Supreme Court of Ohio Clerk of Court - Filed June 27, 2016 - Case No. 2014-0942

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

REPLY BRIEF OF APPELLANT

Counsel for Plaintiff-Appellant

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

CHRISTOPHER D. SCHROEDER (0089855)
ANNA M. FARAGLIA (0067420)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

Counsel for Defendant-Appellee

RUSSELL S. BENSING (0010602)
The IMG Center
1360 East 9th Street, Suite 600
Cleveland, OH 44114
(216) 632-9161
rbensing@ameritech.net

LEIF B. CHRISTMAN (0070014)
55 Public Square, Suite 2100
Cleveland, Ohio 44114
(216) 241-5019
lbchristman@hotmail.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has said, "[w]e will not overturn a conviction for insufficiency of the evidence unless we find that reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 2001-Ohio-132, 749 N.E.2d 226. 12 jurors in this case unanimously found that Dajhon Walker murdered 27-year old father of two Antwon Shannon with prior calculation and design. On appeal, the Eighth District's review for whether the State introduced sufficient evidence to support that conviction should have been extremely deferential to the jury's verdict. The court should have asked whether the evidence viewed in the light most favorable to the State, and drawing all reasonable inferences on the State's behalf, was sufficient to sustain a conviction.

At every turn, however, the Eighth District actually drew inferences in favor of the defendant to justify overturning that conviction. The court characterized a 6-on-1 blitz attack as a "bar fight." The court found that Walker did not choose the site of the murder because his other five cohorts pushed, pulled, punched, kicked, and dragged the surviving victim, Ivor Anderson, over to where Walker was lying in wait. The court ignored the direct testimony of the Anderson that Walker and his group planned the attack in advance. And the court did not consider at all Walker's post-crime conduct, which included fleeing the scene, celebrating the murder on camera, and then lying about it afterwards to police.

This case is one of an unprecedented series of *six* recent decisions in which the Eighth District has reversed a jury's finding of prior calculation and design. 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 precluded from drawing exculpatory inferences the defendant suggests to reverse a conviction. Rather, the court is required to draw all reasonable inferences in favor of the State. As the dissenting judge in the appeal of Walker's codefendant Derrell Shabazz said: "Simply put, the jury in this case saw it differently than the majority sees it here." *State v. Shabazz*, 8th Dist. No. 100021, 2014-Ohio-1828, ¶ 81 (Gallagher, J., dissenting). The court of appeals here distorted Ohio's standard for sufficiency of the evidence into a manifest weight review whereby the court disregarded evidence, weighed credibility, and chose that version of events it found to be the most persuasive. Under this new, expansive standard, there is little if anything that would be outside the scope of a sufficiency review.

This Court should use this case to hold (1) that in a sufficiency review, the appellate court 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, (2) that a defendant's post-crime conduct may be relevant to the existence of prior calculation and design, and (3) that an appellate court must review all of the evidence in the record in a sufficiency review, including inculpatory evidence that is not disputed by the defense.

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.

1. **Walker's act of withdrawing from the attack, hiding behind a pillar, pulling out his gun, and waiting to shoot Shannon in the back was an aggravated murder that was simply inconsistent with a spontaneous and unplanned killing.**

The most crucial evidence in this case was that Walker withdrew from the fight and hid behind the pillar, lying in wait for the victim, before firing the fatal shot. If Walker had pulled the gun out in the spur of the moment during a bar fight and fired once, Walker would have a stronger argument that the killing of Antwon Shannon was a spur-of-the-moment decision made without prior calculation and design. But he did not. Instead, Walker voluntarily withdrew from the circumstances that might have supported a jury's finding of a spontaneous killing, removed himself to a position where he had both time and opportunity to consider his actions, waited until Shannon's back was turned, and then shot Shannon at close range while Shannon was defenseless.

This and other Ohio courts have repeatedly focused on the defendant's action of withdrawing from a fight as evidence of prior calculation and design. *See State v. Robbins*, 58 Ohio St.2d 74, 79, 388 N.E.2d 755 (1979); *State v. Hogg*, 10th Dist. Franklin No. 11AP-50, 2011-Ohio-6454, ¶ 20; *State v. Norman*, 10th Dist. Franklin No. 99AP-398, 1999 Ohio App. LEXIS 6454, *25 (Dec. 23, 1999). The reason for this is that the defendant's withdrawal from the altercation indicates "a sufficient 'cooling off' period in which [the defendant] could plan [his] actions[.]" *Hogg*, ¶ 20, citing *State v. Martin*, 10th Dist. Franklin No. 11AP-50, 2001 Ohio App. LEXIS 1788, *18 (Apr. 19, 2001).

Walker had that amount of time in this case. His withdrawal from the fight represented a break in the chain of events in which the shooting of Shannon might otherwise have been construed as a continuous course of conduct that spiraled out of control; a decision made on impulse and without planning. In that case, Walker could have argued that

the shooting was one punch leading to another, leading to striking someone with a bottle, leading to a gunshot, all in the confusion and chaos of the attack. That is not what happened. Walker broke that chain when he left the fight and gave himself time to decide what he wanted to do. The events did not simply spiral out of control. Walker took control when he hid behind the pillar and pulled out a gun, waiting for his chance to strike as soon as Shannon's back was turned.

In his brief, Walker proposes that the dividing line should be that in those cases, the defendant retrieved a weapon from wherever he withdrew to, whereas in this case Walker already had the weapon hidden in his waistband. Appellee's Brief, p. 7. This distinction misses the import of that case law. The key to those cases is that the defendant's withdrawal from the fight to obtain the weapon indicated that the defendant had decided – at the time he withdrew from the altercation – to kill the victim, and then took affirmative steps to bring about that result. The defendant then had to maintain that intent throughout whatever intervening period of time elapsed between the withdrawal and the murder.

Similarly, Walker still had to remove the gun from his waistband, and walked away from the attack to behind the pillar to do so. Hiding behind the pillar allowed Walker to wait for a clear shot at either Shannon or Anderson without being at risk of becoming involved in the fight himself. If Walker had in fact decided to kill Shannon only on the spur of the moment, logic dictates that he would have simply pulled out his gun and shot him at any point during the attack. Shannon was an unarmed peacekeeper and Walker could not have felt threatened by him. Instead, Walker withdrew from the fight, moved to a better vantage point, and then fired at Shannon's back when he had an opportunity to do so. The only reason

for Walker to move behind the pillar was to lie in wait for a clean shot. That indicates a previously-conceived plan to kill and steps taken to successfully execute that plan.

2. Walker has consistently argued that he did not have a gun at the time he entered the nightclub.

In his brief, Walker argues that he did not chose the murder weapon because "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.)" Appellee's Brief, p. 5. Walker thus appears to be arguing that he was carrying the weapon at the time he entered the club, and therefore the fact that he had it is not relevant to show that he acted with prior calculation and design in killing Shannon.

This is a new argument that is inconsistent with Walker's prior position in this case. Walker argued at both trial and in the court of appeals that he did not have a gun when he entered the nightclub, as evidenced by the fact that security patted him down on entry. See Tr. 1205 ("we know from that video that there was a patdown, and apparently there was no weapons found so up to this point there is no evidence of any weapons, and I'll put patdown under the NG column"); Appellant's Brief, State v. Dajhon Walker, CA-99998, p. 10 ("Walker was patted down upon entry into the club, and did not have a firearm in his possession. No firearm was ever recovered"). If the jury accepted that argument, it meant that Walker must have armed himself at some point while inside the club. This would be even more indicative of prior calculation and design, not less.

3. The court of appeals should have considered Walker's post-crime conduct as relevant in a sufficiency review.

Several Ohio appellate courts have recognized that a defendant's post-crime conduct may be relevant to the existence of prior calculation and design; this Court has not as of yet

and should do so in this case. The evidence showed that Walker fled the scene immediately after the shooting as he was patted on the chest and back by his codefendant Derrell Shabazz. He ran outside the club where Camera 6 captured him jumping into the air and pumping his fists in a celebratory gesture. And he lied to police in a statement after the shooting in which he claimed that he could not remember who he was even at the club with that night.

It is an easy inference to draw that where a defendant celebrates a killing immediately after it happens, and then lies about it in the aftermath, that celebration and attempt to conceal his role in the murder is evidence that the killing was the culmination of a preconceived plan and conscious desire to kill. The Eighth District itself recently recognized that post-crime celebratory gestures were relevant evidence of a defendant's intent to use deadly force. "Further, we are unable to ignore Porter's conduct immediately after the shooting, which was described as 'celebratory' and included him following [the victim's] vehicle as it pulled away from the scene and his subsequent acts of 'high-fiving' Chino and 'fist-bumping' Jeff." *State v. Porter*, 8th Dist. Cuyahoga No. 102257, 2016-Ohio-1115, ¶ 32.

Walker argues that "[t]here is no * * * logical connection between" Walker's post-crime conduct and prior calculation and design, but offers no explanation as to why this is so. Appellee's Brief, p. 8. "The totality of the circumstances test in Jenkins makes the appellant's conduct both before and after the assault pertinent to the element of prior calculation and design." *State v. Allen*, 1st Dist. Hamilton No. C-930159, C-930160, 1994 Ohio App. LEXIS 2239, *8 (May 25, 1994). If the killing itself was the product of a previously-formed plan, the jury may infer that the defendant's behavior after the killing was part of that same plan. And the act of celebrating the murder was essentially an admission by

Walker that he planned the killing. Little more than a confession or detailed notetaking could be considered better evidence than celebrating the murder on camera.

4. The act of shooting an unarmed and defenseless victim in the back after beating him with bottles is itself evidence of prior calculation and design.

This Court has previously recognized that "the firing of shots into a victim's head at close range was crucial evidence on the basis of which we affirmed jury findings of prior calculation and design." *State v. Campbell*, 90 Ohio St.3d 320, 330, 738 N.E.2d 1178 (2000). In *State v. Palmer*, 80 Ohio St.3d 543, 568-569, 687 N.E.2d 685 (1997), this Court found prior calculation and design to be present where the defendant killed two strangers in a road rage incident after exiting his vehicle with a revolver that he only needed time to cock before it would fire. And in *State v. Goodwin*, 84 Ohio St.3d 331, 344, 703 N.E.2d 1251 (1999), this Court found prior calculation and design where the defendant robbed a store, put a gun to the head of one of the clerks, and pulled the trigger. "It was an action that required thought on his part to place the gun at the victim's forehead, and he took additional time to decide to pull the trigger in order to carry out a calculated plan to obtain money from the store. This was not a spur-of-the-moment accidental shooting on the part of a robber." *Id.* at 344.

This Court does not even have to go that far in this case. The defendants in *Goodwin* and *Palmer* did not participate in a 6-on-1 attack on the victim involving several deadly weapons that lasted over a period of several minutes. They simply pointed their guns at the victims and fired. If that is sufficient to constitute prior calculation and design, then surely shooting an unarmed and defenseless victim in the back after beating him with champagne bottles and then withdrawing from the attack so that Walker could pull out his gun, wait for a chance to shoot, and fire into the victim's back is sufficient as well.

<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.

1. **There is not set amount of time required to establish the existence of prior calculation and design.**

Walker asks this Court to distinguish between minutes and seconds in prior calculation and design cases. A "few minutes," Walker says, are sufficient, but "twenty-two seconds" are not. Appellee's Brief, p. 6. This is arbitrary and this Court has previously rejected this argument. "No definitive period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill." *State v. Pierce*, 64 Ohio St.2d 281, 287, 414 N.E.2d 1038 (1980). It is not the amount of time that passes; it is what the defendant does in that time.

2. **The Eighth District failed to consider the direct testimony of the surviving victim that he believed Walker and his group were planning an attack.**

The surviving victim in this case testified that he believed, based on his eyewitness observations of Walker and his group, that Walker'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. On the basis of that testimony alone, the court of appeals could have – and should have – affirmed the jury's finding of prior calculation and design in this case. The surviving victim and eyewitness testified that Walker and his group were planning to attack him when his back was turned, and Walker never disputed that testimony. This is some of the most relevant evidence in this case because it removes the subject matter of the discussion Walker's group had (that of attacking Anderson) from

inference and places it firmly within the category of direct evidence. And it is testimony that the appellate court utterly failed to consider in its opinion.

3. Walker, and the court of appeals' opinion in this case, misstate the test for sufficiency of the evidence.

In his brief, Walker mischaracterizes the State's position as being that the *jury* was "duty-bound to accept Anderson's conjecture as indisputable proof." Appellee's Brief, p. 11. The jury was not required to accept anything as true. "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. But an appellate court sitting in a sufficiency review is not as free as the jury, and is required to view the evidence in the light most favorable to the State.

Where there is any dispute as to the interpretation of evidence – as there is now for the first time regarding Anderson's testimony – the appellate court is required to adopt the "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). An appellate court considering a sufficiency challenge does not ask whether a witness' testimony should be believed, but rather, "*if believed*, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus (emphasis added).

Although it was not required to do so, the jury in this case chose to believe Anderson's testimony. The jury was certainly not duty-bound to accept the State's version; but that also is not the question in a sufficiency review. A Crim.R. 29(A) motion for acquittal should only 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." *State v. Byerly*, 11th Dist. Portage

97-P-0034, 1998 WL 637689, *2 (Aug. 21, 1998). "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

Walker's brief thus inverts the test for a sufficiency review. It is reminiscent of this Court's former requirement that the State prove any circumstantial evidence is "irreconcilable with any reasonable theory of the accused's innocence in order to support a finding of guilt." *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897, at syllabus (1974). But that requirement no longer exists. To prevail in a sufficiency review, it was Walker's burden on appeal to show that the jury was obligated to reject Anderson's testimony, not the State's burden to show that the jury was obligated to accept it. The fact that Walker makes this argument demonstrates the continuing confusion in Ohio, and particularly in the Eighth District, as to the correct application of the test for sufficiency of the evidence. This Court should adopt the language of *Byerly* in its opinion to prevent such confusion in the future.

It was not enough on appeal for Walker to argue that Anderson's testimony was merely his "opinion" or that there was "no basis for it." Appellee's Brief, p. 11. These arguments could be brought in a manifest weight challenge in which the appellate court would consider and review the credibility of witnesses. But "[t]his contention calls for an evaluation of the witness' credibility, which is not proper on review of evidentiary sufficiency." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 135.

4. Walker's attempt to label the State's evidence as speculative ignores the role that circumstantial evidence may play in a valid conviction.

Walker's primary response to all of this in his brief is to label the State's evidence as "speculative." A defendant, or a court of appeals, however, cannot evade the limitations this

Court has placed on a sufficiency review and disregard the State's evidence by simply labeling that evidence as speculative. Ivor Anderson's testimony was not speculative. The video showing Walker and five other people launch a coordinate assault on Anderson and Shannon was not speculative. The fact that Walker focused on Shannon immediately after the blitz attack began and only made aggressive moves towards Shannon at any point, while ignoring Anderson, was not speculative. The video of Walker celebrating the murder out in the street as he left the club was not speculative.

Much like the overwhelming majority of defendants who commit aggravated murder, the defendant in this case did not confess, nor did police located detailed written plans for committing the murder afterwards. The State instead built at trial a meticulous and complex case for prior calculation and design based on the totality of the evidence in this case. The fact that some of that evidence was circumstantial does not in any way diminish its impact or somehow render it incapable of surviving a sufficiency analysis. "[C]ircumstantial evidence alone can be used to sustain an aggravated murder conviction. As the Ohio Supreme Court has acknowledged, "* * * circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence." *State v. Tinch*, 84 Ohio App.3d 111, 122-123, 616 N.E.2d 529 (12th Dist.1992), quoting *State v. Jackson*, 57 Ohio St.3d 29, 38, 565 N.E.2d 549 (1991).

In his brief, Walker attempts to blur the lines between circumstantial evidence and speculation. The fact that the State's case rests in part of circumstantial evidence or inference does not render that case subject to being dismissed as "speculative":

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute

> by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Lavender v. Kurn, 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946). This case does not involve a "complete absence of probative facts to support the conclusion" that the jury reached. *Id.* The State's case rested on the testimony of an eyewitness and surviving victim, surveillance video, and Walker's own actions before, during, and after the murder.

This is not a case in which the murderer and the victim disappeared into an apartment, shots rang out, and the defendant left, leaving only a gap in the middle as to what happened. *See State v. Blackwell*, 10th Dist. Franklin No. 96APA03-348, 1996 Ohio App. LEXIS 3886 (Sep. 3, 1996). The murder in this case was captured on camera. The jury saw Walker attack Shannon and then withdraw from the fight. They saw him hide behind the pillar. They saw the gunshot as soon as Shannon turned his back. They saw Walker stuffing the gun into his waistband as he ran out from behind the pillar and fled the club. It is true that the State's theory of the case required the jury to choose what it believed to be the most reasonable inference and thereby reject the defense's exculpatory inferences. The jury was permitted to make that choice; the court of appeals was not in a sufficiency review.

5. The court of appeals failed to consider Anderson's testimony in its sufficiency review because Walker simply never disputed that testimony.

Not only are Walker's last-minute attempts to chisel at the credibility of Anderson's eyewitness testimony beyond the scope of a sufficiency review, but he is also making them for the first time in this Court. Walker did not contest Anderson's testimony either at trial or

at the court of appeals. The only cross-examination of Anderson seemed intended to reinforce his testimony – that Anderson was "watching the individual that spilled champagne" on him, that this individual "was a concern of yours[,]" that Anderson was "trying to make sure where he was and who he was with," that Anderson was "trying to keep track of him," and that Anderson "did a pretty good job of" keeping track of him. Tr. 732-733. And Walker's only reference to Anderson's testimony in his brief in the court of appeals was a single sentence in his statement of facts: "Anderson believed they were conspiring against him." Appellant's Brief, State v. Dajhon Walker, CA-99998, p. 2.

Even if Walker had disputed Anderson's testimony at trial, the standard of review in a sufficiency claim still would have required the court of appeals to accept that testimony as true. And Walker did not even do so. This should have meant that the court of appeals considered Anderson's testimony as directly relevant to the existence of prior calculation and design under the light most favorable to the State. Instead, because Walker ignored the testimony, the court of appeals did too. This failed this Court's holding that in a sufficiency review, "[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).

CONCLUSION

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,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney

/S/ Christopher Schroeder

CHRISTOPHER D. SCHROEDER (0089855)
ANNA M. FARAGLIA (0067420)
Assistant Prosecuting Attorneys
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was served by email this 27th day of June, 2016 to Russell S. Bensing (rbensing@ameritech.net) and Lief B. Christman (lbchristman@hotmail.com), counsel for Defendant-Appellee Dajhon Walker.

/S/ Christopher Schroeder
Christopher D. Schroeder (0089855)
Assistant Prosecuting Attorney