

NO. 2013-2023

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99538

STATE OF OHIO
Plaintiff-Appellant

-vs-

DERRELL SHABAZZ
Defendant-Appellee

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Mr. Derrell Shabazz (hereinafter “Shabazz”), along with co-defendants Otis Johnson (hereinafter “Johnson”) and Dajhon Walker (hereinafter “Walker”), was charged originally charged in a nine count indictment by a Cuyahoga County Grand Jury on April 16, 2012. The indictment alleged one count of Aggravated Murder in violation of Ohio Revised Code (ORC) 2903.01A; one count of Murder in violation of ORC 2903.02B; six counts of Felonious Assault, including two violations of ORC 2903.11A(1) and four violations of OC 2903.11A(2); and, one count of Having Weapons Under Disability in violation of ORC 2923.13A(3). Appellant entered a plea of not guilty to all charges at his arraignment on April 17, 2012. The case was re-indicted on October 16, 2012, reflecting all of the same charges as the original indictment, and Mr. Shabazz again entered a not guilty plea at his arraignment on October 19, 2012.

After numerous pre-trial hearings were held, the case proceeded to trial on February 13, 2013. A mistrial was granted during the voir dire process and the case was then re-set for trial on May 20, 2013. The trial re-commenced on that date, although prior to this trial date Johnson entered a guilty plea to a single count of felonious assault and was sentenced to a community control sanction. During the trial, Mr. Shabazz filed a Motion to Suppress Evidence or in the Alternative Motion in Limine to Exclude Any Testimony From Newly Disclosed State Witness, for which no ruling is noted in the Court’s Docket. The witness referenced in those Motions was Robert Steele (hereinafter “Steele”), whose identity the State of Ohio claimed to have discovered in the midst of the trial. In a subsequent case based upon these same events, Steele entered a guilty plea to a single count of felonious assault, and was sentenced to a five (5) year term of incarceration.

On June 7, 2013 the jury returned a verdict of guilty as to the charges of Aggravated Murder, Murder and four counts of Felonious Assault. The charge of Having Weapons Under Disability was tried directly to the court, and a finding of guilt was entered as to that charge. The jury returned a verdict of not guilty as to two counts of Felonious Assault. The Trial Court ruled that the Aggravated Murder, Murder and three counts of Felonious Assault merged for purposes of sentencing, and, after the State elected to proceed to sentencing on Aggravated Murder, the Trial Court imposed a sentence of life imprisonment with parole eligibility after twenty (20) years. On the remaining count of Felonious Assault the Trial Court imposed a sentence of two (2) years in prison to be served consecutively to the sentence imposed for Aggravated Murder. On the charge of Having Weapons While Under Disability the Trial Court imposed a sentence of nine months imprisonment to be served concurrently to the sentence imposed for Aggravated Murder. Thus, Shabazz was sentenced to an aggregate sentence of life imprisonment with parole eligibility after twenty two (22) years. Walker, having been found guilty of aggravated murder with firearm specifications, murder with firearm specifications, 4 counts of felonious assault and having weapons under disability, was sentenced to life imprisonment with parole eligibility after twenty five (25) years.

On June 20, 2013, Shabazz file a Notice of Appeal with Ohio's Eighth District Court of Appeals. After full briefings and oral arguments, the Eighth District affirmed in part, vacated in part and remanded for resentencing in a divided opinion. Specifically, the Eighth District vacated Shabazz' convictions for Aggravated Murder, Murder, three (3) counts of Felonious Assault with a Firearm and Having Weapons While Under Disability. The Court affirmed Shabazz' two convictions for Felonious Assault relating to champagne bottles, with one count naming Ivor Anderson as the victim, and the other count naming Antwon Shannon. On his appeal, the Eighth

District vacated Walker's conviction for aggravated murder, but upheld his remaining convictions.

Upon the ruling of the Eighth District Court of Appeals, the State of Ohio requested this Honorable Court take jurisdiction over this matter. On September 24, 2014, after consideration of the jurisdictional memoranda filed, this Honorable Court accepted the Appeal.

STATEMENT OF THE FACTS

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

At 1:57 a.m., Steele, who had entered the bar separately from Shabazz, Walker and Johnson, appeared to spill champagne on Anderson. Anderson and Steele briefly exchanged words, then went their own separate ways. (see, State's Exhibit 3-A) According to Anderson's testimony, he told Steele at that time that he was "doing too much," before they were separated. (Tr. 693) Although Steele and Anderson did not interact over the next several minutes, they remained within several feet of one another, and continued to drink, dance and socialize. Anderson is captured on the surveillance video alongside Shannon during the ensuing period, and despite trial testimony cited by Appellant, Anderson and Shannon are clearly engaged in

drinking and socializing, with no signs that they are standing and cautiously observing Steele and his group of friends out of fear of being attacked. There is no attempt to move to another area of the bar, or any other outward signs that Anderson and Shannon are maintaining a high degree of suspicion toward Steele's group.

At various times over the next several minutes, Steele does interact with Shabazz, Walker and Johnson, but he is primarily seen on the video continuing to dance, drink champagne and engage with bar patrons. Throughout that time, Steele, Shabazz, Walker and Johnson can be seen socializing with other bar patrons, dancing, taking pictures and behaving in a manner consistent with enjoying the environment of the bar. (See, State's Exhibit 3-A) While they are at times facing the general direction where Anderson and Shannon are located, there is no indication that they are watching Anderson and Shannon or plotting an attack. (Id.)

At 2:11:01, Johnson does appear in the center of the camera's view, but his activity is clearly mischaracterized by Appellant in its merit brief. He is seen holding a champagne bottle by its neck, but rather than flip it over to grip it upside down by its neck, so as to effectively render it as a weapon, he is seen moving his hand from the neck to the bottom of the bottle, cradling the bottle in the palm of his hand. Johnson continues to cradle the bottle from the bottom before moving through the crowd. (Id.) At 2:11 a.m., Steele is then seen dancing in an area near Anderson, whose back is turned to Steele. Steele then strikes Anderson with a champagne bottle, setting off a bar fight. (Id.) It is noteworthy that although it is clear that Steele hit Anderson with the bottle, and that Shabazz was several feet away from the area where Steele's attack occurs, Anderson told police that he was "100% sure" that Shabazz was the one who struck him. (Tr. 703)

As the fight between Anderson and Steele ensues, two females, who appear to be with Johnson, enter the fray and attack Anderson. Johnson also engages in the fight, but without the bottle that Appellant had indicated he had been preparing to use as a weapon. (See, State's Exhibit 3-A) Johnson pulls someone from the fight, as the two females continue to fight with Anderson. (Id.) Walker then attempts to strike Shannon with a bottle. (Id.) At that time, Shabazz, who had been on the fringe of where the fight was proceeding, enters the fray for the first time and punches Shannon. (Id.) As Shabazz walks away from Shannon, Walker is seen on the video walking behind a pillar near the dance floor. Shabazz and Walker do not converse during that time; in fact, Shabazz does not even look in Walker's direction. (Id.) Instead, Shabazz is seen walking across the room toward Johnson. Shabazz then runs toward Anderson, who is in the middle of the melee, and punches him. In contradiction to another blatant mischaracterization by the State of Ohio, Shabazz is not "directing" anyone on how to proceed; other than what appears to be a comment made in the general direction of an unidentified man who is not participating in the fight, Shabazz cannot be seen communicating with anyone. (Id.)

The fight then proceeds to the area near the pillar, and as Shabazz begins walking in that general direction, it appears that a single gunshot is fired. (Id.) At the time of the gun shot, both Johnson and Steele are directly engaged in the fight with Shannon and Anderson, and are within arm's reach of Shannon when he is struck. Thus, despite the suggestion that they are aware a gunshot is forthcoming, they have walked themselves directly into the line of fire, and Shabazz is moving toward it.

Just prior to the shot being fired, Shannon had moved toward that same pillar, and was seen attempting to pull the women off of Anderson. (Id.) The gunshot hits Shannon in the lower back, causing his fatal injury. (Tr. 598, 1056) As the shot is fired, the crowd begins to run out of

the bar, and amongst all of the patrons fleeing, Walker is seen struggling with his waistband. Although Appellant argues that he was placing a firearm back into his waistband, no weapon is visible to the camera. (Tr. 597, State's Exhibit 3-A)

Like virtually every other patron in the bar, Walker and Shabazz are seen on camera running out of the bar. They do meet up on their way out, and exit at the same time, although there is no indication from the surveillance video that Shabazz "congratulated" Walker, as opposed to merely checking on his well-being. (State's Exhibit 3-A) Appellant argues that Walker is later seen pumping his fist in celebration outside the bar, but this appears to be yet another mischaracterization of the evidence. As the Eighth District wrote:

"(W)e 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."

State v. Shabazz, 8th Dist. No. 100021, 2014-Ohio-1828.

The gunshot that was fired struck Mr. Shannon, who stumbled from the dance floor area toward a bathroom in the rear of the Club. (Tr., P 1072) There, Tennison Malcolm, a medical student, saw him and determined that he had been struck by the bullet. (Tr., P. 822) Mr. Malcolm began to tend to Mr. Shannon's injuries, and called 911. (Tr., P. 822) He continued to provide care until emergency personnel arrived. (Tr., P. 824)

Mr. Anderson returned to Tavo a few minutes later to find another friend, Ms. Eunique Worley, who he assisted to his car, and when he noticed that Mr. Shannon's car was still present, he surmised Mr. Shannon had been shot. (Tr., P. 698) Afterward, Mr. Anderson went to the hospital, where he learned that Mr. Shannon had died. (Tr., P. 700)

LAW AND ARGUMENT

APPELLANT'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.

While Appellant is correct that a challenge to the sufficiency of the evidence requires an appellate court to draw all reasonable inferences in favor of the state's case and the jury's verdict, no such deference is required with regard to unreasonable and unsubstantiated inferences. Further, the reviewing court shall not allow a conviction to stand where proof of the essential elements of a charge relies upon an inference based solely upon another inference, without additional supporting facts. At trial, the state offered nothing more than soundless surveillance video, idle speculation of a single witness, and the state's own creative interpretation of the events depicted in the video to attempt to establish the elements of the crimes. Appellant now tries to buttress this scant evidence by offering further interpretation of the surveillance video, much of which is both factually inaccurate and unsupported by testimony or other evidence offered at trial. As this meager evidence is insufficient to support the convictions of aggravated murder, murder or felonious assault with a firearm, the Eighth District was correct to vacate those convictions.

- 1. While the legal standard for sufficiency of the evidence requires deference, the appellate court shall perform a de novo review of the evidence to determine whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction.**

It is now axiomatic that when determining whether a conviction is supported by sufficient evidence the reviewing court must view the evidence “in the light most favorable to the prosecution” and inquire as to whether “any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, citing, *Jackson v. Virginia*, 443 U.S. 307, 319, 99S.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. The determination of whether a conviction is supported by sufficient evidence is a question of law, requiring a de novo review. *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, citing *State v. Thompkins*, (1997), 78 Ohio St.3d 380. This question of law does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. However, “where the evidence offered by the prosecution in support of the elements of the offense charged is so insubstantial and insufficient, and of such slight probative value, that it is not proper to make a finding beyond a reasonable doubt that (appellant) committed all of the acts constituting the elements of the offense, a reviewing court must reverse, rather than affirm, the conviction.” *State v. Gordon*, 2011-Ohio-5738, citing, *State v. Fyffe* (1990), 67b Ohio App.3d 608, 615, 588 N.E.2d 137.

In their analysis of the testimony and evidence offered at trial, the Eighth District clearly abided by their role of reviewing the evidence in a light most favorable to the state, and accepting all *reasonable* inferences set forth in favor of the prosecution. The Eighth District

simply refused to accept *unreasonable* inferences and unsubstantiated innuendo as true, and they were under no onus to do so. An inference is defined as the act or process of deriving logical conclusions from premises known to be true. Inference and speculation are not synonymous. The speculation and idle musings of the state in closing argument did not amount to reasonable inferences, as there was no basis in evidence from which to infer their theories. The reviewing court was not obliged to accept as reasonable inferences whatever strained ideas the state could conjure. Thus, when conducting a de novo review, and considering those musings in the context of surveillance video capturing the event in its entirety, the Eighth District rejected those alleged inferences as unreasonable and not based upon premises known to be true. Accordingly, the evidence was clearly insufficient to uphold the convictions in question.

2. The evidence offered at trial was insufficient to support the claim that Shabazz was complicit in the aggravated murder of Antwon Shannon.

In its Merit Brief, Appellant argues that there were numerous pieces of evidence presented in support of its claim that Shabazz and his group discussed a premeditated assault on Anderson and Shannon. Specifically, Appellant offers eight such pieces of evidence that Appellant claims were adduced at trial. It is noteworthy that, although the video was played in its entirety at trial, several of these new interpretations of the evidence were not supported by any testimony, and are being brought forth now for the first time. It is also noteworthy that a careful review of the video clearly shows that many of these interpretations are absolutely inaccurate. Further, two of the participants in the alleged scheme, Johnson and Steele, received extremely favorable plea deals with no agreement to testify at trial. Thus, the opportunity to establish the genesis of a

premeditated plan, if one existed at all, through direct testimony of co-conspirators was either squandered or was not borne out as true during those plea negotiations.

In reviewing the eight pieces of allegedly supportive evidence suggested by Appellant, it is clear that each piece standing alone is substantially flawed, and viewing those pieces collectively does nothing more to enhance their evidentiary value. Specifically:

1) *Appellant offers Anderson's testimony that he believed the group was plotting against him, and that they were looking "suspect."* (Tr. 693-694).

This testimony is simply speculation by Anderson, and does not constitute direct, or even indirect, evidence of a premeditated scheme to commit murder. Anderson does not testify that he heard their conversation, or that he had any other factual indication of a clandestine plan being developed. Additionally, the video shows all of the members of Shabazz' group continuing to socialize throughout the relevant fifteen (15) minute period of time, both together and separately, and are not actively engaging in ongoing scheming. Appellant also suggests that Shabazz' group was continually staring at Anderson and Shannon throughout this time. While the surveillance video does not bear this out, even were it so, as the Eighth District noted, "(A)lthough 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." See, *Shabazz*.

Further, relying upon this testimony to support the conviction requires acceptance of an inference based upon another inference. First the trier of fact must accept the strained inference that there was a discussion amongst Shabazz' group to attack Anderson and Shannon. Then, based upon that inference, the trier of fact must accept that each member of the group collectively acted upon that scheme in the fight that followed, and contrived to move the fight in the direction of a pillar where Walker would lie in wait to shoot Shannon. Although a trier of

fact is permitted to make reasonable inference based upon the evidence presented, it may not rely on an inference based entirely on another inference, unsupported by any additional fact or another inference from other facts. *State v. Bullard*, 2010–Ohio-3464 (Ohio App., 2010) citing *State v. Fields*, 3d Dist. No. 16-09-05, 2009-Ohio-5909, quoting *State v. Taylor* (Feb. 9, 2001), 7th Dist. No 98 JE 31, 2001 Ohio App. LEXUS 498. Accordingly, this speculative testimony must be disregarded.

2) *Appellant suggests that Johnson can be seen on camera flipping over a bottle in his right hand so as to hold it upside down by the neck for use as a weapon.*

This notion, which is unsupported by any trial testimony, is a blatant mischaracterization of the surveillance video. A careful review of the video shows that while Johnson does move the bottle to his other hand it is clear that he does not flip the bottle over or grip it upside down by its neck. Rather, when he puts the bottle in his right hand, Johnson is clearly cupping the bottom of the bottle in his right hand, which, if anything, renders it less likely to be used as a weapon. Further, a minute later, when Johnson enters the fray, he does so without a bottle in his hand, in complete contradiction to Appellant’s argument that he was preparing to use the bottle as a weapon. Thus, any suggestion that Johnson's conduct gives rise to an inference that a nefarious scheme has been developed is spurious at best. The inclusion of this misinterpretation as fact or inference to be accepted by a reviewing court on the mere basis of Appellant saying it is so is a stark illustration of why a court’s onus is limited to viewing only **reasonable** inferences in a light most favorable to the prosecution.

3) *Appellant suggests that Johnson walking over to another part of the bar on the opposite side of Shannon and Anderson and enters the fray four seconds after the fight begins is indicative of premeditated scheme.*

Johnson can be seen walking to another part of the bar. During his walk, he can also be seen socializing with others, including a woman he hugs and kisses. It is unclear from video that

he is even looking in the direction of the fight when it begins. No testimony is offered that suggests any particular plan or purpose in Johnson leaving the area, and any notion that he has such a purpose is completely unsubstantiated, and not based upon any known premise.

4) Appellant posits that six people launched a coordinated attack upon Anderson and Shannon.

This claim again depends on building inferences upon inferences. Appellant refers to this as a “coordinated” attack, which depends on the unsupported inference that a scheme was discussed by the group of four men prior to Steele’s independent action of striking Anderson, and then the inference built upon that inference that the six people in question, including two unidentified women who are never included in the alleged scheming, acted upon that plot. Again, there is no known premise from which the state could draw such inferences.

5) Walker repeatedly attacked Shannon and followed him around the dance floor.

This claim does appear to be accurate in viewing the surveillance, but Appellant fails to explain how this act by another individual is indicative of Shabazz being engaged in any specific plan with regard to an assault. Shabazz is acting independently at this time, and there is no specific fact or inference that would support the notion that Walker’s actions are coordinated with Shabazz’.

6) Everyone in the bar except Shabazz ducked when the shot was fired.

This bit of hyperbole is also factually inaccurate. A review of the surveillance video shows that the bar patrons display a wide variety of reactions to the gunshot. Some duck, some turn in the direction of the gunshot and some do not react at all. All that is consistent amongst most of the people represented in the video is that shortly after the gun shot, most are seen running from the dance floor in the same direction as Shabazz. To infer knowledge of a plan for murder on the basis of a reaction from Shabazz requires the stacking of several inferences, and

would also seem to inculcate numerous other bar patrons whose reactions to the gunshot the Appellant might deem inappropriate.

7) *Appellant argues Shabazz knew to walk over to the right side of the pole as Walker emerged from behind it and that Shabazz "congratulated" Walker by patting him on the chest and back.*

Appellant attempts to raise an inference that Shabazz must have known the shooting would occur because he walked to the same side of the pole where Walker emerged. This ignores the simple fact that Shabazz moved in the general direction of the exit, a reasonable action under the circumstances. There is no known premise, fact or testimony to suggest that the reason Shabazz travelled in the direction arose from anything more than expedience in leaving the scene where a shot had been fired. No reasonable explanation has been offered to suggest why Shabazz would have moved in the opposite direction from the exit and toward a place where a gunshot had been fired, instead of moving as he did. Such an unreasonable inference is not one subject to review in a light most favorable to the prosecution.

Further, there is no known fact that supports the inference that Shabazz was congratulating Walker. Under the circumstances presented, a multitude of explanations for this interaction could be inferred. No one with knowledge of what words were spoken or message was intended testified at trial. Detective Diaz' opinion of what occurred is meritless, as it has no basis in fact, and requires the stacking of several inferences to achieve its goal of showing the intended message. Accordingly, this activity provides no support for Appellant's wild speculation.

8) *Appellant claims as Walker ran outside the club and across Rockwell Avenue, he jumped into the air and pumped his fists in celebration.*

As the Eighth District noted:

“(W)e 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.” *Shabazz*.

Appellant has attempted to create a factual scenario that would support their theory that there was a pre-meditated scheme to commit murder. Simply stating something repeatedly as fact does not make it so. There is no discernible indication of Walker pumping his fists outside the bar, and even assuming *arguendo* that there were, there is no indication of the significance of such an action. It would require the stacking of inferences, specifically, the creation of a plan, leading to the execution of a plan, leading to a celebratory act, in order to arrive at Appellant’s conclusion. Under *Bullard* this is clearly impermissible, and therefore provides no support for Appellants theory.

Reviewing each of the “facts” offered by Appellant in support of their contentions leads to the inescapable conclusion that the evidence offered was woefully insufficient to support these convictions. Even with the new arguments and factually inaccurate interpretations of what appears in the surveillance video, none of which were presented at trial or supported by testimony, Appellant’s evidence cannot sustain the convictions. The Eighth District was appropriately deferential to the State of Ohio in its review, but deferential, or even extreme deference, must not be confused with serving as a rubber stamp for the state’s arguments. Appellant would have this Honorable Court accept the notion that because the state argued a theory, otherwise unsupported by testimony, that any reviewing court must therefore accept it is as true. Such a ruling would render any future insufficiency claim void on its face.

The reviewing court is tasked by *Thompkins* to conduct a de novo review of the evidence and determine if that evidence, viewed in a light most favorable to the prosecution, would support the notion that a rational trier of fact could find that all elements of the charges had been proven beyond a reasonable doubt. *Jackson v. Virginia*, supra. All reasonable inferences must be drawn in favor of the prosecution, but the reviewing court is not bound by any and all suggestions or musings the state offers ungirded by a known fact or premise. Where, as here, the known “facts” presented by the state are patently false, there is no deference that a reviewing court must provide. The state is not entitled to create its own facts.

In this case, the Eighth District faithfully served its function as a reviewing court. The deference provided to the state and the jury verdict was appropriate and consistent with the law, as was the court’s de novo review of the evidence. Accordingly, the judgment of the Eighth District must not be disturbed by this Honorable Court.

3. The State of Ohio failed to establish the presence of prior calculation and design.

In order to convict Shabazz and Walker of aggravated murder under Ohio Revised Code 2903.01(A), the state was required to prove beyond a reasonable doubt that they purposely caused the death of Shannon with prior calculation and design. This Honorable Court noted in *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, that there is no bright-line rule to determine whether a defendant acted with prior calculation and design. In so doing, the *Cassano* court acknowledged that “prior calculation and design” is a more stringent element than the “deliberate and premeditated malice *** required under prior law. *State v. Walker*, 8th Dist. No. 99998, 2014-Ohio-1827 citing *State v. Cotton*, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978), paragraph one of the syllabus. Specifically, prior calculation and design requires “a scheme

designed to implement the calculated decision to kill.” *Walker*, quoting *State v. D’Amborsio*, 67 Ohio St.3d 185, 196, 616 N.E.2d 909 (1993), *Cotton* at 11.

The existence of prior calculation and design is determined on a case-by-case analysis of the facts and evidence. *State v. Jones*, 91 Ohio St.3d 335, 345, 2001-Ohio-57, 744 N.E.2d. This Court did, however, establish the following factors to consider in determining the existence of prior calculation and design:

“(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or “an almost spontaneous eruption of events?”

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

With regard to the first prong of the *Taylor* test, as Appellant readily concedes, there is no evidence that either Anderson or Shannon knew Shabazz prior to this event. Anderson’s misidentification of Shabazz to the police as the individual who struck him with the bottle is further evidence that there was no pre-existing relationship between these parties. Appellant attempts to create a relationship between Shabazz and either Anderson or Shannon, on the basis of the claim that the three women at the club with Anderson, Eunique Worley, Marvella Grant and Ashley Nix, all knew Shabazz. This seems to imply a strong pre-existing relationship between the women and Shabazz. This clearly misstates the testimony. The following exchange occurred between Worley and defense counsel:

Q: Is it accurate from your testimony to say that you and Mr. Shabazz don’t know each other well but you know him somewhat?

A: Yes. (Tr., p.761)

Further, the following exchange occurred between Nix and the prosecuting attorney:

Q: All right. During the course of meeting Ivor and Mr. Shannon, did you see some other friends that you knew or recognized or that someone else in your party recognized?

A: Marvella knew a guy that was there.

Q: All right. Did you know that same guy?

A: No.

Q: All right. Did you come to know who that guy was?

A: Yes.

Q: Who was that?

A: Derrell. (Tr., p. 804)

Finally, the following exchange occurred between Marvella Grant and the prosecuting attorney:

Q: And what do you know Derrell's last name to be?

A: Shabazz.

Q: And how do you know him?

A: He's a friend.

Q: All right. Did you go to school together?

A: No.

Q: Where did you know him from?

A: Just mutual friends. (Tr. 770-771)

According to the testimony it was established that one of the three women did not know Shabazz at all, one knew him "somewhat," and one knew him through mutual friends. While it is unclear how knowing other people would establish the pre-existing relationship between Shannon and Shabazz contemplated in the first prong of the *Taylor*, as Appellant suggests, it is

clear that there was hardly a relationship between Shabazz and those other people, and certainly no indication that such a relationship was strained in any way. Thus, Appellant fails under this part of the test.

The state failed at trial to meet the second prong of the *Taylor* test as well. While Appellant argues the semantical question of whether this should have been deemed a “fight”, what is clear is that the video shows a chaotic scene that involves people on both sides of the altercation throwing punches and engaged with one another in combat. There is no way that either side could have contrived to control this scene in a manner that would have insured that the parties involved would have ended up in one area of the bar or another. In fact, at various times during the fight different people end up on opposite ends of the dance floor. Amidst the chaos the *Walker* court was correct in noting “Walker did not choose the murder site or pursue Shannon. Rather, the video shows the murder site came to him instead.” Thus, it cannot be shown that Walker gave thought or preparation to choosing the murder site.

The final prong requires consideration of whether the act was drawn out or an almost spontaneous eruption of events. *Taylor*, supra. As was written above, there was no evidence presented, nor any known premise upon which to base an inference, to suggest that Shabazz, Walker, Steele and Johnson spent the period leading up to 2:11 a.m. devising a murder plot. To the contrary, that time is spent dancing, socializing, taking pictures and generally enjoying the atmosphere of the bar. Thus, the genesis of this incident occurs at 2:11:51, when Steele independently strikes Anderson with the bottle. This leads to the fight that ends with the fatal gunshot less than one minute later. This is a quintessential spontaneous eruption of events. While it is correct to note that “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, a reviewing court still must make a determination of whether the events were spontaneous.

In *State v. Simms*, (Spet. 19, 1996), 8th Dist. No. 69314, 1996 WL 532090, the reviewing court was confronted with an aggravated murder conviction arising from a fight between two friends at a party. There, the defendant placed the victim in a chokehold and held a gun to his head. After the victim begged for mercy, the defendant fired several shots, killing the victim. Despite the pre-existing relationship, the choice of murder weapons by the defendant and the time that elapsed during a fight and the subsequent period where the victim begged for mercy, the reviewing court deemed this insufficient evidence to support prior calculation and design. The court's decision relied upon the key fact that there, as here, the incident arose from a spontaneous fight. As the evidence was insufficient in *Simms* to uphold an aggravated murder conviction, so too does it fail in the present case.

In the habeas corpus action that followed the *Taylor* ruling (see, *Taylor v. Mitchell* (2003), 296 F. Supp.2d 784), the federal court summarized the state of Ohio's law regarding prior calculation and design as follows:

“In view of the understandable lack of a bright line rule governing determinations of whether the proof shows prior calculation and design, Ohio courts have consistently considered various factors in addition to those - the defendant's relationship with the victim, the thought given by the defendant to the means and place of the crime, and the timing of the pertinent events, recited in *Taylor*, 78 Ohio St.3d at 19, 676 N.E.2d 82, when determining whether the defendant engaged in prior calculation and design.

‘Among these other frequently considered factors are:

- Whether the defendant at any time expressed an intent to kill.
- Whether there was a break or interruption in the encounter giving time for reflection.
- Whether the defendant displayed a weapon from the outset.
- Whether the defendant retrieved a weapon during the encounter.

- The extent to which the defendant pursued the victim.
- The number of shots fired.”

State v. Snyder (Ohio App. 2011), 2011-Ohio-3334, citing *Taylor v. Mitchell*. None of these other factors cuts in favor of prior calculation and design. There was no prior expression of an intent to kill, nor any break from the time Steele first struck Anderson until the shot was fired that would have allowed for reflection. The gun was not displayed until the first shot was fired, and no extraordinary steps appear to have been taken to retrieve the weapon. Walker, rather than pursue Shannon, was standing behind a pillar when Shannon happened to wander into the area where a shot could be taken. Finally, it was only a single shot that was fired. As neither the factors in the original *Taylor* test are present, nor is there evidence of any of the other delineated factors from *Taylor v. Mitchell*, the state did not provide sufficient evidence at trial to sustain a conviction for aggravated murder, and even viewing the evidence in a light most favorable to the prosecution, the Eighth District was correct to vacate that conviction.

APPELLANT’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 PRINCIPLE HAD A FIREARM THAT WAS THE ACTUAL CAUSE OF THE VICTIM’S DEATH.

The Eighth District ruled that Shabazz’ conviction under the felony-murder statute failed because the court could “find no evidence that Shabazz aided and abetted Walker in the murder.” *Shabazz*, at ¶. 31. In so finding, the Eighth District appropriately applied the holdings in precedential cases, both from this Honorable Court’s jurisdiction and also from the United States Supreme Court, to these facts and determined that without establishing Shabazz’ foreknowledge that Walker possessed a firearm, the state could not prove that Shabazz’ actions as an alleged accomplice met the proximate cause element of RC 2903.02(B). Appellant argues

that this ruling has created a “new and additional requirement” that must be met in order to uphold a conviction under Ohio Revised Code 2903.02(B). Specifically, the State submits that the Eighth District “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.” See, Merit Brief of Appellant. This claim misstates the holding of the Eighth District’s opinion, as the focus of that Court’s analysis is clearly upon the issue of the foreseeability prong of the definition of proximate cause, as opposed to any indication that the state must be held to the purported new burden Appellant’s argument would suggest. The state’s onus in securing a felony-murder conviction remains undisturbed by the Eighth District’s holding in *Shabazz*; the court simply ruled that the evidence provided here proved insufficient to satisfy the state’s burden.

1. An accomplice may only be convicted of felony murder where the underlying crime is the proximate cause of the victim’s death and the accomplice participated in the commission of the underlying felony knowing its full extent and character.

RC 2903.02(B), which codifies the felony murder doctrine, provides that “no person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree.” Ohio case law has consistently held that a defendant can be held criminally responsible for the killing of a person, regardless of that individual’s identity or the identity of the person whose act directly caused the death, so long as the death is the “proximate result” of defendant’s conduct in committing the underlying offense. See, *State v. Robinson*, 8th Dist. No. 99290, 2013-Ohio-4375, citing, *State v. Tuggle*, 6th Dist. Lucas No. L-09-1313, 2010-Ohio-4162.; *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 Ohio App. LEXIS 472 (Feb. 8, 2002). “For criminal conduct to constitute the ‘proximate cause’ of a result, the conduct must have (1) caused the result, in that but for the

conduct the result would not have occurred, and (2) the result must have been foreseeable.” *State v. Gibson*, 8th Dist. No. 98725, 2013-Ohio-4372.

Foreseeability is determined from the perspective of what the defendant knew or should have known when viewed in light of ordinary experience. *Gibson*, citing *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809; *State v. Lovelace*, 137 Ohio App.3d 206, 738 N.E.2d 418 (1st Dist. 1999) “It is not necessary that the defendant be in position to foresee the precise consequences of his conduct; only that the consequences be foreseeable in the sense that what transpired was natural and logical in that it was within the scope of the risk created by his conduct.” *State v. Losey* (1985), 23 Ohio App.3d 93, 95, 23 OBR 158, 491 N.E.2d 379. “When the result varied from the harmed (sic) intended or hazarded it must be determined that the result achieved was not so extraordinary or surprising that it would be simply unfair to hold the defendant criminally responsible for something so unforeseeable.” *State v. Mills*, 2011-Ohio-5793 (Ohio App. 2011), citing *Lovelace* at 216. Thus, in order to overrule the Eighth District and reinstate Shabazz’ conviction for felony-murder this Honorable Court must find that, despite the paucity of evidence supporting the notion, he was or should have been aware that Walker was apparently armed with a loaded gun and was prepared to use it during a bar fight. Given the level of security provided in the bar, the ultimate outcome of the fight, which was the fatal shooting of Shannon, was unforeseeable to Shabazz. Without knowing Walker was armed, and in fact having reason to believe that no one in the bar was carrying a firearm, Shabazz lacked knowledge of the full extent and character of the nature of the bar fight, and could not have foreseen its conclusion. Accordingly, he cannot be held criminally responsible for Shannon’s death.

2. *Rosemond v. United States* established that aiding and abetting requires the alleged accomplice to take affirmative steps toward the furtherance of an underlying offense with an intent to facilitate that offense’s commission that extends to the entirety of the crime.

In *Rosemond v. United States*, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), the United States Supreme Court considered an issue directly analogous to the question at the heart of the Eighth District’s ruling. There, the Supreme Court, citing Judge Learned Hand, held that “(t)o aid and abet a crime a defendant must not just ‘in some sort associate himself with the venture,’ but also ‘participate in it as something that he wishes to bring about’ and ‘seek by his action to make it succeed.’” *Rosemond*, citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). The *Rosemond* court added, “So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme’s commission.”

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

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

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

Rosemond, 134 S.Ct. at 1249.

This principle of foreknowledge concerning possession of a firearm as a necessary element for foreseeability and, therefore, proximate causation, has been applied repeatedly in Ohio jurisprudence to situations where the felony-murder doctrine was applied. Notably, in *State v. Wynn*, 2d Dist. Montgomery No. 25097, 2014-Ohio 420, the court noted that evidence purporting to show that the accomplice did not know that the shooter had a gun would be relevant to whether he knowingly aided and abetted the shooter.

Further, in *State v. Chatmon*, 8th Dist. No. 99508, 2013-Ohio-5245 and *State v. Ayers*, 10th Dist. No. 13AP-18, 2013-Ohio-5601, the Courts in each case, citing *State v. Johnson*, 93 Ohio St.3d 240 (2001) wrote that “(t)o sustain a conviction on the basis of complicity, the evidence must show that the defendant ‘supported, assisted, encouraged, cooperated with, advised or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.” Further, both the 8th and 10th District courts noted “Mere presence of an accused at the crime scene is not, of itself, sufficient to prove that the defendant was an aider and abettor under R.C. 2923.03(A)(2).” *Id.*

In *Wynn*, *Chatmon* and *Ayers*, the Court upheld the felony-murder convictions on the basis of the defendant's foreknowledge of the firearm. In *Wynn*, testimony from the principal offender confirmed that the weapon was brandished in front of Wynn, discounting any notion that Wynn was unaware of its presence. In *Ayers*, testimony established that discussion occurred within a vehicle, prior to the shooting, wherein the primary shooter asked for and was provided a gun in the defendant's presence. This testimony proved the defendant's foreknowledge that the shooter possessed a firearm. Similarly, in *Chatmon*, testimony established that both Chatmon and his co-defendant arrived on scene with weapons, and video showed that each had knowledge of the others weapon.

Given their foreknowledge of the weapons, Wynn, Ayers and Chatmon had the ability to withdraw from the enterprise or otherwise reconsider their participation, prior to the murder. It was foreseeable in each case that a gun would be fired with the lethal consequences that transpired, and still each chose to participate rather than attempt to alter the plan or withdraw altogether. By doing so, each accepted the responsibility for the events that were to unfold. Without the knowledge of the full extent and character of the enterprise the primary actors were preparing to embark upon, neither Wynn, Chatmon nor Ayers would have had the reasonable opportunity to walk away from those activities, and accordingly, accomplice liability would not have attached.

3. Without foreknowledge that Walker was armed and prepared to introduce a firearm into the bar fight, Shabazz had no opportunity to persuade Walker to alter his plan or withdraw from the enterprise.

Despite Appellant's protestations to the contrary, there was no evidence offered at trial to establish Shabazz' foreknowledge of the weapon Walker appears to use to shoot Shannon. Rather, based upon what he personally observed upon entry to the bar, as shown on surveillance

video, Shabazz would be fully justified in his belief that neither Walker specifically, nor any other bar patron generally, was armed upon entering. The video clearly shows the security staff patting down each patron for weapons as they enter the bar. This includes Walker, who was frisked thoroughly in Shabazz' presence. Further, testimony was offered through the bar owner, Christopher King, verifying the security protocol:

Q: Mr. King, was the patdown procedure that was done at your club or establishment, was that something that you directed the security that you had contracted out to do or was that something that they did on their own?

A: That's standard procedure, so when you -- when you have security, there are certain things they do. This is what they do routinely so --

Q: So you hire people that you believe to be competent?

A: Right.

Q: And experienced at their jobs to patdown so that would mean everyone would be patted down, correct?

A: Yes.

Q: And so that's how you understood it for any night the club was open that anyone that was coming in to patronize your establishment, they would have been subject to a patdown?

A: Correct. (Tr., p. 673-674)

Accordingly, when viewed in light of ordinary experience it was reasonable for any patron of the bar to assume that there were no firearms in the establishment that would be introduced into a bar fight. Further, there is nothing on the surveillance video to indicate that Walker displayed or brandished a firearm prior to the fatal shot being fired, or that Shabazz was ever made aware of the weapon's presence. Simply, no evidence supports the notion that Shabazz knew Walker to be armed.

When the fight broke out in the bar, and several bar patrons became involved, Shabazz and Walker did not remain unified in their actions. As Walker disengages from the fray and walks several feet to position himself behind a pillar on the outskirts of the fight, Shabazz remains in the area where the fight occurs, and is seen throwing a single punch at both the victim and the victim's co-hort. Shabazz' position relative to the pillar renders him unaware of the actions Walker is taking. Further, at the time the shot is fired, both Johnson and Steele, alleged co-conspirators, are engaged in the fight with Shannon and Anderson, in the direct line of Walker's fire. Given the position Johnson and Steele were in at the time of the shooting, it seems highly unlikely that there was a plan afoot to fire a gun as they themselves were in extreme danger of being shot under those circumstances.

Once the shot is fired, all bar patrons, including Shabazz and Walker, are seen running from the dance floor area where the fight had occurred, and toward the bar exit. Even then, there is no indication that Shabazz is aware that Walker may have fired the shot, or even that Walker is in possession of the firearm, as no gun is visible to the camera. As stated above, there is only idle speculation on the part of the state in its closing argument that anyone "celebrated" the shooting, and there is no testimony or physical evidence in support of that theory.

As there is no evidence of a concerted effort to bring about a fight, much less a murder, and there is no evidence that Shabazz was aware of, or could have reasonably expected there to be, a firearm present in the bar, Shabazz was denied any meaningful opportunity to dissuade a shooter or extricate himself from such a scheme. At the time the shot is fired, Shabazz has already completed whatever assistance he provided in the furtherance of the fight, that being to throw two punches. Without evidence showing that he assented to participate in the alleged enterprise, knowing the full extent and character of that plan, the state failed, pursuant to

Rosemond and the entirety of Ohio jurisprudence, to establish that Shabazz aided and abetted the primary actor. Accordingly, the state failed to meet its burden for accomplice liability and the Eighth District was correct to vacate his conviction for felony-murder.

4. The decision of the Eighth District did not place a new burden upon the state to establish the guilt of an aider and abettor to a felony-murder charge; rather, the Eighth District based its vacation of the conviction on the insufficiency of the evidence in this particular case.

Under the particular circumstances presented here, without foreknowledge that an individual had managed to skirt security protocol and smuggle a firearm into the bar, it was not foreseeable that a bar fight would lead to a fatal shooting. As Ohio's Eighth District held in *Muntaser*, supra, "Foreseeability is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience." There was no reason to suspect that anyone in the bar would have been armed with a firearm, based upon the patdown search to which every patron was subjected. There was further no evidence to substantiate the notion that Shabazz was aware that Walker possessed a gun, much less that they and others had formulated a wild scheme that would lead to a murder.

Shabazz did, of his own volition, choose to enter into a fight already begun, even though he was clearly aware that a bottle had been used to strike another participant in the fray. For that reason, the Eighth District chose to uphold his conviction as an accomplice to the felonious assaults that arose from the use of a bottle as a weapon. As Appellant argues, given the Eighth District's endorsement of that felonious assault conviction, that court next must apply the test defined in *Muntaser* to determine whether that assault was the proximate cause of Shannon's death. This requires the court to find that the conduct "(1) caused the result, in that but for the conduct the result would not have occurred, and (2) the result must have been foreseeable. See, *Muntaser*, supra.

The Eighth District proceeded to conduct just such an analysis, expressly concluding “that bottle throwing was not the proximate cause of Shannon’s death.” See, *Shabazz*, at ¶ 36. Appellant may disagree with the conclusion the Eighth District reached in applying the *Muntaser* test, but that disagreement does not negate that the analysis was conducted. The Eighth District determined that the evidence presented at trial was insufficient to satisfy the foreseeability prong of the test, and therefore the conviction did not pass muster. Appellant now attempts to support their notion of foreseeability by making arguments not in the record, some of which, such as “(Shabazz) directed his accomplice how to proceed” and “(Shabazz) congratulated Walker” are unsupported in any manner by the surveillance video. The Eighth District was not persuaded by the testimony and the surveillance video that a shooting death was a foreseeable consequence of the bar fight, and therefore Shabazz’ conviction for felony-murder could not stand. There is no new onus being created by this ruling; it is merely a proper application of existing law.

Further, this ruling in no way invalidates the legal concept that a killing done by another, be it a co-defendant or a third party, can be sufficient to uphold a felony-murder conviction. In fact, in explaining its analysis concerning the felony-murder rule, the Eighth District cites a string of cases as support for its vacation of the felony murder conviction where the actual killer was someone other than the defendant. See, *Shabazz*, citing *State v. Wynn*, 2d Dist. Montgomery No. 25097, 2014-Ohio-420; *Ayers*, supra; *Chatmon*, supra; *State v. Robinson*, 8th Dist. Cuyahoga CNo. 99290, 2013-Ohio-4375; *State v. Hall*, 10th Dist. Franklin Nos. 08AP-939 and 08AP-940, 2009-Ohio-2277; *State v. Hudson*, 5th Dist. Stark No. 2007-CA-00176, 2009-Ohio-456; *State v. Hickman*, 5th Dist. Stark No. 2003-CA-00408, 2004-Ohio-6760. The ruling does not stand in any way for re-defining who must actually commit the killing as a pre-requisite for felony murder, it merely holds, as does all Ohio jurisprudence, that the action of the defendant must be the

proximate cause of the victim's death. Where sufficiency of the evidence is established, the actor, or actors, whose actions are the proximate cause of another's death will be held criminally accountable, whether or not that actor is the principal offender. Where, as here, the evidence is insufficient to support proximate causality, the charge will fail. The ruling of the Eighth District again does nothing to alter the state of the law; to the contrary, it reinforces precedent. Thus, the ruling of the Eighth District must not be disturbed.

CONCLUSION

When reviewing a criminal conviction for the sufficiency of the evidence, the appellate court must perform a de novo review of the evidence presented at trial and determine if, 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. *Jackson; Jenks*. In this case, the Eighth District accepted that responsibility and conducted its review granting weight to all of the state's reasonable inferences that could be drawn from the facts and known premises gleaned from the evidence. The Eighth District, after an extremely thorough consideration of these facts and inferences, determined that the evidence was insufficient to support Shabazz' convictions for aggravated murder, felony murder and felonious assault with firearm specifications. Accordingly, those convictions were vacated. The Eighth District neither usurped the role of the jury nor did it create new onerous burdens for the state to have to meet in order to secure convictions for these charges. The court merely determined that the evidence did not support the theories espoused by the state. The state was unable to establish, either through witness testimony or the surveillance videos of the incident, that a common scheme had been formed amongst the various actors that set off the events leading to Antwon Shannon's death.

There was no evidence of prior calculation and design leading to the single gunshot that brought about Shannon's demise.

Further, as there was no support for the notion that Shabazz was aware or should have been aware that Walker was armed, Shabazz could not be held criminally liable for Walker's actions. As the United States Supreme Court held in *Rosemond*, without the requisite knowledge that Walker was armed Shabazz did not have a meaningful opportunity to dissuade Walker from his actions, or to withdraw from the events altogether. Accordingly, without evidence of Shabazz' foreknowledge that Walker was armed, the state was unable to meet the foreseeability prong of the test for proximate cause pertaining to the felony murder charge.

The Eighth District correctly performed its function in reviewing the present case. It is therefore incumbent on this Honorable Court to leave undisturbed the Eighth District's ruling, and remand the case back to the trial court for sentencing on Shabazz' outstanding conviction for felonious assault on Shannon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of foregoing Merit Brief of Appellee has been sent this 21st day of January, 2015 via U.S. Mail to counsel for Appellant Timothy J. McGinty, Cuyahoga County Prosecutor, Christopher D. Schroeder, Assistant County Prosecutor and Anna M. Faraglia, Assistant County Prosecutor, at 1200 Ontario Rd., Justice Center – 9th Floor, Cleveland, Ohio, 44113, and via electronic service to cschroeder@prosecutor.cuyahogacounty.us.

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