such evidence. *Id.*

{¶61} As Shabazz points out, evidence was given at trial that he, along with everyone else, fled the scene. But the trial court informed the jury that it could determine from the evidence whether the defendant fled the scene for some other purpose. Thus, the jury could have decided whether Shabazz fled because he was trying to avoid the police or if he fled for safety reasons to avoid being shot. Therefore, we find no error in the flight instruction.

{¶62} Shabazz also contends the trial court should not have instructed the jury on complicity. However, as we discussed in Shabazz’s fifth assigned error, there was sufficient evidence that Shabazz participated in the fight. Therefore, an instruction on complicity was proper.

{¶63} Shabazz also argues the trial court erred in instructing the jury on conspiracy. However, given our disposition of Shabazz's fifth assigned error, this error is moot. Accordingly, Shabazz's third and fourth assigned errors are overruled.

{¶64} Accordingly, we vacate Shabazz's aggravated murder, murder, felonious assault convictions related to a firearm, and weapons while under disability convictions. Shabazz's remaining convictions are affirmed and the matter remanded for resentencing on his conviction for felonious assault against Shannon.

It is ordered that appellant and the appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;  
SEAN C. GALLAGHER, J., DISSENTS  
(WITH ATTACHED DISSENTING OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

{¶65} I respectfully dissent from the holding and analysis of the majority opinion.

{¶66} This case is about a 27-year-old father of two who joined a friend at a club for a night out only to meet his untimely death. Although not directly relevant to our

analysis, Antwon Shannon, by all accounts, was completely innocent and did nothing to justify or bring about his own demise.

{¶67} There is no easy way to disagree with my respected colleagues, but disagree I must.

{¶68} I do not share the view that the evidence was insufficient to support Shabazz's convictions for aggravated murder under R.C. 2903.01(A) with attendant gun specifications and murder under R.C. 2903.02(B) also with attendant gun specifications. Likewise, I disagree with the majority view that the gun-related specifications involving Shabazz on his felonious assault convictions in Counts 3 and 5 are not supported by the evidence. I also disagree with the majority's reliance on the analysis in *State v. Walker*, 8th Dist. Cuyahoga No. 99998 (May 1, 2014), where that panel finds insufficient evidence to support the aggravated murder conviction under R.C. 2903.01(A) of the codefendant Walker. Lastly, I disagree with the majority's analysis of *Rosemond v. United States*, 572 U.S. \_\_\_\_, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), and its impact on this case. I would affirm in total the jury verdict and reject all of Shabazz's errors on appeal.

{¶69} The majority embraces the *Walker* panel's view that there is no evidence of prior calculation and design by Walker, and thus there is no evidence Shabazz had committed to a plan to kill Shannon. The majority bases much of its analysis on its judgment that Shabazz was unaware that Walker had a gun. I respectfully disagree with these conclusions.

{¶70} My disagreement with the majority opinion, and by implication the panel opinion in *Walker*, is the majority's focus on the direct evidence without giving what I consider proper consideration to the circumstantial evidence at play and the reasonable inferences that can be drawn from that evidence.

{¶71} In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court holds that no rational trier of fact could have found that the elements of the offense were proven beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The court must view the evidence in the light most favorable to the prosecution. *Id.* Whether the state presented sufficient evidence is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

I do not believe the majority view adheres to this requirement. The majority substitutes its interpretation of the inferences drawn from the circumstantial evidence, rather than accepting the inferences found by the trier of fact.

{¶72} The majority opinion accurately outlines the conduct of the respective participants. Nevertheless, the majority emphasizes what the majority's view of the evidence is (and primarily direct evidence at that) and not the reasonable inferences that were drawn from the circumstantial evidence by the jury. This is the essential difference between my view and the view of the majority.

#### 1. Felony Murder

{¶73} The majority vacates Shabazz's conviction on the basis that the felony murder count was predicated on Shabazz's knowledge of the firearm Walker used to

shoot Shannon. Shabazz's knowledge of the firearm is irrelevant to the felony murder charge, predicated on the felonious assault committed with the champagne bottles used as a deadly weapon as charged in the indictment.<sup>5</sup> "Felony murder' under R.C. 2903.02(B) provides that '[n]o 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 \* \* \*.'" *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶ 35-36.

Under the "proximate cause theory," it is irrelevant whether the killer was the defendant, an accomplice, or some third party such as the victim of the underlying felony or a police officer. Neither does the guilt or innocence of the person killed matter. [A] defendant can be held criminally responsible for the killing regardless of the identity of the person killed 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 felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience.

*Id.* at ¶ 35, quoting *State v. Ervin*, 8th Dist. Cuyahoga No. 87333, 2006-Ohio-4498.

{¶74} As this court further recognized, "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." *Id.* at ¶ 36, citing *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809, ¶ 38. Foreseeability, in turn,

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<sup>5</sup>It appears the majority considers the firearm specifications as controlling which count of felonious assault is the predicate felony offense underlying the felony-murder count, the felonious assault with the firearm or the felonious assault with the bottle. The specifications, however, serve to enhance the penalty, and the felony-murder count can be proven independent of the firearm specifications.

is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience. It is not necessary that the defendant be able to foresee the precise consequences of his conduct; only that the consequences be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by the defendant.

*Id.* In this case, Shabazz knowingly participated in the felonious assault of Anderson and Shannon with bottles used as deadly weapons. Death was a foreseeable consequence of either of those felonious assault charges, and the attacks on both victims culminated in the murder of Shannon. It is undisputed that Shabazz participated in the orchestrated attacks on the victims, knowing that bottles were used as weapons and the attacks resulted in Shannon's death. The death of Shannon was within the scope of the risk created by Shabazz through the felonious assault, and therefore, the fact that the death in this case was actually caused by Walker is irrelevant to the felony murder analysis. Shabazz's conviction for felony murder is not against the sufficiency of the evidence.

## 2. Complicity to Commit Murder

{¶75} In regard to the murder charges, as noted in *State v. Moore*, 7th Dist. Mahoning No. O2 CA 152, 2004-Ohio-2320, ¶ 31,

“the state does not need to prove that the accomplice and principal had a specific plan to commit a crime.” [*State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336, 754 N.E.2d 796.] The fact that the defendant shares the criminal intent of the principal may be inferred from the circumstances surrounding the crime, which may include the defendant's presence, companionship, and conduct before and after the offense is committed. *Id.*

at 245-246. This is a situation where “circumstantial evidence and direct evidence inherently possess the same probative value,” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus, because “the intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be.” *In re Washington*, 81 Ohio St.3d 337, 340, 1998-Ohio-627, 691 N.E.2d 285, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph four of the syllabus.

{¶76} “A person is guilty of complicity if that person aids or abets another in committing an offense while acting with the kind of culpability required for the commission of an offense.” *Moore* at ¶ 26, citing R.C. 2923.03(A)(2).

“To ‘aid’ is to assist and to ‘abet’ is to incite or encourage. Mere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting the act. \* \* \* [I]n order to aid or abet, whether by words, acts, encouragement, support, or presence, there must be something more than a failure to object unless one is under a legal duty to object.

“The state may demonstrate that an accused is guilty of aiding and abetting by direct or circumstantial evidence. Participation in criminal intent may be inferred from presence, companionship, and conduct before, and after the offense is committed.”

*State v. Mendoza*, 137 Ohio App.3d 336, 342, 2000-Ohio-1689, 738 N.E.2d 822 (3d Dist.), quoting *State v. Stepp*, 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342 (4th Dist.1997).

{¶77} Although the majority asserts that it is not unusual for a group to stand together and converse while in a nightclub, that supposed innocent gathering takes a different tone, as here, when the conversation occurs immediately after an incident involving a spilled drink and the party who had that drink spilled on him warns his friend that the rival group is watching him and he senses something is going to happen. As evident through the video evidence, while the party was “innocently” conversing, they repeatedly focused their attention in the direction of Anderson and Shannon. The video makes clear that Shabazz and his compatriots are gazing in the direction of the impending attack over a period of several minutes. Anderson’s fear of reprisal became a reality. When Anderson is struck with a champagne bottle, what followed was an orchestrated attack on Anderson and Shannon by members of this conversing group, culminating with Shabazz, not only participating in the brutal attack that involved bottles being wielded as deadly weapons, but walking over to Walker as Walker drew a gun and fired the death shot. That Shannon’s death came about through the firearm, rather than a blow to the head by one of the bottle-wielding perpetrators of this senseless crime, should not alter the legal analysis. The jury is entitled to disregard any inference that these conversations were innocent, to conclude that the attack was orchestrated to severely hurt Anderson and Shannon, if not kill either of them, and to determine that Shabazz

demonstrated complicity by running out with Walker as he placed the gun back into his waistband. The facts, and reasonable inferences therein, support the jury's conclusion.

{¶78} The majority also notes that there was no audio recording on the video, suggesting the purposeful intent and prior calculation and design had to be recorded to be proven. Few crimes are recorded by audio or video. The absence of one or both does not mean the conduct of the parties cannot be examined to establish the intent or culpability of the respective participants. That is the role of the trier of fact. Significantly, idle conversation and innocuous dancing between the initial confrontation and the assault as described by the majority does not diminish the actual conduct that plays out with the concerted attack on Anderson and Shannon. The jury was well within its province to infer a plan of attack was in play, including one involving not only serious physical harm, but a purposeful intent to kill, given the subsequent conduct of those involved and their collective decision to use bottles as weapons to attack the defenseless.

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{¶79} A person is guilty of complicity when he acts with the kind of culpability required for the commission of an offense and aids and abets or conspires to commit the offense. R.C. 2923.03(A)(2) and (3). As the Ohio Supreme Court explained in *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus, this means that the aider and abettor must share the criminal intent of the principal. The circumstances of Shabazz and Walker arriving together, plotting with Steele and Johnson after the drink spill, remaining together in relative proximity during events, participating in the attack, leaving together after the shooting with Walker placing what appears to be an object into his front waistband, and the celebratory act in the parking lot could all be considered by

the jury in examining Shabazz's knowledge of the intent to kill Shannon. The majority may see this as "inference stacking," but it is actually a series of independent facts that can be taken together by the jury to reach an acceptable inference and the conclusion that Shabazz knew Walker was armed.

{¶80} In short, Shabazz's culpability is not defined as an aider and abettor solely from events leading up to the shooting, but also by his conduct during and immediately after the act. Aiding and abetting encompasses conduct before, during, and after the crime. Certainly the jury could establish that this was an orchestrated attack and that Shabazz had the same criminal intent and culpability for the crimes as Walker.

### 3. Prior Calculation and Design

{¶81} While the majority adopts the finding of the Walker panel that there was no prior calculation and design by Walker, and by implication Shabazz, the facts in the case can be interpreted differently. Simply put, the jury in this case saw it differently than the majority sees it here.

{¶82} Under R.C. 2903.01(A), aggravated murder, no person shall purposely, and with prior calculation and design, cause the death of another. Accordingly, to find a defendant guilty of murder under this provision, the trier of fact would have to conclude that the defendant purposely, and with prior calculation and design, caused the death of the victim. A person acts "purposely" when it is his specific intention to cause a certain result. R.C. 2901.22(A).

“Prior calculation and design” is “indicated [by] studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim.” While “neither the degree of care nor the length of time \* \* \* are critical factors in themselves, \* \* \* they must amount to more than momentary deliberation.” \* \* \* “If the victim is killed in a cold-blooded, execution-style manner, the killing bespeaks aforethought, and a jury may infer prior calculation and design.” (Citations omitted.)

*State v. Williams*, 8th Dist. Cuyahoga No. 98528, 2013-Ohio-1181, ¶ 24, quoting *State v. Taylor*, 78 Ohio St.3d 15, 19, 1997-Ohio-243, 676 N.E.2d 82, and *State v. Hough*, 8th Dist. Cuyahoga No. 91691, 2010-Ohio-2770, ¶ 19.

{¶83} 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. The fact that the murder actually involved a handgun, rather than a champagne bottle, does not diminish the criminal intent established by the conduct prior to the shooting.

{¶84} I recognize the majority does not share this view of Shabazz's intent, but that is the majority's perspective, not the perspective of the jury. Steele initially acts with a level of culpability embracing both serious physical harm and purposeful murder in violently swinging a bottle at the back of the head of a defenseless man. The conspirators meeting and conversing immediately preceding this event and then joining in the attack immediately after Steele initiates the assault are sufficient grounds to establish prior calculation and design. The culpability and level of criminal intent is ultimately shared by those who subsequently join in the attack as aider and abettors.

{¶85} There is little doubt that Walker specifically intended to kill Shannon. He shot him in the back. He was not responding to an immediate threat against his person or instinctively reacting to an event. The *Walker* panel found, and the majority here embraced, the view that because Walker did not previously know Shannon, one of the factors of prior calculation and design was not met. I disagree. Simply because someone does not know another individual in advance does not mean he cannot plan to kill them. Walker was certainly aware that he had a loaded weapon on his person when these events unfolded. Between the time that Steele initially conversed with Walker, Johnson, and Shabazz, more than 12 minutes elapsed for all parties involved to gain a sense of what was evolving. Once Anderson was struck with the champagne bottle, events rapidly spiraled out of control, but Walker was well aware of his armed status and clearly made a conscious decision to fire his weapon and shoot Shannon. I disagree with the view expressed in *Walker* and adopted by this majority that in doing so Walker did not "choose the murder site." That view ignores the reality that Steele, Johnson, Shabazz,

and Walker initiated this orchestrated attack. Likewise, the majority's adopting the *Walker* panel's description of events as happening in a spontaneous manner ignores the interlude between Anderson and Steele's initial encounter and the subsequent turmoil and Walker's shooting of Shannon.

{¶86} Lastly, the majority incorrectly relies on the Supreme Court's decision in *Rosemond*, 572 U.S. \_\_\_, 134 S.Ct. 1240, 188 L.Ed.2d 248. The majority interprets *Rosemond* as requiring advanced knowledge of the firearm from evidence limited to events prior to the crime in order to convict Shabazz as an aider and abettor to the murder.

In *Rosemond*, however, the drug trafficking with a firearm crime included an element of having or using a firearm, and the erroneous jury instruction stated that the defendant knew his cohort "used" a firearm in the commission of the drug trafficking offense. The Supreme Court reversed because the instruction incorrectly had the jury consider the defendant's contemporaneous knowledge of the use of a firearm rather than whether the defendant knew in advance that his cohort would be armed while committing the drug trafficking offense. Knowledge of the use or carrying of a firearm was an element of the offense in *Rosemond*, and that case is simply inapplicable. Knowledge of a firearm is not an element of the felony-murder charge, predicated on the felonious assault with the bottle.

{¶87} In fact, in *State v. Wynn*, 2d Dist. Montgomery No. 25097, 2014-Ohio-420, ¶ 69 cited by the majority, the court noted that the lack of knowledge of a gun was merely evidence purporting to demonstrate whether the defendant knowingly aided and abetted the principal actor. Even that court recognized that the lack of knowledge is evidence

disproving complicity, but it is not in and of itself dispositive of the issue. In this case, while the majority concludes that Shabazz was unaware of the weapon, there is ample evidence supporting the fact that Shabazz was complicit in the murder through his actions in participating in the orchestrated attack on Anderson and Shannon with the bottles used as deadly weapons. Knowledge of the firearm would be icing on the state's case.

{¶88} For the foregoing reasons, I respectfully dissent.

## APPENDIX

### Assignments of Error

- I. Appellant was denied effective assistance of counsel in violation of the sixth amendment to the constitution of the United States and Article I, Section 10 of the Constitution of the State of Ohio.
- II. The state's closing arguments contained statements that went beyond the record and were not substantiated by the evidence and therefore constituted prejudicial misconduct that violated appellant's right to due process.
- III. The trial court erred in instructing the jury on defendant's flight.
- IV. The trial court erred in instructing the jury on conspiracy and complicity.
- V. The trial court erred in failing to grant the appellant's motion for acquittal pursuant to Criminal Rule 29 as the evidence presented by the state at trial was insufficient to prove the elements of the offense.
- VI. The verdict was against the manifest weight of the evidence.



79775862

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO  
Plaintiff

DERRELL B SHABAZZ  
Defendant

Case No: CR-12-567946-B

Judge: PAMELA A BARKER

INDICT: 2903.01 AGGRAVATED MURDER /FRM1 /FRM3  
2903.02 MURDER /FRM1 /FRM3  
2903.11 FELONIOUS ASSAULT /FRM1 /FRM3  
ADDITIONAL COUNTS...

**JOURNAL ENTRY**

DEFENDANT IN COURT WITH COUNSEL MYRON P. WATSON / TYRESHA BROWN-O'NEAL. PROSECUTING ATTORNEY ANNA FARAGLIA AND KERRY SOWUL PRESENT. COURT REPORTER KATHLEEN KILBANE PRESENT. THE JURY RETURNS A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A UN UNDER COUNT(S) 1 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF GUILTY OF MURDER 2903.02 B UN UNDER COUNT(S) 2 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 UNDER COUNT(S) 3 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 AS CHARGED IN COUNT(S) 4, 6 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 UNDER COUNT(S) 5 OF THE INDICTMENT. THE COURT FINDS THE DEFENDANT GUILTY OF HAVING WEAPONS WHILE UNDER DISABILITY 2923.13 A(3) F3 AS CHARGED IN COUNT(S) 9 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 AS CHARGED IN COUNT(S) 7 OF THE INDICTMENT. THE JURY RETURNS A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 AS CHARGED IN COUNT(S) 8 OF THE INDICTMENT. COUNT 10 DOES NOT APPLY TO THIS DEFENDANT. THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW. THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11. THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF LIFE. COUNT 1 - AGGRAVATED MURDER - SENTENCE TO LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER SERVING 20 YEARS OF IMPRISONMENT. COUNTS 2 THROUGH 5, MERGE WITH COUNT 1 FOR PURPOSES OF SENTENCING. COUNT 6 (F2) - 2 YEARS IN PRISON. COUNT 9 (F3) - 9 MONTHS IN PRISON. COUNTS 1 AND 9 ARE TO BE SERVED CONCURRENTLY. COUNT 6 IS TO BE SERVED CONSECUTIVE TO COUNTS 1 AND 9. COUNT 6 - PRC - MANDATORY FOR 3 YEARS. COUNT 9 - PRC - UP TO 3 YEARS. DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 419 DAY(S), TO DATE. COURT TO HOLD HEARING ON DEFENDANT'S INDIGENCY STATUS. HEARING SET FOR 06/11/2013 AT 11:30 A.M. DEFENDANT ADVISED OF APPEAL RIGHTS. THE COURT HEREBY ENTERS JUDGMENT AGAINST THE DEFENDANT IN AN AMOUNT EQUAL TO THE COSTS OF THIS PROSECUTION.

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ANDREA F. ROCCO, CLERK



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DEFENDANT REMANDED.

SHERIFF ORDERED TO TRANSPORT DEFENDANT DERRELL B SHABAZZ, DOB: 07/12/1987, GENDER: MALE, RACE: BLACK.

06/07/2013

CPLXS 06/11/2013 20:40:35

*Patricia A. Barker*

Judge Signature

06/11/2013

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06/07/2013

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Page 2 of 2



79762656

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO  
Plaintiff

DAJHON WALKER  
Defendant

Case No: CR-12-567946-C

Judge: PAMELA A BARKER

INDICT: 2903.01 AGGRAVATED MURDER /FRM1 /FRM3  
2903.02 MURDER /FRM1 /FRM3  
2903.11 FELONIOUS ASSAULT /FRM1 /FRM3  
ADDITIONAL COUNTS...

**JOURNAL ENTRY**

DEFENDANT IN COURT WITH COUNSEL CHARLES M MORGAN, JOSEPH PAGANO. PROSECUTING ATTORNEY ANNA FARAGLIA, KERRY SOWUL PRESENT.  
COURT REPORTER KATHLEEN KILBANE PRESENT.  
THE JURY RETURNS A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A UN WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 1 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF GUILTY OF MURDER 2903.02 B UN WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 2 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 AS CHARGED IN COUNT(S) 4, 6 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 5 OF THE INDICTMENT.  
THE COURT FINDS THE DEFENDANT GUILTY OF HAVING WEAPONS WHILE UNDER DISABILITY 2923.13 A(2) F3 AS CHARGED IN COUNT(S) 10 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 AS CHARGED IN COUNT(S) 7 OF THE INDICTMENT.  
THE JURY RETURNS A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 AS CHARGED IN COUNT(S) 8 OF THE INDICTMENT.  
COUNTS 1, 2, 3 AND 5 THE DEFENDANT DID HAVE A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE R.C. 2941.141 (A).  
COUNTS 1, 2, 3 AND 5 THE DEFENDANT DID HAVE A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE AND DISPLAYED THE FIREARM, BRANDISHED THE FIREARM INDICATING THAT HE POSSESSED THE FIREARM, OR USED IT TO FACILITATE THE OFFENSE R.C. 2941.145.  
COUNT 9 DOES NOT APPLY TO THIS DEFENDANT.  
DEFENDANT WAS FOUND GUILTY OF COUNT 10 BY THE COURT.  
PROSECUTOR ADDRESSES THE COURT, OTHERS ADDRESS THE COURT  
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.  
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.  
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF LIFE.  
COUNT 1, AGGRAVATED MURDER - SENTENCE OF LIFE IMPRISONMENT WITH PAROLE ELIGIBIILTY AFTER SERVING 20 YEARS OF IMPRISONMENT.  
COUNTS 2 THROUGH 5 MERGE WITH COUNT 1 FOR PURPOSES OF SENTENCING.  
COUNT 1 - 3 YEAR GUN SPEC - TERM OF 3 YEARS THAT MUST BE SERVED PRIOR TO AND CONSECUTIVE TO THE

SENT  
06/07/2013

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ANDREA F. ROCCO, CLERK



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UNDERLYING SENTENCE OF LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER SERVING 20 YEARS OF IMPRISONMENT.

COUNT 6 - TERM OF 2 YEARS, PRC MANDATORY 3 YEARS.

COUNT 10 - TERM OF 9 MONTHS, PRC UP TO 3 YEARS.

COUNTS 1 AND 10 ARE TO BE SERVED CONCURRENTLY.

COUNT 6 IS TO BE SERVED CONSECUTIVE TO COUNTS 1 AND 10.

DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 271 DAY(S), TO DATE.

DEFENDANT DECLARED INDIGENT.

COSTS WAIVED

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS LEIF CHRISTMAN AS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

DEFENDANT REMANDED.

SHERIFF ORDERED TO TRANSPORT DEFENDANT DAJHON WALKER, DOB: 11/14/1988, GENDER: MALE, RACE: BLACK.

06/07/2013

CPTRC 06/11/2013 10:45:07

Judge Signature

06/11/2013

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## **2903.02 Murder.**

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) 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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Effective Date: 06-30-1998

## 2903.11 Felonious assault.

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

(1) Cause serious physical harm to another or to another's unborn;

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

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)

(1)

(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit,

probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 03-23-2000; 08-03-2006; 03-14-2007; 04-04-2007; 2008 HB280 04-07-2009