

NO. 2014-0941

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 SHABAZZ,

Defendant-Appellee

REPLY BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Derrell Shabazz succeeded in asking the Eighth District to try this case in chambers and to find that the jury in this case was irrational, that the evidence against him was based solely on inferences that were unreasonable, and that the testimony of a State's witness should not be believed. To accomplish this, Shabazz crafted a series of inferences that he believed the reviewing court should accept when the evidence in this case was viewed in the light most favorable to the defense:

- Shabazz was really walking towards the exit rather than towards Dajhon Walker after Walker shot Antwon Shannon, (Appellant's Brief, at p. 13),
- Shabazz was merely checking on Walker's well-being when he patted him on the chest and back, (Id., at p. 6),
- Otis Johnson must not have been holding the bottle at the time he attacked Shannon and Ivor Anderson, (Id., at p. 11),
- Shabazz must have been aware of the level of security in the bar and, because of this, could not have foreseen that Walker would shoot Shannon. (Id., at p. 22).

There is a proper venue for all of these arguments, and it is the closing statements of counsel to the jury. It is not in a challenge to the sufficiency of the evidence made for the first time on appeal. A sufficiency analysis requires the appellate court to "draw all reasonable inferences in favor of the prosecution[.]" *State v. Waldrop*, 10th Dist. No. 98AP-102, 1998 WL 598112, at *5. Shabazz is asking this Court to draw its own inferences in favor of the defense for the first time in a sufficiency analysis, to find those inferences more persuasive than the evidence the jury believed, and by doing so, to overrule the jury's verdict. This is improper in the extremely limited context of a sufficiency review.

Even on their merit, Shabazz's inferences are unpersuasive. The surviving victim, Ivor Anderson, directly testified that Shabazz and his group were planning to attack him,

and that he was so concerned about this that he asked Antwon Shannon to keep an eye on the group. Otis Johnson was captured on camera flipping a bottle over in his hand and gripping it as a weapon. Walker and Shabazz repeatedly attacked Antwon Shannon, an innocent man trying to protect his friend, by punching him, striking him in the face with a beer bottle, and then throwing the bottle at him. After Walker shot Shannon in the back, Shabazz walked over to Walker as he came running out from behind the pole and patted him on the chest and back.

The jury in this case saw that Derrell Shabazz acted at all times like a man who knew the shot was coming and inconsistently with someone who did not. Shabazz was free to argue that this was all a coincidence, and did his best to argue this to the jury. The jury heard all of the evidence and simply disbelieved him. The Eighth District should not have taken the exceptional step of overturning the jury's verdict on the basis that a verdict of acquittal – not reached by even one of the twelve jurors or the trial court – should have been so much a foregone conclusion that there was “no need for formal deliberation.” *State v. Byerly*, 11th Dist. 97-P-0034, 1998 WL 637689. This Court should not allow the test for sufficiency of the evidence to be changed to manifest weight by another name and should reverse the court of appeals.

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.

In his brief, Shabazz places great emphasis on the lack of testimony in the record to substantiate the jury's verdict as to what the video showed. “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.” (Appellee’s Brief, at p. 9). The reason no witness testified as to what they saw on the video was that the defense twice objected to allowing any of the State’s witness to describe what they and the jury could plainly see. (Tr. 591, 1037). The trial court sustained those objections.¹

Shabazz is now asking this Court to view the lack of narrative testimony in the record as a commentary of the content of the video itself. It is not. This is why an appellate court presiding over a cold record should not take it upon itself to conduct a second trial. Shabazz’s approach would actually make it more difficult for the State to win cases in which the crime is captured on video: no witness can testify as to what they see, and on appeal the defendant can simply point to the lack of narrative testimony and claim it is exculpatory. The jury watched the video and believed that it proved Shabazz’s guilt. The Eighth District had no basis to interfere with that finding.

1. The victim directly testified that Shabazz was engaged in planning an attack against him and Antwon Shannon.

The simplest way for this Court to resolve this case is to look at the testimony of Ivor Anderson that after the champagne spill, Shabazz and his group were “plotting against me

¹ Although not at issue in this appeal, there is precedent in Ohio for allowing such narrative testimony where it would be helpful to the jury. See *State v. Harrington*, 4th Dist. No. 05CA3038, 2006-Ohio-4388, at 49-50 (upholding the admission of a video showing defendant engaging in drug transactions and allowing a police officer to narrate that video during his testimony); *State v. Blackmon*, 10th Dist. No. 94APA05-773, 1995 WL 68166, at *14 (“We cannot conclude that the admission of either the tape or the narrative was an abuse of discretion and any error allowing the narrative was harmless beyond a reasonable doubt”).

and Mr. Shannon.” (Tr. 694). This is not an inference; it is direct testimony from the victim who witnessed the events. Anderson further testified that he “stood there and watched them for the next five to ten minutes” because “I didn’t want to get attacked with my back turned[,]” and that he told Shannon “to keep an eye out because they’re looking suspect[.]” (Tr. 694). Anderson’s testimony on this point was so compelling that the defense did not even cross-examine him about it at trial. To the contrary, the defense actually buttressed the point:

Q. Okay. In that half hour is it fair to say that you were watching the individual that spilled champagne on you?

A. For a brief period after it happened.

Q. He was a concern of yours, is that fair to say?

A. Yeah.

Q. So you were to the best of your ability, I know it was a crowded place, to the best of your ability you were trying to make sure where he was and who he was with, correct?

A. Yes.

Q. Okay. So you were trying to keep track of him, correct?

A. Correct.

Q. You obviously didn't keep track of him the entire time but he did a pretty good job of it, fair to say?

A. That's fair to say.

The only other testimony the defense elicited from Anderson on this point was that he was so fearful that Shabazz was going to attack him that he initially assumed Shabazz was the person who hit him with the bottle. (Tr. 722). Anderson testified, “[a]t that time I believed it had to be Derrell.” (Tr. 734).

“The jury was free to believe some, all, or none of any witness's testimony.” *State v. Jones*, 1st Dist. No. C-080518, 2009-Ohio-4190, at ¶ 43. In this case, where the defense failed to even attempt to challenge Anderson’s testimony on cross-examination, and did not reference it in closing arguments, the defense left the jury with no other conclusion but to accept that testimony as true. The jury’s decision to believe what Anderson said was a proper reliance on the direct testimony of a witness who personally observed the actions of Shabazz’s group. It did not require reliance on an inference.

The Eighth District was required to not only consider this evidence, but to do in the light most favorable to the prosecution. Instead, the panel in Shabazz’s case did the exact opposite, recasting and minimizing Anderson’s testimony as being about nothing more than “dirty looks[.]” *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, at ¶ 28. Meanwhile, the panel in Walker’s appeal did not discuss or consider Anderson’s testimony at all. *State v. Walker*, 8th Dist. No. 99998, 2014-Ohio-1827. This fell short of the court of appeals’ duty in a sufficiency challenge to “review ‘*all of the evidence*’ admitted at trial.” *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, at ¶ 18 (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Shabazz now argues, for the first time, that this Court should discount Anderson’s testimony because it was “simply speculation by Anderson[.]” (Appellant’s Brief, at p. 11). The testimony was not speculative. Anderson’s testimony was direct, based on Anderson’s personal observations, and – as Shabazz proved a few moments later when he and his group attacked Shannon and Anderson – correct. Moreover, Shabazz’s attempt to minimize the importance of Anderson’s testimony by questioning the basis for his observations is improper in a sufficiency review. An appellate court considering a sufficiency challenge

does not ask whether a witness' testimony should be believed, but rather, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus (emphasis added). In this case, the Eighth District did neither. Instead, it disbelieved the testimony.

2. The State is not required to prove that the unlawful act contemplated in the original conspiracy was identical with or even similar to the murder as executed.

Shabazz also overstates what is required to demonstrate Shabazz's complicity. Even accepting Anderson's testimony as true, Shabazz argues, "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." (Appellant's Brief, at p. 10). This misstates Ohio law. The State was not required to prove that Shabazz acted out a preconceived role in the attack to prove that he was guilty of aiding and abetting.

"Aiding and abetting does not require evidence that the defendant specifically entered into a plan with the principal to commit a crime. As noted above, 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."

State v. Gilliam, 7th Dist. No. 03-MA-176, 2005-Ohio-2791, at ¶ 71, citing *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, at syllabus.

The only charge that required any evidence of a "plan" at all was the aggravated murder count, and even that only required the State to prove that Shabazz and Walker purposely caused the death of Shannon with prior calculation and design. The focus of this inquiry is on the ends, not the means. It did not require the State to prove that Shabazz's

design to cause death accounted for everything that transpired along the way. “Quite simply, * * * poor detail in planning does not indicate lack of prior calculation and design.” *State v. Dunford*, 11th Dist. No. 2009-A-0027, 2010-Ohio-1272, at ¶ 56. Moreover, this Court held in *State v. Doty*, 94 Ohio St. 258, 264, 113 N.E. 811 (1916) that a co-conspirator may be convicted of murder under a theory of complicity even though the unlawful act contemplated in the original conspiracy was not identical with or similar to the crime charged, as long as “the conspired unlawful act and the manner of its performance would be reasonably likely to produce death.” *Id.*, at paragraph two of the syllabus.

3. The evidence in this case demonstrated a murder committed with prior calculation and design.

In addition to Anderson’s direct testimony, numerous pieces of evidence supported the State’s case for Shabazz’s complicity to a murder committed with prior calculation and design. 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. Johnson walked away from his group and over to the left side of where Anderson and Shannon were standing, where he attacked them from the side within four seconds of the initial 6-on-1 coordinated blitz attack. Dajhon Walker focused exclusively on Antwon Shannon throughout this attack, striking him in the face with a beer bottle, throwing the bottle at him, and tackling him to the floor. Walker left the fight, hid behind a pole, and shot Shannon in the back. Shabazz, despite standing mere feet in front of the gun when it went off, did not act surprised. He instead walked 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 and the two fled the club together. As Walker ran outside the club and across Rockwell Avenue, he jumped into the air and pumped his fists in celebration.

Shabazz's answer to each of these points is to litigate the strength of the evidence as if this case were still at trial. But by doing so, Shabazz simply labels each of the State's inferences as "unreasonable," without explaining why they are so, and then provides his own alternative explanation that he believes to be more credible. This is not how a sufficiency analysis works. The appellate court should review all of the evidence in the light most favorable to the prosecution and determine whether any rational trier-of-fact could be convinced of the defendant's guilt. Inferences the defense wishes to draw do not play any role in that analysis. And the best evidence that a rational trier-of-fact could come to that conclusion is the fact that the one in this case already did, and did so in a trial that according to the Eighth District was free from error.

Shabazz's defense inferences not only take this Court outside the scope of a sufficiency review, they do so by either mischaracterizing the evidence or by asking this Court to find new and innocent explanations for the conduct in question. For example, Shabazz incorrectly claims that Otis Johnson did not really flip the bottle over in his hand to grip it by the neck. At 2:11:00 a.m. on Camera 9, Johnson flips the bottle over – still holding it in his right hand – so that he is holding it upside down by the neck. The wider part of the bottle can be seen above Johnson's right hand from where he gripped the bottle by the neck. The trial court specifically cited this "movement with regard to the champagne bottles in the hands of this group of individuals" as part of its basis for denying Shabazz's Rule 29 motion. (Tr. 1122).

Shabazz's claim that the portrayal of the attack as being "coordinated" is impermissible inference stacking also ignores Ivor Anderson's testimony. Anderson testified that Shabazz and his group were "plotting against me and Mr. Shannon." (Tr. 694).

The fact that the same group then launched a coordinated attack on Anderson and Shannon, from different parts of the room, is indicative of a preconceived plan of attack.

Shabazz argues that he did not move to congratulate Walker, but simply “moved in the general direction of the exit[,]” and that “a multitude of explanations” exist for patting Walker on the chest and back. (Appellant’s Brief, at p. 13). This again is defense speculation better suited to a closing argument than to a sufficiency analysis. “When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.” *State v. Jenks*, 61 Ohio St. 3d 259, 262, 574 N.E.2d 492 (1991), paragraph one of the syllabus. This characterization of the evidence is also inaccurate. Shabazz did not move towards the exit; he moved towards Walker at the exact moment Walker emerged from behind the pole and patted Walker on his chest and back. Only after he had reunited with Walker did Shabazz make any attempt to leave the club, and at that point, Shabazz actually had to turn to his right and alter his path towards the bottom of the screen to head towards the exit. (State’s Exhibit 3-A, at 2:12:32).

Once outside the club, Camera 6 shows Walker jumping into the air and pumping his fists immediately after fleeing the club. (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). It is reasonable to infer that an individual who celebrates immediately after shooting someone did so because he had fulfilled a conscious desire formed prior to the killing. Shabazz’s actions of patting Walker on the chest and back, the two of them leaving the club together, and Walker jumping into the air and pumping his fists outside are all celebratory gestures that indicate the achievement of a success, particularly when

viewed in connection to one another. The jury did not need an expert witness to interpret what these things meant.

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's felony-murder rule simply required the State to prove that Shabazz caused Shannon's death as the proximate result of a felony. The Eighth District's decision changed that. The court added a new requirement: not only must Shabazz be guilty of the felony that was the proximate cause of the victim's death, but he must be guilty of the felony that was the actual cause of the victim's death by having actual knowledge that the principal possessed a gun. In doing so, the Eighth District misapplied inapplicable federal law to invent a new element to the felony-murder rule that has never existed in Ohio and should not exist in the future.

1. Shabazz's conviction for felony-murder should stand where he committed two felonious assaults that were the proximate cause of Shannon's death.

This Court should reinstate Shabazz's conviction for felony-murder regardless of whether it believes there was sufficient evidence that Shabazz knew Walker had the gun and was therefore guilty on Count 5. The felony-murder statute applies when a defendant causes the death of another as the proximate result of a violent felony. R.C. 2903.02(B). Any one of the felonious assaults in this case could qualify as that felony if they were the proximate cause of Shannon's death. In closing arguments, the prosecutor specifically referred to the felonious assaults with the bottles, not with the firearm, as the basis for the felony-murder count. (Tr. 1183). And because it is undisputed at this level that Shabazz was guilty of those two counts of felonious assault, one against Shannon and one against

Anderson, the only question the Eighth District should have answered on this point was that of proximate causation.

There was significant evidence in this case to support the State's argument that the felonious assaults with the bottles were the proximate cause of Shannon's death. (1) The shooting occurred on a crowded dance floor in which Walker did not have a clean shot at Shannon until his group cleared the floor by attacking Shannon and Anderson with bottles. (2) 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. (3) The chaos created a distraction that allowed Walker to draw his gun in an otherwise crowded nightclub without being seen by any witnesses. (4) The jury found, and the Eighth District agreed, that the bottles themselves were deadly weapons, meaning that they were "possessed, carried, or used as a weapon." R.C. 2923.11(A).

2. The Eighth District created a new "foreknowledge" requirement in this case requiring the State to prove that the accomplice knew in advance the principal had a gun.

Shabazz and Amicus Curiae disagree about the import of the Eighth District's decision. Shabazz argues that there is no "indication that the state must be held to the purported new burden Appellant's argument would suggest[.]" and that the felony-murder rule "remains undisturbed by the Eighth District's holding[.]" (Appellant's Brief, at p. 21). But the brief filed by Amicus Curiae the Ohio Association of Criminal Defense Attorneys says otherwise. The OACDA's brief correctly recognizes that the Eighth District created a "foreknowledge" requirement in this case, and asks this Court to hold for the first time that "the Supreme Court's foreknowledge requirement from federal accomplice-liability law applies in Ohio as well." (Amicus Brief, at p. 3). Amicus has the better of that dispute. The

Eighth District has indeed adopted a new element to Ohio's felony-murder rule, one that this Court has previously rejected and should reaffirm now does not exist.

3. The State is not required to prove that an accomplice knows the principal has a gun to be guilty of aiding and abetting the principal in murder.

This Court answered this question almost 100 years ago in *State v. Doty*, 94 Ohio St. 258, 113 N.E. 811 (1916). In *Doty*, the prosecution charged Herbert Doty, Gabriel Sullivan, and three others with murder. The State's evidence showed that the five men agreed to go to a hospital and assault some of its employees to prevent them from working. *Id.*, at *1. Doty assaulted one man with a blackjack and Sullivan shot and killed another man named James Shall with a pistol. *Id.*, at *2. The incidents occurred in different rooms and there was no evidence Doty even knew Sullivan had a pistol on him. *Id.* The trial court instructed the jury that it must find Doty not guilty if it found "that the shot which took the life of Shall, was fired by Sullivan, and without the knowledge, connivance, or assent of this defendant[.]" *Id.*, at *8.

This Court found that instruction, requiring the State to prove actual knowledge that the principal had a firearm, to be "vitally erroneous" and "entirely misleading[.]" *Id.*, at *8, 10. This Court stated:

"[I]f Doty engaged in a conspiracy or common design, having for its purpose the use of deadly weapons or force and violence upon the workmen at Christ Hospital, and the crime committed was the natural and probable consequence of the execution of such common design, or was undertaken under such circumstances as would probably endanger human life, then Doty, under our statute, would be equally guilty with Sullivan who actually fired the shot, although Doty neither knew of nor connived at the shot."

If, under the circumstances, it might reasonably be expected that the unlawful act was dangerous to human life, "each is bound by the consequences naturally or probably arising in its furtherance, and in case of death would be homicide." *Id.* Moreover, Ohio's appellate

court continue to apply the felony-murder statute and complicity statutes in this way. See *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”); *State v. Palfy*, 11 Ohio App.2d 142, 146, 229 N.E.2d 76 (9th Dist.1967) (accomplice may be guilty of murder “even though the aider and abettor had no knowledge of the actual weapon used by the killer”).

This is the precise issue before this Court. Shabazz, like Doty, engaged in a common design with the principal offender to use deadly force (the bottles) against the victims. That crime was one that would probably endanger human life. During the commission of that offense, another co-conspirator shot and killed an innocent person. Under *Doty*, it is no defense for Shabazz to argue that he did not specifically know that Walker had a gun. It is enough that Shabazz aided Walker in the commission of a felony, the natural and probable consequence of which was the death.

In his brief, Shabazz fails to provide this Court with any authority for the proposition that actual knowledge that the principal had a gun is required to convict an accomplice of felony-murder. The closest Shabazz can come is *State v. Wynn*, 2d Dist. No. 25097, 2014-Ohio-420, which simply says that “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][.]” *Id.*, at ¶ 69 (emphasis added). Indeed it could be. But this Court has never held that it is required. By contrast, Ohio appellate courts have relied on *Doty* several times to reject this argument.

The Supreme Court’s decision in *Rosemond v. United States*, --- U.S. ---, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) is likewise of no help to Shabazz. The difference is that the

statute in *Rosemond* required, as a prima facie element, use of a firearm. Ohio's felony-murder statute does not. Felony-murder may be committed by means of a firearm or by any other deadly weapon, such as a bottle. If the only predicate offense for the felony-murder is felonious assault by means of a firearm (Count 5), then the State was obviously required to show that Shabazz knew Walker had the firearm. Felonious assault requires a mens rea of knowingly. But if the felonious assaults with the bottles were a proximate cause of Shannon's death, there was no mens rea requirement towards the firearm at all.

What Shabazz seeks to do in this case is to convert *Rosemond* into an absolute rule: even if the accomplice is guilty of a felony that is the proximate cause of the victim's death, the accomplice still cannot be convicted of felony-murder unless he has foreknowledge of the firearm. In other words, Shabazz would have this Court replace the proximate causality of felony-murder with an actual causality requirement. The Supreme Court never intended *Rosemond* to effect such a drastic result and doing so would gut the entire purpose of the felony-murder rule in Ohio.

4. This Court should not adopt Amicus Curiae's invitation to raise the mens rea for all complicity offenses to "purposely."

In its brief, Amicus Curiae proposes that this Court should adopt a new approach towards complicity cases and require a mens rea of "purpose" to promote the underlying offense.² In terms of aggravated murder, this is an unremarkable proposition. The mens rea for aggravated murder is purposely, and neither the principal nor the accomplice may be convicted of aggravated murder absent a purpose to cause death. But the Amicus brief

² Given that Amicus Curiae believes that the outcome of this case would be unchanged regardless of whether this Court were to adopt the "purposely promote" rule or the "knowingly facilitate" rule for complicity cases, it is not clear why this is relevant to this case or why this Court should even address the issue. (Amicus Brief, at p. 7).

fails to account for the fact that felony-murder is a strict liability offense. “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. Amicus Curiae’s proposed rule would thus stand the felony-murder statute on its head. The principal could be found guilty of felony-murder without any intent to kill at all, but the accomplice could only be found guilty if he had the specific purpose to kill. No accomplice could ever be convicted of felony-murder under that rule, and such a rule would obliterate the entire point of the felony-murder statute. If a person acts with the purpose of killing, it is murder, not felony-murder.

Amicus Curiae’s approach has also been rejected by at least two Ohio appellate courts. See *State v. Burress*, 2d Dist. No. 22960, 2009-Ohio-7037, at ¶ 16 (“the issue is whether the defendant aided or abetted ‘knowingly’); *State v. Mendoza*, 137 Ohio App.3d 336, 343, 738 N.E.2d 822 (3d Dist.2000), citing *State v. Lockett*, 49 Ohio St.2d 48, 61-62, 358 N.E.2d 1062 (1976) (a defendant may be convicted of complicity when there is no prior criminal plan to commit the specific act, but there is proof that the aider knew the principal had the requisite intent). As the Third District stated in *Mendoza*:

“[W]e reject the theory that in order to be guilty as an aider or abettor, the complicitor must *purposely* intend to aid or abet the principal in committing the crime. * * * In short, we believe that the statutory terms ‘aid’ and ‘abet’ were merely meant to require that the defendant's conduct be directed--with the culpable mental state of the principle offense--towards accomplishing, assisting, inciting, or encouraging commission of the principle offense. Specifically, plan or purpose is not required to prove a charge with a lesser culpable mental state. Accordingly, in this factual situation, the terms merely indicate that the defendant must have knowingly directed his conduct towards the goal of serious physical harm[.]”

Id.

Amicus Curiae relies heavily upon the “mob fight” rule from *Woolweaver v. State*, 50 Ohio St. 277, 34 N.E. 352 (1893), that mere presence at the scene of a fight does not rise to

the level of aiding or abetting. Certainly it does not, and if this were a case of mere presence, the State would not be here. But it is undisputed that Shabazz was an active participant in the attack. *Woolweaver* recognized that “to constitute the person engaged in the fight an aider or abettor of the homicide, it should appear * * * that there was a prior conspiracy[.]” *Id.*, paragraph two of the syllabus. There was such a conspiracy in this case. Shabazz is guilty of murder because he joined in a conspiracy to commit a felonious assault that led to the death of Antwon Shannon.

CONCLUSION

The State therefore respectfully asks this Honorable Court to adopt the State’s propositions of law, reverse the Eighth District’s decision, and reinstate Shabazz’s convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by email this 10th day of February, 2015 to Reuben J. Sheperd (reubensheperd@hotmail.com), counsel for Defendant-Appellee, and Christopher J. Pagan (cpagan@cinci.rr.com), counsel for Amicus Curiae.

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