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NO. 2014-0942

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99998

STATE OF OHIO,

Plaintiff-Appellant

-vs-

DAJHON WALKER,

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Dajhon Walker attacked an innocent 27-year old father of two, then withdrew from the attack, pulled a gun out of his waistband, hid behind a pillar, waited for a clean shot, and then shot the victim in the back before fleeing the scene. Walker was captured on video being congratulated by his co-defendant as they fled the scene together. On appeal, however, the Eighth District found that there was insufficient evidence to sustain the jury's unanimous verdict finding Walker guilty of aggravated murder with prior calculation and design. In doing so, the court failed to evidence, dismissed and minimized witness testimony, drew contested inferences in favor of the defendant, and refused to show any level of deference to jury's verdict. The Eighth District instead conducted a de novo review in which the court discounted the evidence they either could not see themselves or simply chose not to believe. "The flaw in the appellate court's opinion is that it substituted its judgment for that of the jury. It drew inferences from the evidence that differed from the inferences drawn by the jury from that same evidence." *State v. Shabazz*, Slip Opinion No. 2016-Ohio-1055, ¶ 20 (O'Donnell, J., dissenting).

This is the sixth aggravated murder case since the beginning of 2013 that the Eighth District has reversed based on its disagreement with the trier-of-fact that sufficient evidence existed to support a finding of prior calculation and design:

1. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578 (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 (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 (defendant attacked the victim by throwing a bottle at his head, then withdrew from the fight and hid behind a pillar where he shot the victim in the back);

4. *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021, 2014-Ohio-1828 (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 (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 (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. The Eighth District's position on what is required to prove prior calculation and design is out of step with the rest of the state of Ohio.

This sudden rash of sufficiency reversals in this area demonstrates that the lower court has abandoned its extremely limited role in reviewing criminal convictions for sufficiency of the evidence. Instead, the court determines for itself which inferences it finds to be the most persuasive. This heightened level of scrutiny usurps the jury's function as the finder-of-fact and renders its verdict a mere recommendation that the appellate court is free to accept or reject based solely on its view of what it believes the evidence does or does not say. This is manifest weight review disguised as sufficiency of the evidence.

The State therefore respectfully asks this Honorable Court to reverse the Eighth District's opinion in this case and hold that (1) when reviewing a challenge to the sufficiency of the evidence, an appellate court is required to review the entire record and adopt all reasonable inculpatory inferences in favor of the State's case, and (2) the State is introduces sufficient evidence of prior calculation and design where the jury could

reasonably infer that the defendant discussed purposely killing the victim over a fifteen-minute period prior to the murder.

STATEMENT OF THE CASE

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

On October 16, 2012, the Cuyahoga County Grand Jury indicted Dajhon Walker, the Defendant-Appellee herein, along with Derrell Shabazz, on nine counts each related to the February 18, 2012 shooting death of Antwon Shannon. The indictment charged Walker with one count of aggravated murder, one count of felony murder, six counts of felonious assault, and one count of having weapons while under disability as follows:

Count	Offense	Victim	R.C. Section	Conduct
Count 1	Aggravated murder	Antwon Shannon	R.C. 2903.01(A)	Aggravated Murder of Antwon Shannon with prior calculation and design
Count 2	Felony-murder	Antwon Shannon	R.C. 2903.02(B)	Caused the death of Antwon Shannon as a proximate result of committing or attempting to commit felonious assault

Count 3	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(1)	Did knowingly cause serious physical harm
Count 4	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>champagne bottle</u>
Count 5	Felonious assault	Antwon Shannon	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>firearm</u>
Count 6	Felonious assault	Ivor Anderson	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>champagne bottle</u>
Count 7	Felonious assault	Eunique Worley	R.C. 2903.11(A)(2)	Did knowingly cause serious physical harm by means of a deadly weapon, to wit: <u>champagne bottle</u>
Count 8	Felonious assault	Eunique Worley	R.C. 2903.11(A)(1)	Did knowingly cause serious physical harm
Count 10	Having weapons while under disability	n/a	R.C. 2923.13(A)(2)	Did knowingly acquire, have, carry, or use a firearm

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

Walker and Shabazz's case proceeded to a joint jury trial at which a jury found Walker guilty of aggravated murder, felony-murder, and four counts of felonious assault (Counts 3, 4, 5, and 6), and not guilty of two counts of felonious assault against Eunique Worley (Counts 7 and 8). The jury also found Walker guilty of the one and three-year firearm specifications attached to counts 1, 2, 3, and 5. Walker waived count 10, having

weapons while under disability, to the bench to prevent the jury from hearing that he had a prior conviction for domestic violence in 2009. The trial court found Walker guilty of that count as well. The jury found Shabazz guilty of the same counts, but acquitted him of the firearm specifications on Counts 2, 3, and 5. (Tr. 1272-1277). The trial court sentenced Walker to 25 years to life in prison and sentenced Shabazz to 22 years to life in prison.

On direct appeal, the Eighth District reversed Dajhon Walker's conviction for aggravated murder and modified it down to murder, finding insufficient evidence of prior calculation and design, and affirmed his remaining convictions. *State v. Walker*, 8th Dist. Cuyahoga No. 99998, 2014-Ohio-1827. By a 2-1 vote, a different panel of the court also reversed Derrell Shabazz's convictions for aggravated murder, murder, two of the four counts of felonious assault, and having a weapon while under disability, on the grounds that insufficient evidence existed to show that Shabazz knew that Walker had a gun. *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828.

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

> STATE'S PROPOSITION OF LAW I: An Appellate Court, When Reviewing a Challenge to the Sufficiency of the Evidence, Is Required to Draw All Reasonable Inferences in Favor of the State's Case and May Not Adopt the Defense's Inferences to Reverse a Conviction.
>
> STATE'S PROPOSITION OF LAW II: The State Introduces Sufficient Evidence of Prior Calculation and Design Where a Jury Could Reasonably Infer That the Defendant Discussed Purposely Killing the Victim Over a Fifteen Minute Period Prior to the Murder.

This Court also accepted the State's discretionary appeals in *Shabazz*, Case No. 2014-0941, and *State v. Nathaniel Woods*, Case No. 2014-0940, another case in which the Eighth District reversed a conviction for aggravated murder on sufficiency grounds.

Originally, this Court ordered both *Walker* and *Woods* held for a decision in *Shabazz.* On February 2, 2016, however, this Court sua sponte ordered that this case would no longer be held for *Shabazz* and lifted the stay of the briefing schedule. On March 17, 2016, this Court, by a vote of 4-3, dismissed *Shabazz* as improvidently accepted, more than nine months after hearing oral argument. *State v. Shabazz*, Slip Opinion No. 2016-Ohio-1055.

STATEMENT OF THE FACTS

1. Dajhon Walker and his group planned to attack Ivor Anderson and Antwon Shannon over a champagne spill.

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

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

> "After the champagne was spilled onto me, he [Steele] went over and whispered to the two gentlemen, and at that point I continued to watch the gentlemen because there wasn't nothing that serious to take it that far I felt, so I felt at that point they were plotting against me and Mr. Shannon."

(Tr. 693-694).

Anderson later identified Otis Johnson and Derrell Shabazz as the "two gentlemen" in Steele's group. (Tr. 694, 702). Anderson "stood there and watched them for the next five to ten minutes," because "I didn't want to get attacked with my back turned[.]" (Tr. 694). Anderson told Shannon "to keep an eye out because they're looking suspect[.]" (Tr. 694). After about 10 minutes went by and nothing happened, Anderson lowered his guard and stopped watching Steele's group. (Tr. 695).

2. Walker and a group of five other people launched a premeditated and coordinated deadly attack on Shannon and Anderson.

At 1:56 a.m., Camera 9 – which is positioned in the lounge area – recorded Steele spilling champagne on Anderson. (Tr. 576, 1043-1044; see State's Exhibit 3-A). Steele and Anderson exchanged words and Steele moved towards the center of the dance floor to stand in a circle and talk. Walker joined them and hugged Shabazz, and the group formed a tighter circle. For the next 15 minutes, Camera 9 recorded Steele, Johnson, Shabazz, and Walker as they stood in the middle of the dance floor speaking with one another and watching Anderson and Shannon, who are barely visible on the far left of the screen. "The footage then shows that Steele gestured in the direction of Anderson and Shannon on two occasions, prompting Shabazz, Walker, and the fifth man to look that way." *State v. Shabazz*, Slip Opinion No. 2016-Ohio-1055, ¶ 6 (O'Donnell, J., dissenting).

At 2:11:01 a.m., Camera 9 captured Otis Johnson, standing prominently in the center of its view, flipping over a bottle in his right hand so that he was holding it upside down by the neck. "At different times, Walker and Steel each held a champagne bottle by the neck; Steel held a bottle for over five minutes without taking a drink and cradled the bottle with his hand wrapped around its base and the body of the bottle running up the inside of his forearm." *Id.* At 2:11:19 a.m., Steele moved to the center of the dance floor adjacent to

Anderson's position and began dancing from side-to-side, holding a champagne bottle, and looking to his left at Anderson. Otis Johnson conferred with Walker and Shabazz before separating from the group and walking over to the left of Anderson and Shannon, towards the top of Camera 9's view. "The men in the group then positioned themselves so that Steel was close to Anderson, Johnson was behind Steel, Shabazz and Walker were a few feet behind Steel, and the fifth man was behind and slightly to the left of Steel." *Id.*

At 2:11:52 a.m., Steele suddenly yelled out, "yeah, nigger" and struck Anderson in the head, from behind, with a bottle. (Tr. 697). The bottle glanced off Anderson's head and also struck Eunique Worley in the forehead. (Tr. 697, 756). Anderson initially believed that it was Shabazz who struck him. (Tr. 695). Otis Johnson immediately rushed in from the left and joined the attack, punching and kicking Anderson as he rolled around on the ground. (State's Exhibit 3-A; camera 9, at 2:11:55). [1] Antwon Shannon went to break up the fight. (Id., at 2:11:56). It was uncontested at all levels of this case that Shannon acted only as a peacekeeper and that neither Shannon nor Anderson ever made any aggressive or hostile moves towards Shabazz's group prior to the shooting.

Walker immediately began to pursue Shannon. He struck Shannon in the face with a bottle. (Id., at 2:11:58). Shannon recoiled and moved to his left away from Walker. (Id., at 2:12:00). Walker followed Shannon and threw the bottle at Shannon's head. (Id., at 2:12:01). The bottle missed Shannon but struck an unidentified man standing behind him. (Id.). Shannon, who was still trying to break up the fight, fell down onto his back. (Id., at 2:12:03). As Shannon attempted to stand, Shabazz approached him from behind, threw a punch with his left hand towards Shannon's head, and shoved Shannon to the ground with

[1] No witness described the events depicted on the video at trial because the defense twice objected to any witnesses providing narrative testimony. (Tr. 591, 1037).

Walker on top of him. (Id., at 2:12:05). Walker got up off of Shannon, "made a movement with his right hand toward his waistband, walked through the fight, and disappeared behind the pillar" several feet away. *Shabazz*, ¶ 8 (O'Donnell, J., dissenting).

As Walker moved behind the pillar, Anderson was still trying to defend himself from a 5-on-1 assault by the other members of Walker's group. Shabazz approached Anderson and threw two punches at Anderson's head. (State's Exhibit 3-A; camera 9, at 2:12:19). Anderson was pushed back behind the left side of the pillar where Walker was lying in wait and fell to the ground as Walker's group continued to punch and kick him. (Id., at 2:12:24).

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

3. Walker and Shabazz celebrated as Shannon died.

Shabazz, who had followed Shannon towards the left side of the pillar, was standing near the front of the pillar when the gun went off. (State's Exhibit 3-A, Camera 9, at 2:12:27). Despite being mere feet from the shooting, Shabazz "displayed no reaction to the gunshot." *Shabazz*, ¶ 9 (O'Donnell, J., dissenting). Walker then ran out from behind the right side of the pillar, visibly stuffing an object into his waistband. (Tr. 597; State's Exhibit

3-A, Camera 9, at 2:12:31-33). "Shabazz moved toward Walker, reached up with his right hand and patted Walker on the chest. Shabazz then reached up with his left hand, placed it on the back of Walker's right shoulder and slightly pushed Walker forward as both men headed toward the exit." *Shabazz*, ¶ 10 (O'Donnell, J., dissenting). Walker, Shabazz, and their group ran outside into the view of Camera 6 on Rockwell Avenue.

Det. Ray Diaz, with the Homicide Unit of the Cleveland Division of Police, testified that he followed Shabazz's group on Camera 6 as they exited Tavo. (Tr. 1063). Walker, who was walking quickly and ahead of his group, jumped into the air and pumped his fists. (State's Exhibit 3-D, Camera 6, at 2:13:29). Det. Diaz identified both Shabazz and Walker on the video and in court as the individuals on the video. (Tr. 1068).

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

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

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

LAW AND ARGUMENT

***STATE'S PROPOSITION OF LAW I*: An Appellate Court, When Reviewing a Challenge to the Sufficiency of the Evidence, Is Required to Draw All Reasonable Inferences in Favor of the State's Case and May Not Adopt the Defense's Inferences to Reverse a Conviction.**

When reviewing a challenge to the sufficiency of the evidence, an appellate court is required to draw all reasonable inculpatory inferences in favor of the State's case and the jury's verdict. The State presented numerous pieces of evidence that showed Walker's group planning the attack and celebrating in its aftermath. As this Court has recently noted, "[a]n appellate court must review '*all of the evidence*' admitted at trial." *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 18 (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When all of the evidence in this case is included in a properly-applied sufficiency review, the State provided clear evidence to support Walker's conviction for aggravated murder.

This is not a case in which the defendant pulled out a gun in the midst of a heated argument or fight and shot the victim on the spur of the moment, in anger and without thinking. Walker *left the fight*, hid behind the pillar, and lied in wait until Shannon turned

his back to him before he shot him. This occurred after Walker had spent 15 minutes standing in a circle with other men "during which members of the foursome gestured and repeatedly looked in Anderson's direction." *Shabazz*, ¶ 23 (O'Donnell, J., dissenting). Anderson was so worried by this behavior that he told Shannon to watch Walker's group because he was afraid they would attack him when his back was turned. At the end of that 15 minutes, Steele, Walker, Shabazz, and Johnson launched a coordinated attack on Anderson and Shannon that culminated in Walker shooting Shannon in the back. This case thus involves prior calculation and design layered on top of prior calculation and design. The Eighth District had to cut through both layers to find the evidence insufficient.

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

The relevant question in a sufficiency-of-the-evidence review is whether, "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "The standard of review governing sufficiency-of-the-evidence challenges is extremely deferential to the underlying guilty verdict and raises a high bar for a defendant to overcome[.]" *U.S. v. Wells*, 646 F.3d 1097, 1102 (8th Cir.2011).

As one Ohio appellate court held: "When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is extremely limited." *State v. Byerly*, 11th Dist. Portage 97-P-0034, 1998 WL 637689, *2 (Aug. 21, 1998).

> "When the state has produced at least a modicum of evidence on each of the essential elements of the crime, the question on appeal is not whether we think the accused is innocent of the charge. * * * We are not to inquire into

> the weight, or persuasiveness, of the evidence presented, for that is within the purview of the trier of fact. Therefore, a motion for acquittal should only be granted in those exceptional cases where reasonable minds must have reasonable doubt as to the defendant's guilt. *State v. Apanovich* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394. In other words, the motion should be granted where there is no need for formal deliberation on the evidence because a verdict of acquittal is, or should have been, a foregone conclusion."

Id. Under the standard of review for a sufficiency challenge, the appellate court is to draw all disputed inferences in favor of the prosecution. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Given the choice between a reasonable inference that is inculpatory and a reasonable inference that is not, the appellate court is required – in a sufficiency analysis - to choose the inference in favor of the State.

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

The lower court thus fundamentally misconstrued its role in a sufficiency challenge. The court's treatment of the State's case was a manifest weight review disguised as

sufficiency of the evidence. A sufficiency review must be more deferential to the jury's verdict. An appellate court cannot sua sponte create its own exculpatory inferences to explain away the State's case simply because it believes those inferences to be the most persuasive. The court's complete lack of deference to the jury's verdict in this case evidences its belief that only it could properly investigate and decide the facts. But an appellate court presiding over a cold record is ill-equipped to investigate the crime at issue, and particularly so when the court chooses to ignore significant parts of the evidence.

2. Walker's decision to withdraw from the fight and lie in wait behind the pillar was the result of prior calculation and design.

Walker was convicted of aggravated murder under R.C. 2903.01(A), which states: "No person shall purposely, and with prior calculation and design, cause the death of another * * *." Prior calculation and design requires "a scheme designed to implement the calculated decision to kill." *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978). "[N]either the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves,' but 'momentary deliberation' is insufficient.'" *State v. D'Ambrosio*, 67 Ohio St.3d 185, 196, 1993-Ohio-170, 616 N.E.2d 909 (1993), citing Legislative Service Commission Comment to R.C. 2903.01. No bright-line test exists that "emphatically distinguishes between the presence or absence of 'prior calculation and design.' Instead, each case turns on the particular facts and evidence presented at trial." *State v. Taylor*, 78 Ohio St.3d 15, 20, 1997-Ohio-243, 676 N.E.2d 82.

In this case, Walker voluntarily withdrew from the attack to give himself an opportunity to pull his gun out of his waistband and wait for a clear shot. "Appellant's withdrawal from the confrontation to obtain a weapon was a sufficient lapse of time and provided sufficient opportunity to allow appellate to form a plan to carry out the purpose

to kill." *State v. Norman*, 10th Dist. Franklin No. 99AP-398, 1999 Ohio App. LEXIS 6454, *25 (Dec. 23, 1999), citing *State v. Robbins*, 58 Ohio St.2d 74, 79, 388 N.E.2d 755 (1979).

In *Robbins*, the defendant "accosted the decedent in the hallway of their apartment building and struck the decedent, knocking him to the floor." *Robbins* at 78. The defendant then "went into his adjacent apartment and got a long knife, or 'sword,' from under his mattress, returned to the hallway and stabbed the victim to death." *Id.* This Court found that the defendant's use of "extreme aggression against a helpless victim," followed by the defendant leaving the altercation and obtaining a weapon to kill the victim, was sufficient to support the jury's finding of prior calculation and design. *Id.* at 78-79.

In this case, Walker likewise used extreme aggression against a helpless victim. Walker pursued Shannon, who never threw any punches or acted aggressively in any way, and struck him in the face with a champagne bottle. As Shannon recoiled and tried to move away, Walker followed him and threw the bottle at his head, missing Shannon and striking a man behind him. Shannon fell down onto his back. As Shannon attempted to stand, Shabazz approached him from behind, punched him in the head, and shoved Shannon to the ground with Walker on top of him. Walker got up off of Shannon, "made a movement with his right hand toward his waistband, walked through the fight, and disappeared behind the pillar" several feet away. *Shabazz*, ¶ 8 (O'Donnell, J., dissenting).

Once Walker withdrew from the fight, he pulled a gun from his waistband and hid behind the pillar, lying in wait for either Shannon or Anderson to come within range. He continued to hide behind the pole as Anderson was beaten in a 5-on-1 attack and as Shannon tried in vain to restrain some of the attackers. And when Shannon turned his back to Walker to try to restrain Otis Johnson from beating Anderson, Walker shot him in the

back. The facts in this case similarly "support a finding of prior calculation and design in that defendant left the affray, retrieved a weapon, and used it to kill the victim." *State v. Hogg*, 10th Dist. Franklin No. 11AP-50, 2011-Ohio-6454, ¶ 20.

In this case, it was reasonable for the jury to conclude that Walker made a calculated decision to kill. "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton*, 56 Ohio St.2d 8, 381 N.E.2d 190, paragraph three of the syllabus.

3. The court of appeals failed to consider all of the evidence in the light most favorable to the state under each of the three factors in *Taylor*.

In *State v. Taylor*, 78 Ohio St.3d at 19, 1997-Ohio-243, 676 N.E.2d 82, this Court articulated the following factors to consider in determining the existence of prior calculation and design:

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

As to the first factor, there is no evidence that Walker knew either Ivor Anderson or Antwon Shannon at the time they arrived at the club. But Walker did know of Anderson and Shannon after Steel exchanged words with Anderson. Steel came back to the group and "gestured in the direction of Anderson and Shannon on two occasions, prompting Shabazz, Walker, and the fifth man to look that way." *State v. Shabazz*, Slip Opinion No. 2016-Ohio-1055, ¶ 6 (O'Donnell, J., dissenting). The reason this Court found this factor significant in *Taylor* is because a defendant is less likely to form prior calculation and

design to kill a stranger than someone the defendant knows. Here, Anderson and Shannon were strangers to these defendants when they entered the bar but not at the time the attack began. Walker had formed a motive by that point based on the interactions from earlier involving the champagne spill.

Under the second factor, the court should look to whether the accused gave thought or preparation to choosing the murder weapon or murder site. The Eighth District found this factor weighed particularly heavily against the State's case:

> "The video then shows the fight spilling over to the area by the pillar where Walker went behind. The fight could have just as easily spilled over into the other direction. Thus, Walker did not choose the murder site or pursue Shannon. Rather, the video shows that the murder site came to him instead."

Walker, ¶ 18. This characterization misconstrues the evidence. This was not a "fight" and it did not simply "spill over[.]" As the dissenting judge in *Shabazz* noted:

> "This was no bar fight. This was a vicious, premeditated attack. The planning, followed by the orchestrated use of a multitude of deadly weapons in the form of champagne bottles by multiple participants, coupled with others like Shabazz offering direct physical support in the attack, was sufficient to establish not only the required purposeful intent for murder, but also the prior calculation and design for aggravated murder."

Shabazz, ¶ 83 (Gallagher, J., dissenting). The Eighth District used a variation of the word "fight" 19 times in its majority opinion. This characterization makes it appear as though Anderson bore some level of culpability for participating in the fight and that he was somehow on an equal footing with the other combatants. This is not true. The attack did not simply "spill over" towards the left side of the pillar. Anderson's five other attackers punched, kicked, dragged, and pulled him over to the left side of the pillar as he attempted to defend himself, laying on the ground. Neither Walker nor Shabazz ever attempted to make this inadvertent "spill over" argument either at trial or in their appeals.

Moreover, Walker did chose both the murder weapon and the murder site. He chose to bring a gun to the Tavo Martini Lounge that night. He chose to involve himself in a 6-on-1 attack over a perceived insult that had nothing to do with him. He chose to strike Antwon Shannon in the face with a champagne bottle and then throw the bottle at him, despite the fact that Shannon had shown no aggression towards anyone. He chose to walk behind the pillar and draw his gun, even though neither of the victims was armed. And he chose, while lying in wait behind that pillar, to shoot an unarmed and defenseless Shannon in the back without any provocation. The fact that Walker did not know exactly where Shannon would be standing at the time he shot him does not indicate a lack of prior calculation and design. Every aggravated murder victim could have, at some point, gone in the other direction and not been where their killers needed them to be in order to kill them.

Under the third factor in *Taylor*, the act was drawn out and not an almost spontaneous eruption of events. 15 minutes elapsed between when Steel spilled the champagne on Anderson and when the attack began. This Court has affirmed convictions of aggravated murder with prior calculation and design in killings that involved far less than 15 minutes of planning. In *State v. Palmer*, 80 Ohio St.3d 543, 568-569, 1997-Ohio-312, 687 N.E.2d 685, this Court found prior calculation and design where the defendant killed two strangers in a road rage incident where the defendant exited his vehicle with a revolver that he only needed time to cock before it would fire. In *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82, this Court found prior calculation and design where the defendant shot an acquaintance after a brief argument in a bar over a juke box. "[T]wo or three minutes * * * was more than sufficient evidence for the jury to reasonably have found that appellant, with prior calculation and design, decided to shoot Alexander in

that space of time." *Id.* at 22. As a result, "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.

4. The court of appeals failed to consider Walker's post-crime actions as relevant to prior calculation and design.

The lower court also failed to consider, at all, Walker's actions following the shooting. This was erroneous because "courts have found that the *Jenkins* totality-of-the-circumstances test renders a defendant's conduct both before and after the victim's death pertinent to prior calculation and design." *State v. Young*, 7th Dist. Belmont No. 96-BA-34, 1999 WL 771070, *13 (Sep. 20, 1999). "Circumstantial evidence demonstrating premeditation includes, but is not limited to * * * defendant's conduct after the killing." *Cyars v. Hofbauer*, 383 F.3d 485, 491 (6th Cir.2004). See also *Jackson v. Virginia*, 443 U.S. at 325, 99 S.Ct. 2781, 61 L.Ed.2d 560 ("The petitioner's calculated behavior both before and after the killing demonstrated that he was fully capable of committing premeditated murder"). The Eighth District itself has previously recognized this principle. See *State v. Flors*, 38 Ohio App.3d 133, 136, 528 N.E.2d 950 (8th Dist.1987) ("The state could show the defendant's purpose from his conduct before and after the offense").

Walker fled the scene immediately after the shooting. Once outside, he jumped into the air and pumped his fists in a display of celebration. Walker also lied to police in a statement eight months after the shooting. Walker denied knowing anything about the murder of Antwon Shannon and claimed that he could not remember who he was with when he arrived at or left the club. (Tr. 1059). All of this is consistent with the successful execution of a pre-conceived plan to shoot Shannon, and a post-crime attempt to cover up the murder.

The panel in *Walker* did not consider this evidence at all, and the majority of the panel in *Shabazz* dismissed the limited evidence it did consider: "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*, ¶ 40. This makes it clear that the court did not consider any evidence from the video that it could not see for itself. The court's analysis was also incorrect. Det. Ray Diaz testified that he followed Walker's group on Camera 6 as they exited Tavo and identified both Walker and Shabazz as the individuals depicted on that video. (Tr. 1063, 1068). The Eighth District was not free to watch the video, decide that it could not see who was on the video or what they were doing, and then ignore Det. Diaz's identification testimony. The court was required to accept that testimony as true. To do otherwise was beyond the scope of a sufficiency review.

5. Conclusion.

The facts of this case give rise to reasonable inferences supporting the existence of prior calculation and design. This was an issue that the trial court correctly submitted to the jury for their deliberations. The jury was free to accept or reject the State's inferences; the Eighth District was not. "[W]hen competing rational inferences can be made, there is not a valid sufficiency challenge." *State v. Thompson*, 7th Dist. Columbia No. 13 CO 20, 2014-Ohio-1225, ¶ 24. The Eighth District had no basis to interfere with that finding on the grounds that there was never a need for formal deliberations at all.

The Eighth District's de novo re-investigation of the fatal shooting of Antwon Shannon was beyond the scope of a sufficiency review, and to compound that error, it was factually wrong. The State therefore respectfully requests that this Honorable Court reverse the Eighth District's decision and hold that in a sufficiency review, the appellate

court is required to adopt all reasonable inferences in favor of the State's case and to show extreme deference to the jury's verdict. Under that properly-annunciated standard, this Court should hold that sufficient evidence existed to affirm Walker's convictions.

<u>STATE'S PROPOSITION OF LAW II</u>: The State Introduces Sufficient Evidence of Prior Calculation and Design Where a Jury Could Reasonably Infer That the Defendant Discussed Purposely Killing the Victim Over a Fifteen Minute Period Prior to the Murder.

Even if the amount of time that Walker was lying in wait to shoot Shannon from behind the pillar was not sufficient to constitute prior calculation and design, the State's evidence showed that Walker planned the attack for far longer than that. Prior to the ambush, Walker and the other members of his group were captured on video standing in a circle in the middle of the dance floor, watching the victims and gesturing towards them. This went on for 15 minutes before Walker's group began their preconceived attack. That 15 minutes is radically different from the "almost spontaneous eruption of events" that the court of appeals found in this case. *Walker*, ¶ 19. It is a second and entirely distinct layer of prior calculation and design that the jury relied upon in rendering its verdict and that the court of appeals improperly disregarded in reversing that verdict. To do so, the court had to infer that the 15 minutes of conversation and gesturing towards the victims was innocent and unrelated to the brutal and coordinated beating that immediately followed. This an inference in favor of the defense that a court cannot draw in a sufficiency review. And even if the court could draw such an inference, once again, the evidence contradicts the exculpatory inference that the court drew.

1. **Sufficient circumstantial evidence existed to infer that Walker and his group discussed attacking the victims during the 15 minutes prior to the assault.**

The State presented numerous pieces of evidence that supported its claim that Walker conceived and planned the attack on Shannon and Anderson well in advance of the instant he fired the fatal gunshot. Walker and Shabazz had a conversation with Steele and Johnson after the spilled drink incident, during which members of the foursome gestured and repeatedly looked in Anderson's direction. *Shabazz*, ¶ 23 (O'Donnell, J., dissenting). "Walker and Steel held champagne bottles, and Steel cradled his bottle in a way that suggests he was attempting to conceal it." *Id.* "Shabazz removed his glasses – an action from which the jury could reasonably infer he intended to be part of the attack." *Id.* "[B]efore Steel tried to hit Anderson with the champagne bottle, Shabazz, Walker, and Johnson positioned themselves to screen out his act so others would not see and then joined the attack." *Id*, ¶ 24. Six people – Robert Steele, Derrell Shabazz, Dajhon Walker, Otis Johnson, and two women – then immediately launched a coordinated attack on Anderson and Shannon despite the fact that neither Anderson nor Shannon acted aggressively at any point. The coordinated nature of that attack belies any assertion that it occurred spontaneously.

Once the attack began, Walker consistently pursued Shannon, following him around the dance floor, striking him in the face with a bottle, and then throwing the bottle at him. Walker then withdrew from the fight, pulled out a gun, waited for an opportunity, and shot Shannon in the back. Shabazz, despite standing mere feet in front of the gun when it went off, had no visible reaction to the gunshot. *Shabazz*, ¶ 9 (O'Donnell, J., dissenting). Shabazz acted at all times before, during, and after the killing as if he knew the shot was coming. He immediately knew to walk over to the right side of the pillar as Walker came running out from behind it. And he congratulated Walker by patting him on his chest and on his back.

Id., ¶ 10. "An appellate court must review '*all of the evidence*' admitted at trial." *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 18 (emphasis in original), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The evidence outlined above was sufficient to allow the jury to find that Shabazz's group spent those 15 minutes discussing a plan to attack and kill Shannon and Anderson.

> "The jury was free to infer from the conversations involving Shabazz and the others that the group was going to exact retribution for Anderson making a comment after the drink was spilled on him. This reasonably included causing not only serious physical harm, but also the purposeful intent to kill. This fact is inferred by the subsequent conduct of Steel, Johnson, Shabazz, and Walker.

Shabazz, ¶ 83 (Gallagher, J., dissenting). But the panel in this case, faced with a choice of competing inferences, impermissibly drew an exculpatory inference in favor of the defense: "It is not unusual for a group to stand together and converse while at a nightclub." *Walker*, ¶ 20. The court thus simply refused to adopt the inference that the jury made in this case, and it did so without explaining why it found that inference to be unreasonable and without accounting for any of the other evidence that bolstered the case for drawing that inference in the first place. It *is* unusual for a group to spread out around the room and suddenly launch a coordinated attack against two innocent persons, and for one of them to then withdraw from the attack, hide behind a pillar, pull a gun out of his waistband, and shoot one of those innocent victims in the back before the group flees the scene together.

2. The court of appeals failed to consider direct testimony of the surviving victim that Walker and his group were planning to attack.

Ivor Anderson's testimony is especially significant because it is direct evidence that Walker's group discussed a plan to attack Anderson and Shannon during that 15 minutes. Anderson testified that he believed Shabazz's group was "plotting against me and Mr.

Shannon[,]" that he told Shannon "to keep an eye out because they're looking suspect[,]" and that he watched them for "the next five to ten minutes" because "I didn't want to get attacked with my back turned[.]" (Tr. 693-694). At that point, the jury was not required to draw any inferences at all. The victim directly testified that Walker and his group were planning to attack him. Anderson's testimony was actually so compelling that the defense did not even attempt to impeach him on cross-examination. To the contrary, the defense actually reinforced Anderson's testimony that Walker's group was planning an attack:

> 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.

(Tr. 732-733). 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. Hamilton No. C-080518, 2009-

Ohio-4190, ¶ 43. In a sufficiency analysis, the reviewing court was required to accept that testimony as true, particularly where – as here – the defense made no attempt to dispute Anderson's testimony on that point.

Once again, however, the panel in *Walker* did not discuss Anderson's testimony at all, and the panel in *Shabazz* minimized and dismissed it: "Although Anderson felt uneasy by the men talking and looking in his direction, more than dirty looks are necessary to prove the men were devising a plan to commit premeditated murder." *Shabazz*, at ¶ 28. But Anderson did not testify that he felt "uneasy" or that Shabazz's group was giving him "dirty looks." He testified that he believed they were "plotting against me and Mr. Shannon" and that he told Antwon Shannon to watch the group because he was afraid they would attack him when his back was turned. (Tr. 693-694). That is exactly what happened. There is a fundamental disconnect between what Anderson testified to and how the Eighth District treated that testimony in its sufficiency review. That review was not "extremely deferential[.]" *U.S. v. Wells*, 646 F.3d 1097, 1102 (8th Cir.2011).

CONCLUSION

In this case, the Eighth District improperly reversed an aggravated murder conviction on sufficiency of the evidence grounds by failing to consider several significant pieces of evidence in the State's case that demonstrated that Shabazz and his co-defendants formed a plan to deliberately attack and kill the victim. This case, along with five other aggravated murder cases the court has recently reversed, demonstrate that the court has jettisoned its extremely limited role in reviewing criminal convictions for sufficiency of the evidence. Instead, the court has repeatedly conducted an improper de novo review of the State's evidence in which the court determines which inferences it finds to be the most

persuasive. This heightened level of scrutiny usurps the jury's function as the finder-of-fact and renders its verdict a mere recommendation that the appellate court is free to accept or reject based solely on its view of what it believes the evidence does or does not say.

An appellate court sitting in review to a challenge to the sufficiency of the evidence is not to draw those inferences that the defendant suggests, but rather, is required to draw all inferences in favor of the State. The State therefore respectfully asks this Honorable Court to reverse the Eighth District's decision and reinstate Walker's conviction for aggravated murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant was sent by email this 18th day of April, 2016 to Leif B. Christman (lbchristman@hotmail.com), counsel for Defendant-Appellee Dajhon Walker.

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ORIGINAL

NO.

IN THE SUPREME COURT OF OHIO

14-0942

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99998

STATE OF OHIO,
Plaintiff-Appellant

-vs-

Dajhon Walker,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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

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

FILED
JUN 06 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Respectfully submitted,
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RECEIVED
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CLERK OF COURT
SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

A foregoing copy of the Notice of Appeal has been mailed via U.S. regular mail this June 6, 2014 to:

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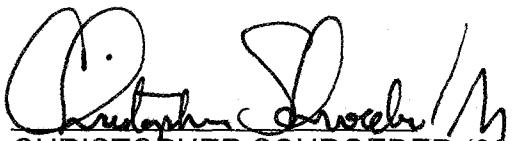

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MAY 1 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99998

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAJHON WALKER

DEFENDANT-APPELLANT

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

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

BEFORE: Kilbane, P.J., Blackmon, J., and Stewart, J.

RELEASED AND JOURNALIZED: May 1, 2014

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 1 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By M. Jacobs Deputy

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ALL PARTIES.-COSTS TAXED

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, DaJhon Walker ("Walker"), appeals from his aggravated murder, murder, felonious assault, and having a weapon while under disability convictions. For the reasons set forth below, we vacate his aggravated murder conviction and sentence, affirm his remaining convictions, and remand for resentencing.

{¶2} In October 2012, Walker and codefendants, Otis Johnson ("Johnson") and Derrell Shabazz ("Shabazz"), were charged in a ten-count indictment.[1] Count 1 charged each of them with the aggravated murder of Antwon Shannon ("Shannon") and carried a one- and three-year firearm specification. Count 2 charged each of them with the murder of Shannon and carried a one- and three-year firearm specification. Counts 3-5 charged each of them with the felonious assault of Shannon, with Counts 3 and 5 carrying a one- and three-year firearm specification. Count 6 charged each of them with the felonious assault of Ivor Anderson ("Anderson"). Counts 7 and 8 charged each of them with the felonious assault of Eunique Worley ("Worley"). Count 9 charged Shabazz with having a weapon while under disability. Count 10 charged Walker with having a weapon while under disability.

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[1]Codefendant Shabazz has filed an appeal with this court in *State v. Shabazz*, 8th Dist. Cuyahoga No. 100021.

{¶3} The matter proceeded to a jury trial on February 13, 2013. Defendants moved for a mistrial the next day. The trial court granted defendants' motion based on juror misconduct and rescheduled the trial for May 20, 2013.[2] The following evidence was adduced at trial.

{¶4} In the early morning hours of February 19, 2012, Shannon and Anderson were at the Tavo Martini Loft ("Tavo") in Cleveland, Ohio. The two men met up with Worley and her three friends, Marvella Grant, Ashley Nix, and Asia Rudolph. At approximately 1:30 a.m., an unknown male, later identified as Robert Steele ("Steele"), spilled champagne on Anderson while he and Shannon were on the dance floor.[3] Anderson looked at the man and moved his hands up and down to gesture "in a sense like I don't care." He told the man, "you're doing too much." This was the only verbal exchange between Anderson and Steele.

{¶5} After this incident, Anderson testified that he observed Steele walk over to two men, later identified as Shabazz and Johnson. He felt that they were plotting against him, so he continued to watch them for approximately ten minutes and then went about his business. Anderson told Shannon "to keep an eye out" because the group looked suspect. Anderson then went over to Worley

---

[2]Count 10, the having a weapon while under disability charge, was bifurcated and tried to the bench.

[3]Steele's identity was unknown until the eighth day of trial. Steele pled guilty to one count of felonious assault and was sentenced to two years in prison.

to have a conversation. They spoke for approximately three minutes when Anderson heard someone yell out "yeah, nig***." As he turned around, Steele struck Anderson in the head with a champagne bottle. Both men fell, where they tussled on the ground. Part of the bottle hit Worley in the head and she also fell to the ground. At this point, an altercation ensued among Shannon, Anderson, Walker, Shabazz, Johnson, and other persons in the nightclub. Anderson was tackled by a female while he fought with Steele. Anderson was on the ground again when he heard a gunshot.

{¶6} Tennison Malcolm ("Malcolm"), a medical school student, testified that he was at Tavo with some friends when he heard the gunshot. He then ran into the bathroom. While he was in there, Shannon came into the bathroom looking confused. Malcolm asked him if he was okay and if he was shot. Shannon replied that he did not know. Malcolm asked him to lift up his shirt. Malcolm observed blood coming from Shannon's chest. He put pressure on Shannon's chest and called 911. At one point, Shannon became unresponsive so Malcolm started chest compressions. The ambulance arrived shortly thereafter.

{¶7} Meanwhile, Anderson was still on the ground grabbing the female on top of him. A few minutes later, Johnson picked the female up off Anderson and then he exited the nightclub. Anderson later told police that the gunshot came from the area near the exit door. Upon exiting the building, Anderson waited outside for approximately five minutes looking for Shannon. He did not

see Shannon so he went back inside the nightclub. Tavo's security guards escorted him back outside.

{¶8} While he was outside, two women approached him, one of which was the woman who attacked him in the nightclub. To avoid them, he went back into Tavo and checked on Worley. He escorted Worley to her car, and as he walked to his car he noticed that Shannon's car was still in the parking lot. At that point, he determined that Shannon was the individual who got shot in the nightclub. Anderson then went to the Metro Health Hospital where he learned that Shannon had died.

{¶9} The incident was captured by surveillance video, which the jury was able view. The video shows Walker speaking with Johnson, Shabazz, and Steele after he spilled champagne on Anderson. The video also shows Steele dancing with a bottle in his hand and Johnson walking around with a bottle in his hand. The four men are standing by Anderson and Shannon. Steele strikes Anderson with the object in his hand and the fight begins. Anderson is fighting with Steele and then is tackled by a female who knocks him to the dance floor. Shannon is seen pulling a female back from the fight. Walker is seen punching Shannon and also hitting him with a bottle. The video then shows Walker pull an object out of his waistband and walk behind a pillar that is right next to the dance floor. At the same time, the fight continues on the dance floor and Shannon is trying to break up the fight by removing one of the females off of

Anderson. The fight then spills over to the area next to the dance floor and the pillar where Walker walked behind. Shannon is seen bending forward, with his back in the direction of where Walker went behind the pillar. The video then shows two flashes — one small flash in front of Shannon, similar to one that would come from a cell phone camera, and a large flash directly behind Shannon, which was the gunshot. Within less than a second, the video shows particulate matter falling in front of the camera. Walker can then be observed running from behind the other side of the pillar and across the dance floor toward an exit door. Shabazz was on the dance floor. He met up with Walker and they exited the nightclub together. As Walker was running, the video shows him fumbling with his waistband.

{¶10} At the conclusion of trial, the jury found Walker guilty of aggravated murder (Count 1), murder (Count 2), the felonious assault of Shannon (Counts 3-5), and the felonious assault of Anderson (Count 6). The jury found him not guilty of the felonious assault of Worley (Counts 7-8). The trial court found him guilty of having a weapon while under disability. The trial court sentenced Walker to life in prison, with the possibility of parole after serving 20 years, on the aggravated murder charge. The trial court merged the murder and felonious assault charges (Counts 2-5) with the aggravated murder for purposes of sentencing. The court also merged all the firearm specifications into one three-year specification to be served prior and consecutive to the aggravated

murder charge. The trial court sentenced him to two years in prison on the remaining felonious assault charge (Count 6) and nine months in prison on the having a weapon while under disability (Count 10). The court ordered that Counts 1 and 10 be served concurrently and Count 6 be served consecutively to Counts 1 and 10.

{¶11} Walker now appeals, with his appellate counsel raising ten assignments of error for review. Walker filed a pro se supplemental brief in which he raises an additional assignment of error. The assignments of error will be discussed together, where appropriate.

Assignment of Error One

> There was insufficient evidence to support a finding of prior calculation and design.

Assignment of Error Two

> There was insufficient evidence that Walker fired the shot.

Assignment of Error Three

> There was insufficient evidence to convict Walker of felonious assault.

Assignment of Error Four

> There was insufficient evidence that Walker possessed a firearm.

Assignment of Error Five

> The verdict finding prior calculation and design was against the manifest weight of the evidence.

Assignment of Error Six

It was against the manifest weight of the evidence to conclude Walker was the shooter.

Assignment of Error Seven

The verdict of felonious assault was against the manifest weight of the evidence.

Assignment of Error Eight

The court finding that Walker possessed a firearm was against the manifest weight of the evidence.

Assignment of Error Nine

It was prejudicial error to give a jury instruction on complicity based upon the evidence presented.

Assignment of Error Ten

It was prejudicial error to give jury instruction on flight based upon the evidence presented.

Pro Se Supplemental Assignment of Error One

Did * * * trial counsel prejudice appellant causing [a] guilty outcome verdict[,] due to the ineffective assistance of counsel [by failing] to successfully challenge [the] state['s] expert witness[.]

Sufficiency of the Evidence

{¶ 12} In the first, second, third, and fourth assignments of error, Walker challenges the sufficiency of the evidence with respect to his aggravated murder, murder, and felonious assault convictions.

{¶13} The Ohio Supreme Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, explained the standard for sufficiency of the evidence as follows:

> Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Aggravated Murder and Murder

{¶14} In the instant case, Walker was convicted of the aggravated murder of Shannon under R.C. 2903.01(A), which provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]" Walker argues the state failed to prove that the shooting was the result of prior calculation and design. He maintains that the shooting was a spur-of-the-moment act. He further argues there was no reliable evidence that anyone attempted to purposefully cause Shannon's death.

{¶15} In *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 79, the Ohio Supreme Court noted that there is no bright-line rule to determine whether a defendant acted with prior calculation and design. The *Cassano* court acknowledged that "'prior calculation and design' is a more

stringent element than the 'deliberate and premeditated malice' * * * required under prior law." *Id.*, quoting *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.'" *State v. D'Ambrosio*, 67 Ohio St.3d 185, 196, 616 N.E.2d 909 (1993), quoting *Cotton* at 11. Walker claims there was insufficient evidence to support a finding of prior calculation and design. We agree.

{¶16} The Ohio Revised Code does not define the phrase "prior calculation and design," but the Ohio Supreme Court has interpreted the phrase to require evidence of "more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill." *Cotton* at 11. While "'[n]either the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, * * * 'momentary deliberation' is insufficient.'" *D'Ambrosio* at 196, quoting the 1973 Legislative Service Commission Comment to R.C. 2903.01. According to the committee comment, "the phrase 'prior calculation and design' [was employed] to indicate studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." *See also State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82.

{¶17} 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 1163. Although there is no bright-line rule for determining prior calculation and design, the Ohio Supreme Court has found the following factors pertinent to 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'?" *Taylor* at 19, quoting *State v. Jenkins*, 48 Ohio App.2d 99, 255 N.E.2d 825 (8th Dist.1976). "These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide." *Jenkins* at 102.

{¶18} In the instant case, when considering these factors and the totality of the circumstances, we find that, even construing the evidence in a light most favorable to the state, there is insufficient evidence of prior calculation and design. As to the first factor, there is no evidence in the record that Walker knew Shannon, let alone had a strained relationship with him. With respect to the second factor, the evidence fails to demonstrate that Walker gave thought in choosing the murder site. The state did not have any eyewitness testimony to the shooting, so it relied on the surveillance video to present its case. The surveillance video shows Anderson and others fighting on the dance floor.

Shannon gets caught in the fight while he is trying to break it up. Walker walks behind a pillar, which is next to the dance floor. The video then shows the fight spilling over to the area by the pillar Walker went behind. The fight could have just as easily spilled over into the other direction. Thus, Walker did not choose the murder site or pursue Shannon. Rather, the video shows that the murder site came to him instead.

{¶19} With respect to the third factor, we find that Walker's actions were the result of an almost spontaneous eruption of events. The evidence demonstrates that after the fight erupted, a group of people were tussling on the dance floor. The fight then happens to spill over to the area by the pillar where Walker was observed walking behind. Shannon is seen bent forward and one gunshot is fired at his back. The video fails to demonstrate that "the act was drawn out." Rather, the video shows the entire sequence of events, which happened within minutes, as a chaotic situation that spiraled out of control.

{¶20} The state argues that because Steele spoke with Walker, Shabazz, and Johnson after he spilled champagne on Anderson, there was evidence of prior calculation and design. However, there is no audio of what these males were discussing, let alone audio of a plan to murder Shannon. The fact that Walker was speaking with the group that he came to the nightclub with does not indicate that he planned to kill Shannon. It is not unusual for a group to stand together and converse while at a nightclub.

{¶21} Based on the foregoing, we conclude that the evidence is insufficient to demonstrate that Walker planned a scheme to implement a calculated decision to kill. Rather, the evidence demonstrates that the act was the result of the sudden eruption of Anderson's fight. Accordingly, there was insufficient evidence to support Walker's conviction for aggravated murder. There was, however, sufficient evidence that Walker committed murder in violation of R.C. 2903.02, which provides that "[n]o person shall purposefully cause the death of another[.]" An individual acts purposefully when "it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶22} Walker argues there is no evidence that he fired the shot or that he had a gun. While there was no eyewitness testimony identifying Walker as the shooter, such evidence is not required in order to sustain a conviction. *State v. Lopez*, 8th Dist. Cuyahoga No. 94312, 2011-Ohio-182, ¶ 62, citing *Jenks*. The surveillance video shows Walker pull an object out of his waistband during the fight and walk behind a pillar that is right next to the dance floor. The fight then spills over to the area next to the pillar where Walker was standing. Shannon is seen bending forward, with his back to where Walker was standing. The video then shows a large flash, which was the gunshot that killed Shannon.

Within seconds, Walker is the first person who can be observed running from behind the other side of the pillar and across the dance floor toward an exit door. As Walker was running, the video shows him fumbling with his waistband. When viewing this evidence in a light most favorable to the state, we find sufficient evidence to support Walker's murder conviction.

{¶23} Accordingly, Walker's aggravated murder conviction is vacated and his murder conviction is affirmed. The first assignment of error is sustained and the second and fourth assignments of error are overruled.

Felonious Assault

{¶24} In the third assignment of error, Walker challenges the sufficiency of his felonious assault convictions. Walker was convicted of four counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2). The indictment lists Shannon as the victim in three counts and Anderson as the victim in the remaining count. R.C. 2903.11(A)(1) and (A)(2) provide in pertinent part:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another * * *;
>
> (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.

{¶25} He argues that the convictions were "presumably based on a complicity theory based upon the lack of any actual assault by Walker." However, the surveillance video clearly shows Walker punching Shannon and

also hitting him with a bottle before he shot Shannon. The video further shows Anderson getting hit in the head with a bottle by Steele. Steele, Johnson, Shabazz, and Walker all participated in the fight. Under R.C. 2923.03(F), an accomplice to a crime is subject to the same prosecution and punishment as the principal offender. The trial court, in the instant case, instructed the jury on complicity. Based on the foregoing, when viewing this evidence in a light most favorable to the state, we find sufficient evidence to sustain Walker's felonious assault convictions.

{¶26} Therefore, the third assignment of error is overruled.

Manifest Weight of the Evidence

{¶27} In the fifth, sixth, seventh, and eighth assignments of error, Walker contends that his convictions for aggravated murder, murder, and felonious assault are against the manifest weight of the evidence. However, in light of our resolution of the first assignment of error, we will consider Walker's arguments as they relate to his convictions for murder and felonious assault.

{¶28} In contrast to a sufficiency argument, a manifest weight challenge questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 390, 1997-Ohio-52, 678 N.E.2d 541. The Ohio Supreme Court in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, has stated:

> [T]he reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." [*Thompkins* at 387], citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶29} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "'in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" *Id.*, quoting Martin.

{¶30} Walker argues that his convictions are against the manifest weight of the evidence because the video shows Walker and his group being patted down for weapons before they entered Tavo. The video also shows other patrons who were not searched before entering the bar. Therefore, he contends that it is highly probable that someone else brought the gun into Tavo.

{¶31} Despite Walker's arguments, this is not the exceptional case where the evidence weighs heavily against his convictions. The video of the patdown does not override Walker's actions during the fight. As discussed above, the video shows Walker punching Shannon and also hitting him with a bottle. The

video then shows Walker pull an object out of his waistband and walk behind a pillar that is right next to the dance floor. The fight spills over to the area next to the dance floor and the pillar where Walker was standing. Shannon is bent forward, with his back to where Walker was standing. There is a large flash, which was the gunshot. Walker then is seen running from behind the other side of the pillar and across the dance floor toward an exit door. As Walker was running, the video shows him fumbling with his waistband.

{¶32} Based on this evidence, we cannot say the jury clearly "lost its way" and created such a manifest miscarriage of justice that Walker's murder and felonious assault convictions must be reversed and a new trial ordered.

{¶33} Therefore, the fifth assignment of error is moot and the sixth, seventh, and eighth assignments of error are overruled.

Jury Instructions

{¶34} In the ninth and tenth assignments of error, Walker challenges the trial court's jury instructions on complicity and flight. "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's issuance of the instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Williams*, 8th Dist. Cuyahoga No. 90845, 2009-Ohio-2026, ¶ 50, citing *State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989). Jury instructions are reviewed in their entirety

to determine if they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984.)

{¶35} Walker first argues that the trial court should not have given an instruction on complicity because the evidence did not support it. He contends there is no evidence that he conspired with Steele, Shabazz, and Johnson, and he did not have a gun, nor did he shoot the gun.

{¶36} In the instant case, the evidence adduced at trial was sufficient to warrant an instruction on complicity. Specifically, the video shows Steele, Shabazz, Walker, and Johnson all participating in the fight, attacking Shannon and Anderson. This testimony was sufficient for the trial court to properly exercise its discretion and give a complicity instruction.

{¶37} Walker next argues the flight instruction was unwarranted because it was a natural reaction for people to run out of a bar after a gunshot.

{¶38} In the instant case, the trial court instructed the jury that:

> Testimony has been admitted indicating that the defendants fled the scene. You are instructed that the fact that any one or both of the defendants fled the scene does not raise presumption of guilt but it may tend to indicate the defendant's consciousness or awareness of guilt.
>
> If you find that the facts do not support that any one or both of the defendants fled the scene, or if you find that some other motive prompted any one or both of the defendant[s'] conduct, or if you are unable to decide what any one or both of the defendant[s'] motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that any one or both of the defendants engaged in such conduct and if you decide

> that any one or both of the defendants was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether any one or both of the defendants is guilty of the crime charged. You alone will determine what weight if any to give to this evidence.

{¶39} In *Taylor*, the Ohio Supreme Court held that evidence of flight is admissible to show consciousness of guilt. *Id.*, 78 Ohio St.3d at 27, 1997-Ohio-243, 676 N.E.2d 82. This court has previously defined flight as "some escape or affirmative attempt to avoid apprehension." *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19. It has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension. *State v. Kilpatrick*, 8th Dist. Cuyahoga No. 92137, 2009-Ohio-5555, ¶ 16, citing *State v. Benjamin*, 8th Dist. Cuyahoga No. 80654, 2003-Ohio-281.

{¶40} In the instant case, the trial court instructed the jury that it may consider Walker's flight from Tavo after shooting Shannon as consciousness of guilt but that "flight does not in and of itself raise the presumption of guilt." Therefore, the instruction correctly advised the jury not to consider evidence of Walker's departure from the scene if they find that it was not motivated by consciousness of guilt. Because the trial court must presume that the jury followed that instruction, we cannot say that the trial court abused its discretion. *State v. Hamilton*, 8th Dist. Cuyahoga No. 86520, 2006-Ohio-1943, ¶ 39,

discretionary appeal not allowed, 111 Ohio St.3d 1416, 2006-Ohio-5083, 854 N.E.2d 1094.

{¶41} Therefore, the ninth and tenth assignments of error are overruled.

Ineffective Assistance of Counsel

{¶42} In Walker's pro se supplemental assignment of error, he argues that he received ineffective assistance of counsel when trial counsel failed to challenge the state's expert witness on ballistics.

{¶43} In order to establish a claim of ineffective assistance of counsel, Walker must demonstrate that: (1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In Ohio, an attorney properly licensed is presumed competent. *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶44} Walker argues trial counsel was ineffective for failing "to request a suppression hearing" on the state's second ballistic expert witness's evidence regarding the gun shell casing found at Tavo. We disagree.

{¶45} In the instant case, two detectives and a forensic scientist testified that they observed a spent bullet and a large casing at the crime scene. The state admitted into evidence pictures of both a spent bullet and a large casing. To establish ineffective assistance of counsel for failure to file a motion to suppress, the defendant must prove that there was a basis to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35. Here, there was no basis to suppress the evidence in question.

{¶46} Therefore, Walker's pro se supplemental assignment of error is overruled.

{¶47} Accordingly, we vacate his aggravated murder conviction and sentence, affirm his remaining convictions, and remand the matter for resentencing.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

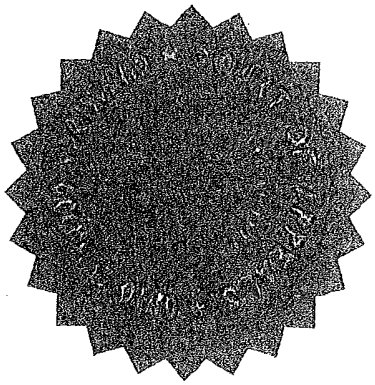
Mary Eileen Kilbane

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
MELODY J. STEWART, J., CONCUR

The State of Ohio,
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 5-1-14 CA 99998 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 5-1-14 CA 99998 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 1 day of May A.D. 2014

ANDREA F. ROCCO, *Clerk of Courts*

By M. Jacobs Deputy Clerk

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

DAJHON WALKER
Defendant

Case No: CR-12-567946-C

Judge: PAMELA A BARKER

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

JOURNAL ENTRY

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

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UNDERLYING SENTENCE OF LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER SERVING 20 YEARS OF IMPRISONMENT.
COUNT 6 - TERM OF 2 YEARS, PRC MANDATORY 3 YEARS.
COUNT 10 - TERM OF 9 MONTHS, PRC UP TO 3 YEARS.
COUNTS 1 AND 10 ARE TO BE SERVED CONCURRENTLY.
COUNT 6 IS TO BE SERVED CONSECUTIVE TO COUNTS 1 AND 10.
DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 271 DAY(S), TO DATE.
DEFENDANT DECLARED INDIGENT.
COSTS WAIVED
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS LEIF CHRISTMAN AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT DAJHON WALKER, DOB: 11/14/1988, GENDER: MALE, RACE: BLACK.

06/07/2013
CPTRC 06/11/2013 10:45:07

Pamela A. Barker
Judge Signature 06/11/2013

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

DERRELL B SHABAZZ
Defendant

Case No: CR-12-567946-B

Judge: PAMELA A BARKER

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

JOURNAL ENTRY

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

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

06/07/2013
CPLXS 06/11/2013 20:40:35

Pamela A. Barker
Judge Signature 06/11/2013

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06/07/2013

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ANDREA F. ROCCO, CLERK

2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

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

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

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

Effective Date: 05-15-2002