Supreme Court of Ohio Clerk of Court - Filed June 07, 2016 - Case No. 2014-0942

IN THE SUPREME COURT OF OHIO
CASE NO. 2014-0942

STATE OF OHIO,	}	
	}	ON APPEAL FROM THE CUYAHOGA
Plaintiff-Appellant,	}	COUNTY COURT OF APPEALS
	}	EIGHTH APPELLATE DISTRICT
v.	}	
	}	COURT OF APPEALS CASE NO. 99998
DAJHON WALKER,	}	
	}	
Defendant-Appellee.	}	

MERIT BRIEF OF APPELLEE
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STATEMENT OF THE CASE AND THE FACTS

On February 19, 2012, Antwon Shannon and Ivor Anderson went to the TAVO Martini Lounge in Cleveland,[1] where they met up with several other friends, including Eunique Worley. (T.p. 686-688.) All were having a good time until approximately 1:56, when someone, later identified as Robert Steele, spilled champagne on Anderson. (T.p. 692.) Anderson told Steele, "you're doing too much"; no further words were exchanged. (T.p. 693.)

According to Anderson, Steele "went over and whispered to the two gentlemen," whom he recognized as Derrell Shabazz and Otis Johnson. (T.p. 693-694.) Anderson believed that "they were plotting against me and Mr. Shannon" *id.*, and "after watching them for about five to ten minutes and nothing occurred, I went about the rest of my business what I had came [sic] there for." (T.p. 694.)

At 2:11:52, roughly fifteen minutes after the champagne incident, Steele rushed across the dance floor, yelled out "yeah, nigger," and struck Anderson from behind with a bottle. (T.p. 697.) At this point in time, Shabazz and Walker were standing about fifteen feet away, looking in a different direction. Johnson joined the attack two seconds later, punching and kicking Anderson. (Video 02:11:54.) Several seconds after that, Walker and Shannon joined the melee, with Walker striking Shannon in the face with a bottle, then throwing the bottle, which missed. (Video 2:11:58 to 2:12:01.)

Shabazz then approached Shannon from behind and shoved him to the ground, with

[1] Much of the incident described here was captured by the Lounge's surveillance cameras, although they did not provide audio. The State introduced as Exhibit 3 at trial the video from Camera No. 9. References here will be to either the transcript or the time an event is depicted on the video, e.g. "Video 2:11:01," which shows the hour, minute, and second an event occurred. All times are A.M.

Walker on top of him. (Video 2:12:05.) At that point, Walker got up and moved behind a pillar a few feet away. Twenty-two seconds after getting up off of Shannon, Walker fired a shot into Shannon's back, mortally wounding him. (Video 2:12:27.)

Walker was indicted by the Cuyahoga County Grand Jury on ten counts: aggravated murder, murder, and three counts of felonious assault against Shannon – one for causing serious physical harm, one for using a champagne bottle as a deadly weapon, and one for using a firearm as a deadly weapon – plus one count of felonious assault against Anderson and two against Eunique Worley, as well as a charge of having a weapon under disability.

At trial, the jury found Walker guilty of all of the counts pertaining to Shannon, including the firearm specifications, and the one count of felonious assault against Anderson, but acquitted him of the two counts pertaining to Eunique Worley. Walker had elected to try the weapons under disability count to the judge, who returned a verdict of guilty on that as well.

At sentencing, the judge merged the counts on Shannon, with the State electing to proceed to sentencing on the aggravated murder count. The judge sentenced Walker to a term of life imprisonment, with parole eligibility after twenty years, plus three years for the firearm specification on that count, and sentenced him to two years in prison for the felonious assault against Anderson, and nine months on the disability charge, running the former sentence consecutively and the latter concurrently. The total sentence was twenty-five years to life.

On appeal, the 8th District unanimously reversed the conviction for aggravated murder and modified it to murder, finding the evidence insufficient to establish prior calculation and design, and remanded the case for resentencing. This Court accepted the State's appeal on September 24, 2014, and ordered the case held for the decision in co-defendant Shabazz's case.

On February 2, 2016, this Court dismissed *Shabazz* as having been improvidently allowed, and lifted the stay on the briefing schedule in this case.

ARGUMENT

STATE'S PROPOSITION OF LAW NO 1: 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 NO. 2: 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.

Although presented as two propositions of law, the State's argument is a singular one: the appellate court erred in finding the evidence insufficient to establish the element of prior calculation and design for aggravated murder. The State contends that the factors this Court set forth in *State v. Taylor*, 78 Ohio St.3d 19, 1997-Ohio-243, 676 N.E.2d 82, all weigh in favor of a finding that Walker acted with prior calculation and design, as does the evidence of what happened before the shooting, the immediate events surrounding the shooting itself, and what happened afterwards.

The videotape which captured the entire event completely contradicts the State's position.

1. None of the Taylor factors apply. In *Taylor, supra*, the Court enunciated three factors which it deemed important in determining the existence of prior calculation and design:

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

A. Walker and Shannon were strangers. The logic behind this factor is clear: the longer and more strained the relationship between two people, the more likely that if one kills the other he's put a good bit of thought into it. No direct testimony was given on this precise point, but Anderson testified that he'd "heard of" Walker, but "didn't know him at all." (T.p. 709.) Certainly, there was no testimony that Walker and Shannon had ever met before that night, let alone that they had a "strained relationship." The State persists nonetheless, contending that while Shannon and Walker may not have had any idea in the world who the other was when they entered the bar, in the span of a mere fifteen minutes they not only developed a relationship, but a strained one at that.

The case law shows no support for this interpretation of the *Taylor* factor. In the cases where a court found that a prior and strained relationship played a role, that relationship was far more expansive. In *State v. Callender*, 10th Dist. Franklin No. 15AP-15, 2015-Ohio-4255, for example, the court cited the conflict between rival gangs, culminating in the victim's killing, as proof of a prior strained relationship; included in that evidence was a YouTube video where the defendant rapped that he was a "shooter," and that "bullets comin [sic] for [the victim]. ¶24. See also *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439 (aggravated murder conviction and death sentence upheld where evidence showed defendant was distraught that victim broke up with him); *State v. Guerra*, 9th Dist. Lorain 12CA010188, 2013-Ohio-5367 (family members testified to months-long escalation of conflict between defendant and victim).

B. There was no choosing of a weapon or selection of a murder site. Again, the logic behind this factor is readily apparent: if the defendant gets a weapon, or makes a concrete decision as to where the crime will be committed – especially where the selection of the murder

site reduces the chances that the crime will be discovered – that shows that enough thought was put into the killing to satisfy the element of prior calculation and design.

The State insists that this factor exists here, but it plainly does not. Walker did not choose the weapon, he had it on him. (Or, to put it another way, he "chose" the weapon long before he knew Shannon existed, let alone formulated the intent to kill him.) Nor did he choose the site with murder in mind; the killing occurred in the bar, which, again, Walker entered unaware of Shannon's presence.

That leaves the third factor, whether this was an act which was "drawn out," or an almost "instantaneous eruption of events." For that, we have to look at the evidence of what transpired before the shooting, what transpired during it, and what transpired after it.

2. The evidence surrounding the actual shooting provides no proof of prior calculation and design. The State's second proposition of law, with its reference to the "fifteen-minute period" during which it claims Walker planned to kill Shannon, represents a tacit admission that the facts of the shooting itself fall far short of proving prior calculation and design. Indeed, to find that it does would require this Court to overrule some forty years of precedent.

Prior to 1974, conviction of aggravated murder in Ohio required only proof of premeditation. The criminal justice reforms instituted that year changed that element to require proof of "prior calculation and design." This Court has emphasized that "prior calculation and design is a more stringent element than premeditation." *State v. Green*, 90 Ohio St.3d 352, 357, 2000-Ohio-182, 738 N.E.2d 1208. As the Court explained in *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978), while "under the prior statute, a killing could be premeditated even though conceived and executed on the spur of the moment,"

> The apparent intention of the General Assembly in employing this phrase [prior calculation and design] was to require 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. Thus, instantaneous deliberation is not sufficient to constitute "prior calculation and design."

Prior calculation and design "indicates studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." *State v. Taylor, supra,*78 Ohio St.3d 15, 19. "Neither 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, quoting from the 1973 Legislative Service Commission Comment.

Taylor articulated the factors which should be considered in determining whether the State has met its burden of proving prior calculation and design:

> [W]hether the accused and the victim knew each other, whether there was thought or preparation in choosing the murder weapon or murder site, and whether the act was "drawn out" or "an almost instantaneous eruption of events" should be weighed with the totality of the circumstances surrounding the murder to determine whether there was prior calculation and design.

While there is no "bright-line" test for determining the time period necessary to find prior calculation and design, there is nothing in the case law which suggests it could be as little as twenty-two seconds, as even the cases relied upon by the State demonstrate. See *Taylor*, *supra* ("two or three ***minutes***" sufficient to show prior design and calculation); *State v. Coley,* 93 Ohio St.3d 253, 264, 2001-Ohio-1340, 754 N.E.2d 1129 ("prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few ***minutes***.") (Emphasis supplied in both.)

The State argues that the fact that "Walker voluntarily withdrew from the attack to give

himself an opportunity to pull his gun and wait for a clear shot" demonstrates prior calculation and design, but the cases it relies on are easily distinguishable. In *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), the defendant struck the decedent in the hallway, knocking him down, then went into his apartment, retrieved a sword from under his mattress, returned, and stabbed the victim to death. Similarly, in *State v. Hogg*, 10th Dist. Franklin No. 11AP-50, 2011-Ohio-6454, the defendant left the scene of an altercation in the front room of a house, went to the kitchen and retrieved a knife, then returned and stabbed the victim in the neck. The same fact pattern occurred in *State v. Norman*, 10 Dist. Franklin No. 99-AP-398, 1999 Ohio App. LEXIS 6454, 2000 WL 775620 (Dec. 23, 199): after an altercation in the living room, the defendant went upstairs, retrieved a gun, and returned and shot the victim. See also *State v. Morrison*, 8th Dist. Cuyahoga No. 86967, 2006-Ohio-3352 (defendant and victim argued in bar, defendant went to his car and retrieved a gun, returned to bar and shot victim.)

The common event in all these cases is that the defendant ***left the scene and retrieved a weapon***, then returned and used it to kill. An inference of prior calculation and design arises from those facts: leaving the scene of an encounter, getting a weapon, and returning obviously gives time for the "few minutes" necessary to formulate a plan to kill, and the retrieval of the weapon shows that one did indeed formulate that plan.

But that is a far cry from what happened here. Walker moved only a few feet, behind a pillar in the bar, and did not retrieve a weapon; he already had one. That leaves only the twenty-two seconds for Walker to have formulated the "prior calculation and design" required for conviction of aggravated murder, and no court decision in the forty-two years since that element was adopted would permit a conviction under those circumstances.

3. The evidence of what transpired after the shooting provides no proof of prior calculation and design. The State faults the appellate court for "fail[ing] to consider Walker's post-crime actions as relevant to prior calculation and design." State's Merit Brief at 20. Those post-crime actions are

- Walker "fled the scene immediately after the shooting."
- Walker "pumped his fists in celebration."
- Walker "lied to the police in a statement after the shooting," denying any knowledge of the killing, and claiming not to remember who he was with that night. *Id.*

The mere stating of these factors undercuts the State's argument. There is no the logical connection between fleeing the scene of a shooting and having formulated a plan in advance to commit, nor between lying to the police about having committed it, let alone "fist-pumping."

Nor does the State's resort to the case law help its argument here. *Cyars v. Hofbauer*, 383 F.3d 485, 491 (6th Cir. 2004), involved an appeal from the denial of a habeas petition, requiring the highly deferential standard of review mandated by the Anti-Terrorism and Effective Death Penalty Act. The case does include *dicta* regarding consideration of post-offense conduct, but nothing in the opinion cites the defendant's post-offense conduct, because it was unnecessary to consider it: he shot one victim who was sleeping, and another while she was begging for her life. Most significantly, the case involved Michigan law, which requires only premeditation for conviction of first-degree murder.

The State's reliance on *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), is equally puzzling. It involved a Virginia law also requiring only premeditation, which, the Court noted, 'need not exist for any particular length of time, and … may be formed at the

moment of the commission of the unlawful act," at 324, a formulation which stands in stark contrast to the requirements for aggravated murder under Ohio law. And while the opinion does refer to the defendant's conduct after the killing, it is in a wholly different context than that presented here: the Court noted that while the defendant claimed to have been intoxicated at the time of the killing, that was belied by the fact that "[i]mmediately after the shooting, the petitioner drove without mishap from Virginia to North Carolina." U.S. at 325.

The State's reference to its only Ohio court citation, *State v. Flors*, 38 Ohio App.3d 133, 528 N.E.2d 950 (8th Dist. 1987), is simply bewildering. *Flors* involved a charge of tampering with evidence. The court did indeed hold that "the state could show the defendant's ***purpose*** from his conduct before and after the offense," but here purpose is not at issue: no one disputes that Walker had the intent to kill Shannon. Had that been in controversy, Walker's celebratory action might have gone to prove intent, at least as far as showing an absence of accident. But it contributes nothing to resolving whether Walker acted with prior calculation and design.

There may be occasions when the defendant's post-offense conduct might provide some evidence of prior calculation and design. For example, where a defendant has put ample thought into concealing or disposing of a body, one might infer that he also put ample forethought into the killing itself.

But this is not that case. If the appellate court failed to consider it, as the State alleges, there was a very good reason for that: there was nothing to consider. None of Walker's post-offense actions cited by the State create even a whisper of an inference that he acted with prior calculation and design in shooting Shannon.

3. The evidence of what transpired before the shooting provides no proof of prior

calculation and design. The true gravamen of the State's argument is that the jury could have inferred prior calculation and design from the actions of Walker prior to the shooting; in the State's view, the evidence shows that after Steele spilled champagne on Anderson, Walker, Shabazz, Steele, and Johnson spent fifteen minutes planning an attack on Shannon and Anderson, culminating in the firing of the fatal shot.

In this context, it is important to understand that while the jury's verdict is entitled to deference, that deference is not absolute. As this Court noted in *State v. Haynes*, 25 Ohio St.2d 264, 270, 267 N.E.2d 787 (1971), "[c]riminal convictions cannot rest upon mere speculation; the state must establish the guilt of the accused by proof beyond a reasonable doubt." See also *State v. Miller*, 11th Dist. Lake No. 2002-L-162, 2004-Ohio-6342, ¶50 ("speculative evidence does not support conviction beyond a reasonable doubt"); *State v. Chessman*, 2d Dist. Montgomery No. 24451, 2012-Ohio-1427, ¶20 (fact that the jury could speculate that it was the defendant's intent to deprive the owner of property "does not satisfy the reasonable doubt standard").

This applies with equal force to proof of the element of prior calculation and design. *State v. Blackwell*, 10th Dist. Franklin No. 96APA03-348, 1996 Ohio App. LEXIS 3886, 1996 WL 506823 (September 3, 1996), presents a case strikingly similar to this one. There, the defendant and the victim had been engaged in drug activity. The defendant visited the victim's apartment, and remained there for fifteen minutes before the landlord heard several gunshots. The defendant ran out of the building, and the police found the victim lying face-down on the bed, with several gunshots to the back of his head.

In reversing Blackwell's conviction of aggravated murder and reducing it to murder, the panel found that "we cannot substitute mere speculation as to what *might* have occurred between

the two during the brief time involved for proof of prior calculation and design." *9-10. Rejecting the State's claim that the 15 minutes allowed for the formation of the plan to kill, the court found that "[s]uch assertions are purely conjecture and not a sufficient substitute for proof of a crucial element of the crime." *Id.*

The State claims the appellate court was remiss in failing "to consider direct testimony of the surviving victim that Walker and his group were planning to attack." According to Anderson, he believed Shabazz's group was "plotting against me and Mr. Shannon." (T.p. 693.)

But this is not "direct testimony," it is Anderson's opinion, and his testimony discloses no basis for it. After the champagne was spilled on him, he saw Steele go back and "whisper" to two other men, Shabazz and Otis Johnson (T.p. 693); this is what caused him to surmise that a plot was in the works. And that was it. There was no exchange of words, no gestures, nothing more than the whisper. The State nonetheless insists that "[a]t that point, the jury was not required to draw any inferences at all"; they were duty-bound to accept Anderson's conjecture as indisputable proof. State's Merit Brief at 25.

The State's real point here is that since there was in fact an attack, it could be inferred that Shabazz's group spent the fifteen minutes after the champagne spill planning to do so. This is inference disguised as speculation. Moreover, it is at this point that the State's theory completely unravels, for two reasons.

First, even assuming there was a plan to *attack*, the element of prior calculation and design requires the formulation of a plan to *kill*. Had Walker shot Shannon at that point, that might possibly give rise to an inference that he had spent some time planning to do so, although even that borders on conjecture. But that is not what happened. If the ensuing brawl was

intended to kill Shannon or Anderson, or both, its woeful inefficacy is best demonstrated by the fact that Anderson, despite being hit over the head with a bottle, punched in the face, and kicked while he lay on the floor, required no medical treatment, but instead called his friend Quentin Daniels to give him a ride from the bar. (T.p. 699.)

The bigger problem for the State is that the surveillance video completely eviscerates its claim that this was a "premeditated and coordinated deadly attack." State's Merit Brief at 8. The video conclusively shows it was anything but. At the precise instant that Steele hits Anderson with the champagne bottle (Video 2:11:52), Walker and Shabazz are standing some ten to fifteen feet away, ***looking in a different direction,*** about 90° from where the action is unfolding. Even then they stand and watch, not joining the fray until a full six seconds had passed.

The video incontrovertibly shows what the appellate court found: that far from being the product of planning designed to culminate in Shannon's death, this was indeed a "spontaneous eruption of events." The State is right in one respect: no inference is needed here. The video shows Shannon engaged in a melee, falling to the floor, then in a matter of seconds moving behind a pillar and shooting in the back. That was a craven act, and a criminal one, and Walker will pay a heavy price for it: his sentence for murder will be only five years shorter than the sentence initially imposed upon him. But no Ohio court has ever held that Walker's actions would be sufficient to prove prior calculation and design. This Court should not be the first to do so.

CONCLUSION

This is error correction without any error. Despite the State's caterwauling, here and in *Shabazz*, that the 8th District has gone rogue and engaged in the wholesale reversal of aggravated murder convictions on the flimsiest of pretenses, evaluation of the evidence in this case shows it did nothing of the sort here. It carefully reviewed the evidence, particularly the video surveillance tape, and came to the only possible conclusion: that the State presented no evidence which would support a finding that Walker acted with prior calculation and design. While the State maintains in its proposition of law that the appellate court did not give deference to the inferences the jury might have drawn, the State's true grievance is that the appellate court did not give deference to the State's theory of the case. That is not a basis for reversal.

For the foregoing reasons, Defendant-Appellee respectfully prays the Court to affirm the decision of the court of appeals.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee Dahjon Walker was sent by ordinary U.S. mail, postage prepaid, to Christopher Schroeder and Anna Faraglia, Attorneys for Appellant State of Ohio, 1200 Ontario Street, 9th Floor, Cleveland, OH 44113, this 6th day of June, 2016.

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