

NO. 2014-0941

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IN THE SUPREME COURT OF OHIO

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

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

DERRELL SHABAZZ,

Defendant-Appellee

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**APPELLANT'S MOTION FOR RECONSIDERATION**

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## MOTION FOR RECONSIDERATION

This Court has said, “[w]e will not overturn a conviction for insufficiency of the evidence unless we find that reasonable minds could not reach the conclusion reached by the trier of fact.” *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 2001-Ohio-132, 749 N.E.2d 226. 12 jurors in this case unanimously came to the conclusion that Derrell Shabazz was complicit in the aggravated murder of Antwon Shannon. The vote in the Eighth District to overturn that verdict was 2-1; the vote in this Court to dismiss this case as improvident was 4-3. It is clear that reasonable minds can, have, and still do, disagree about the jury’s verdict in this case. But an appellate court does not sit as a thirteenth juror in a sufficiency challenge, offering its own opinion after reweighing the evidence to decide which version of the facts it finds to be the most persuasive. If this Court, and the court of appeals, are both so closely divided that a single vote is the difference, this case does not meet the standard of *Tibbetts*.

**1. This case, and numerous others that the Eighth District has recently reversed for insufficient evidence, show that the court has abandoned its limited role in a sufficiency review.**

At the time this Court accepted this case on September 24, 2014, it was one of three aggravated murder cases in two weeks that the Eighth District Court of Appeals had reversed on sufficiency grounds. Since the beginning of 2013, that number of aggravated murder reversals has now grown to six:

1. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578 (no prior calculation and design where the defendant drew a retreating victim back into a confrontation and shot him three times, including a third shot fired while the victim was down on his knees);
2. *State v. Woods*, 8th Dist. Cuyahoga No. 99630, 2014-Ohio-1722 (no prior calculation and design present where the defendant brought the victim back to his apartment, strangled her to death, and then burned her body);

3. *State v. Walker*, 8th Dist. Cuyahoga No. 99998, 2014-Ohio-1827 (no prior calculation and design present where the defendant attacked the victim by throwing a bottle at his head, then withdrew from the fight and hid behind a pole where he shot the victim in the back);
4. *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021, 2014-Ohio-1828 (no prior calculation and design present for an accomplice where the defendant spoke to the victim for 15 minutes, jointly attacked the victim, and congratulated the defendant by patting him on the chest and back immediately after as they fled the scene together);
5. *State v. Hicks*, 8th Dist. Cuyahoga No. 102206, 2015-Ohio-4978 (no prior calculation and design present where the defendant retrieved a gun before going out with his estranged and battered wife, and later that night shot her in the neck and again in the chest, dumped her body in the street, and ran over her over with a car as he drove away);
6. *State v. Durham*, 8th Dist. Cuyahoga No. 102654, 2016-Ohio-691 (no prior calculation and design where the defendant lured the victim behind a building and shot him in the face during a feud over business).

By contrast, the State has been able to find only *one other case* among Ohio's remaining 11 appellate districts over the same timeframe reversing an aggravated murder conviction for a lack of prior calculation and design. See *State v. Daniel*, 5th Dist. Muskingum No. CT2014-0018, 2014-Ohio-4274.

This problem is not even limited to cases involving prior calculation and design. Over the past few years, this Court has reviewed and declined to hear at least a dozen other sufficiency reversals out of the Eighth District:

1. *State v. Evans*, Case No. 2015-1690 (O'Connor, C.J., O'Donnell, J., and French, J., dissenting) (insufficient evidence of robbery where the defendant reached into the victim's car and forcibly grabbed a cell phone out of his hand);
2. *In re: J.C.C.*, Case No. 2015-0535 (O'Donnell, J., dissenting) (insufficient evidence of involuntary manslaughter where the defendant assaulted the victim and the victim died of a heart attack in the ensuing fight);
3. *In re: R.T.*, Case No. 2015-0227 (O'Donnell, J., dissenting) (insufficient evidence of burglary where the defendant stole items from the victim's home);

4. *State v. Santiago-Dennis*, Case No. 2014-2141 (O'Connor, C.J., dissenting) (insufficient evidence of assaulting a peace officer where the defendant began flailing his arms as the officer reached for him and struck the officer with a closed fist in the face);
5. *State v. Dobson*, Case No. 2014-1899 (insufficient evidence of rape and kidnapping where the defendant punched, stomped, and kicked his girlfriend in the head, and then demanded that she have sex with him, and the victim testified she did not resist only because she did not want to be beaten again);
6. *State v. McCoy*, Case No. 2013-1735 (Pfeifer, J., O'Donnell, J., and O'Neill, J., dissenting) (insufficient evidence of burglary where there was no forensic evidence to prove the defendant was inside the victim's home, but eyewitnesses testified that they saw him in the home);
7. *State v. Roscoe*, Case No. 2013-1585 (O'Donnell, J., and Kennedy, J. dissenting) (insufficient evidence of aggravated robbery, having a weapon while under disability, and firearm specifications where the victim felt a small, cold, hard object that she believed to be a gun pressed into the back of her neck as she was robbed, but did not see the gun);
8. *State v. Johnson*, Case No. 2013-0556 (O'Donnell, J., and Kennedy, J., dissenting) (insufficient evidence of possession of criminal tools where police found a safe containing cocaine residue, glass vials with cutting agents, a scale box, and glass jars for packaging and shipping drugs);
9. *State v. Beckwith*, Case No. 2013-0517 (O'Donnell, J., Kennedy, J., and French, J., dissenting) (insufficient evidence of menacing by stalking where the defendant followed co-worker numerous times in and outside of work and she testified that she feared for her safety);
10. *State v. Knox*, Case No. 2012-1896 (O'Connor, C.J., O'Donnell, J., and Kennedy, J., dissenting) (affirming trial court's finding of insufficient evidence of failure to register as a sex offender where the defendant gave a false address on his registration form);
11. *State v. Chopak*, Case No. 2012-0871 (Lanzinger, J., dissenting) (insufficient evidence of ethnic intimidation where the defendant yelled at the victim, "I will f\*\*\*ing kill you and slit your throat, you f\*\*\*ing n\*\*\*er!" because the defendant's use of a racial slur did not justify an inference that the crime was motivated by race);
12. *State v. Copley*, Case No. 2010-1865 (O'Donnell, J., dissenting) (insufficient evidence of felonious assault where the defendant yelled over his loudspeaker at a victim riding his bicycle, "Nice bike fa\*\*\*t," and "I'm going to get you off the road," and then sideswiped the victim with his van).

Something is amiss in the Eighth District. While judges and juries are finding each of these defendants guilty beyond a reasonable doubt, the court of appeals consistently reverses

those convictions by deciding that they are based on no evidence whatsoever. Time after time, the court has accused those jurors and judges of failing to be even a “rational trier of fact” – all that should be required to uphold a conviction against a challenge to the sufficiency of the evidence. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), at paragraph two of the syllabus. This is a new and recurring trend of jury nullification in sufficiency reviews, and it is a problem this Court has already reversed once before.

In *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, this Court unanimously reversed the Eighth District’s decision to vacate a defendant’s conviction for kidnapping a 14-year old girl in which the lower court sua sponte found that the State failed to prove the defendant’s identity. Tate was captured on video and numerous eyewitnesses testified to his identity. *Id.* at 445. This Court found that the evidence of Tate’s identity was “overwhelming, undisputed, and not mentioned in the court of appeals’ opinion” and warned the Eighth District that “[a]n appellate court must review ‘*all of the evidence*’ admitted at trial.” *Id.* (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

That warning has gone unnoticed and the sufficiency reversals have continued apace. They have come to this Court in a steady stream of decisions in which the Eighth District ignores evidence, minimizes witness testimony, or simply refuses to view the evidence in the light most favorable to the State because the court disagrees with the jury’s verdict. They include such dismissive assertions as it “defies logic to conclude” or “common sense dictates that” what the State, the jury, and the trial court found all cannot be true. *State v. Durham*, 8th Dist. Cuyahoga No. 102654, 2016-Ohio-691, ¶ 145; *State v. Hicks*, 8th Dist. Cuyahoga No. 102206, 2015-Ohio-4978, ¶ 50. Defense attorneys cannot even make these arguments in a

sufficiency review because the court is required to view all of the evidence in the light most favorable to the prosecution and cannot weigh credibility.

This problem has gotten worse since this Court heard oral argument in this case nine months ago, not better. It will continue to grow until this Court reverses one of these cases and clarifies that in a sufficiency review, an appellate court is prohibited, as a matter of law, from accepting as true those inferences the defendant asks the court to draw to reverse the jury's verdict. Doing so is a manifest weight review in the guise of sufficiency of the evidence, and it was outcome-determinative in this case because the court of appeals was divided 2-1 and therefore could not reverse under a manifest weight challenge.

**2. The Eighth District recognized on the same day this Court dismissed this case that post-crime celebratory gestures are relevant evidence of intent.**

One of the most important pieces of evidence in this case was the fact that Derrell Shabazz was captured on video congratulating Dajhon Walker immediately after the shooting. “Shabazz did not react to the gunshot, but rather walked across the dance floor away from the fight, patted Walker on the chest, and placed his left hand on Walker’s shoulder as they both moved toward the exit.” *State v. Shabazz*, Slip Opinion No. 2016-Ohio-1055, ¶ 24 (O’Donnell, J., dissenting). In his brief, Shabazz attempted to minimize this evidence by arguing that it did not justify an inference as to Shabazz’s intent: “Under the circumstances presented, a multitude of explanations for this interaction could be inferred.” Brief of Appellee, p. 13.

On the same day that this Court dismissed this case as improvident, the Eighth District itself held that post-crime celebratory gestures were relevant evidence of a defendant’s intent to use deadly force. *State v. Porter*, 8th Dist. Cuyahoga No. 102257, 2016-Ohio-1115. “Further, we are unable to ignore Porter’s conduct immediately after the shooting, which

was described as ‘celebratory’ and included him following [the victim’s] vehicle as it pulled away from the scene and his subsequent acts of ‘high-fiving’ Chino and ‘fist-bumping’ Jeff.” *Porters*, ¶ 32. But the Court ignored the same evidence in this case. That evidence supported the jury’s finding that Shabazz knew the shot was coming and that he consciously aided Walker to bring about that result. If the decision in this case is allowed to stand undisturbed, trial courts in Cuyahoga County must now deal with conflicting precedents regarding the relevance of a defendant’s post-crime actions to the defendant’s pre-crime intent.

**3. This Court should decide in this case whether *Rosemond v. United States* requires a defendant convicted of felony-murder have actual knowledge that a co-defendant had a firearm.**

This case should also be heard for another reason unique to the Eighth District’s decision here. The lower court interpreted *Rosemond v. United States*, --- U.S. ---, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) to require the State to prove that Shabazz had actual knowledge that his co-defendant Walker had a firearm to be complicit in the victim’s death. The court applied this new rule to overturn even a conviction of felony-murder, which by definition does not require Shabazz be guilty of the felonious assault with a firearm that was the direct cause of the victim’s death. It should have been enough that Shabazz was guilty of two felonious assaults, and that those felonious assaults were the proximate cause of the victim’s death. The Eighth District’s decision to add an additional requirement outside and beyond the boundaries of existing Ohio case law in felony-murder cases.

The lower court’s decision in this case has proven not to be limited to its facts, seeping into other appellate districts as well. After this Court accepted jurisdiction over this case, the Twelfth District cited it to hold that a defendant must have knowledge that the principal has a firearm to be convicted of aggravated burglary and aggravated robbery. See *State v.*

*Frymire*, 12th Dist. Butler No. CA2014-02-034, 2015-Ohio-155, ¶¶ 17-22. This case has thus come to stand for an absolute rule that one cannot be convicted of complicity to any crime involving a deadly weapon unless the defendant had prior knowledge that the co-defendant was going to use the weapon. This application of *Rosemond* to a felony-murder cases is unsupportable in light of the fact that that the statute in *Rosemond* required as a prima facie element the use of a firearm, whereas felony-murder does not. But if the courts of Ohio are going to interpret *Rosemond* in this new way, it is a rule that should be applied uniformly statewide. Only a decision on the merits by this Court can establish such a clear rule.

**4. If this Court declines to decide this case on the merits, it should order it held for the decision in *Walker* to prevent the premature release of a dangerous killer from prison onto the streets.**

In the alternative, the State asks this Court to order this case held for a decision in the pending appeal involving Shabazz's codefendant, *State v. Dajhon Walker*, Case No. 2014-0942. On February 2, 2016, this Court unanimously ordered that *Walker* would no longer be held for the decision in this case, and ordered that the briefing schedule in *Walker* should proceed. The panel in *Shabazz* explicitly based its decision to reverse the conviction on the decision of another panel of the court the same day in *Walker*. "We agree with the *Walker* decision that there was no evidence of prior calculation and design. Therefore, insufficient evidence was presented to support Shabazz's conviction for aggravated murder." *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021, 2014-Ohio-1828, ¶ 29.

If this Court reverses the Eighth District's decision in *Walker*, this would then invalidate the Eighth District's basis for reversing in this case and necessitate a remand to the court of appeals. If this Court chooses not to decide this case on its merits after oral argument, the State asks this Court to instead hold this case for a decision in *Walker* so that

a remand will still be possible. Otherwise, Derrell Shabazz, a man currently serving 22 years to life imprisonment for the murder of an innocent man, will potentially be eligible for immediate release on time served on a pair of felonious assaults for hitting him with a bottle.

Moreover, this Court is still holding another aggravated murder case, *State v. Nathaniel Woods*, Case No. 2014-0940, for a decision in this case. The State has a fourth memorandum in support pending in *State v. Antonio Hicks*, Case No. 2016-0076, and is currently writing a fifth after the recent decision in *State v. Durham*, 8th Dist. Cuyahoga No. 102654, 2016-Ohio-691. Because all of these cases arise from the same district and involve an identical proposition of law regarding the court of appeals' failure to adhere to the requirements of a sufficiency analysis, this Court should hold all of them for *Walker*.

#### **CONCLUSION**

The State therefore respectfully asks this Honorable Court to reconsider its decision to dismiss this case as improvidently allowed and to decide this case on the merits. In the alternative, the State asks this Court to hold this case for a decision in *State v. Walker*, Case No. 2014-0942.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellant's Motion for Reconsideration was sent by email this 21st day of March, 2016 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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