

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

APPELLEE AND AMICUS' JOINT MEMORANDUM IN
RESPONSE TO MOTION FOR RECONSIDERATION

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1. This court should not reconsider its decision based upon the results from other 8th District Court of Appeals cases.

- a. Reconsideration is inappropriate because appellate courts adjudicate legal disputes between parties—they do not send messages to inferior courts based upon a collection of cases not in the present record.*
- b. The State’s reasoning does not follow—losing a string of insufficient-evidence claims can show flawed prosecutions as much as flawed judging.*

The State cites to six cases where the 8th District Court of Appeals reversed aggravated-murder convictions for insufficient evidence, and 12 cases where that same court reversed other convictions for insufficient evidence. It then reasons that the only explanation for these results is the 8th District’s abandonment of the insufficient-evidence standard. It asks for reconsideration to send a message to the 8th District regarding the proper application of this legal standard.

The 17 other cases are not part of this record. There is no way to determine if the 8th District applied the insufficient-evidence standard with too little deference in those cases, if the State overreached by expanding criminal statutes beyond their scopes, whether a jury lost its way—or combinations of all of these. Each case is different. Which is why courts adjudicate individual cases, not collections of them. Yet the State’s primary argument for reconsideration is to place this case with 17 others and to posit that the State’s collection of losses can only mean insufficient deference from the 8th District. It does not follow, however, that the State is losing its cases only because the courts are misapplying law. And Shabazz, as all litigants, is entitled to a merits adjudication of his case—not to function as a message for others.

- c. The 8th District properly confined its deference to the reasonable inferences from the basic facts—and the State has continually erred by suggesting it is entitled to any and all inferences regardless of their reasonableness.*

For insufficient-evidence claims, the reviewing court must construe the evidence to favor the State, including all reasonable inferences from the basic facts. Excluded from this definition are

unreasonable inferences and raw speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This legal standard is uncontroverted by the parties.

The instant dispute is whether the record contained reasonable inferences to support Shabazz' conviction for complicity to aggravated murder or felony murder. The 8th District majority found there were no reasonable inferences to support the view that Shabazz even knew that Walker had a gun to use—let alone that he shared in Walker's intent to kill Shannon by prior-calculation-and- design with the gun. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶¶29, 39-40. Importantly, the authoring judge noted that the panel made specific inquiries of the State at oral argument for it to pinpoint the places in the video that showed, for example, a post-crime celebration between Walker and Shabazz indicative of conspiracy and shared intent. *Id.* at ¶40. But the State failed to do so.

Thus, contrary to the State's argument, this case represents a fact-based application of the reasonable-inferences prong of the insufficient-evidence standard. It does not represent a sinister and serial disregard for the familiar *Jackson* insufficient-evidence standard.

2. This court should deny State's request to conduct anew a fact-based analysis of this matter.

- a. *The State's second argument in the Motion for Reconsideration amounts to nothing more than a request for the court to review again the factual underpinnings of the case.*

The State argues that the 8th District has recognized that post-crime celebratory gestures may be relevant evidence of intent in *State v. Porter*, 8th Dist. Cuyahoga No. 102257, 2016-Ohio-1115. This recognition does not represent a new legal precept, but simply restates with specificity the notion highlighted by Ohio Rule of Evidence 401 that any evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Shabazz does not dispute that such evidence may in fact be probative; and he does not dispute

that, if present in the record, it must be utilized to favor the State in a sufficiency analysis. However, the 8th District found no reasonable basis to discern a post-crime celebratory gesture by Shabazz in the video. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶40. So the State is simply requesting that this court engage in error correction as to that factual point, while presuming that this court failed to consider the issue when dismissing this matter sua sponte as improvidently accepted. This is not a judicious exercise for this court's consideration, and does not give rise to a basis for granting the State's Motion for Reconsideration.

b. Assuming arguendo that this court would wish to engage in such a fact-based analysis, the State's references to a celebration are unsupported by the evidence presented at trial, and amounts to nothing more than idle conjecture.

Shabazz argues that this court should refrain from granting the State's Motion for Reconsideration in order to reengage in a fact-specific analysis of the case. If, however, the court does entertain this argument, Shabazz asserts that this argument should still be rejected, as the State has repeatedly misstated the nature of the evidence. At the trial, and throughout the appellate proceedings, the State has repeatedly raised the specter of a "post-crime celebration" to support the notion that there was a preconceived plan amongst several co-conspirators to murder Shannon. The State has failed, however, to provide any evidence that such a post-crime celebration occurred. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶40. In lieu of evidence, the State has offered only idle speculation as to the meaning of Shabazz' actions as seen in the video of the shooting, and has attempted to pass off that conjecture as an inference. Yet inference and speculation are not synonymous.

There is no doubt that a sufficiency analysis requires that all reasonable inferences be drawn in favor of the State's case. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, citing, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61

Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965. That standard, however, does not require the reviewing court to accept all innuendo posited by the State as true, nor does it grant the State carte blanche to create its own set of facts. An inference is defined as the act or process of deriving logical conclusions from premises known to be true. Here, the actions of Shabazz are open to a myriad of possible meanings and interpretations, none of which is based upon a specific premise that is known to be true.

Had Shabazz' actions risen to a level where they could be reasonably viewed as celebratory, then the State would have been entitled to the inference of a conspiracy between Walker and Shabazz and a shared intent. But that was not the case. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶40. Instead, the State is attempting to ascribe a particular meaning to Shabazz' vague and undefined actions without the benefit of any testimony or demonstrative evidence that would support that inference. This is not a reasonable inference, rather it is conjecture unmoored to the truth by any significant ties.

3. The State is barred from a foreknowledge argument.

a. The State conflated the elements of felony murder and complicity to felony murder in its briefing and argument, so it is now barred from seeking reconsideration on new grounds that complicity to felony murder does not require foreknowledge as an element.

An element of felony murder is proximate cause. R.C. 2903.02(B). But proximate cause is not an element of complicity to felony murder. For complicity liability, the defendant must only aid, abet, or encourage the principal in some minimal way—regardless of whether the aiding, abetting, or encouragement proximately caused the victim's death. R.C. 2923.03(A).

In its Proposition of Law II, the State blurred these distinctions. Recognizing this error, it now seeks to walk back its Proposition regarding the proximate-cause element and to redirect its

argument to whether complicity liability for felony murder requires foreknowledge as an element. It is too late for that. A party cannot inject new arguments for the first time upon reconsideration. And, in any event, both the 8th and 12th Districts have held that complicity to felony murder requires proof that the complicitor had foreknowledge of the murder weapon, adopting the U.S. Supreme Court's decision in *Rosemond v. United States*, 572 U.S. ___, 188 L.Ed.2d 248 (2014). See *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶¶32-35; *State v. Frymire*, 12th Dist. No. CA2014-02-034, 2015-Ohio-155, ¶¶17-18. With no conflict in the district courts, and a concordance with the U.S. Supreme Court, there is no reason to consider—let alone reconsider—foreknowledge as a complicity element for felony murder.

4. There is no valid justification for holding the decision in this matter pending the outcome of the *Walker* case.

Finally, the State argues that this court should order this case held for the decision in *Walker* because “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*.” While it is true that the *Shabazz* court did reference the *Walker* decision in its finding that there was insufficient evidence to support prior- calculation-and-design, the court further wrote that “the evidence was also insufficient because...there was no evidence that Shabazz was aware that Walker had a gun.” *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021, 2014-Ohio-1828, ¶29. The *Shabazz* Court later added, “Although the Court in *Walker* found sufficient evidence that Walker murdered Shannon, we find no evidence that Shabazz aided and abetted Walker in the murder. There was no evidence that Shabazz was aware that Walker had a gun until the shot was fired.” *Id.* at ¶31.

These additional findings that the State omitted from its motion indicate that regardless of the outcome in *Walker*, the evidence adduced at trial was insufficient to support Shabazz' murder

convictions. It is unquestioned that Walker was the principal offender, and that the State's case against Shabazz was based solely on an aiding-and-abetting theory. The issue of whether there was sufficient evidence to sustain an aiding-and-abetting theory is not germane to the disposition of Walker's case and accordingly is not a subject of his ongoing litigation. Even if this court were to determine that there was sufficient evidence to prove prior-calculation-and-design by Walker, there will remain an insufficiency with regard to aiding-and-abetting that will not be addressed, and the case against Shabazz will still fail. Accordingly, there is no valid purpose served by tabling a decision in *Shabazz*.

The State does cynically attempt to argue that delaying the decision here will "prevent the premature release of a dangerous killer from prison onto the streets." Such a suggestion is anathema to the very structure of our criminal justice system. As this Court has dismissed this case as improvidently granted and let stand the ruling of the lower court, justice requires that the case be returned to the trial court so a sentence can be announced on the remaining charges. To continue to delay Shabazz' sentencing with no possibility that the *Walker* case will alter the final outcome of his case does not prevent the release of a dangerous killer; instead, it tramples on the rights of a man who stands convicted of two counts of felonious assault. The State's plea for the imposition of preventative justice for future imagined harm to the community has no place in our jurisprudence. So this court should not abide it.

CONCLUSION

For the above reasons, the State's Motion for Reconsideration should be denied.

To the court, the instant Memorandum Contra is

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This undersigned hereby certifies that a copy of the foregoing Joint Memorandum in Response to Motion for Reconsideration was delivered to the following counsel by regular United States mail, this 30th day of March, 2016:

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