

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

May 13, 2024

[Cite as *05/13/2024 Case Announcements #2, 2024-Ohio-1815.*]

APPEALS NOT ACCEPTED FOR REVIEW

2024-0213. State v. Shepard.

Cuyahoga App. No. 112225, [2023-Ohio-4791](#).

Donnelly, J., dissents, with an opinion joined by Brunner, J.
Stewart, J., dissents.

DONNELLY, J., dissenting.

{¶ 1} A majority of this court has declined to accept jurisdiction over this case. I consider this case a matter of public or great general interest and vote to accept jurisdiction.¹

{¶ 2} It is beyond debate that murderers, who commit the most heinous form of criminal conduct, should be held fully accountable for the offenses they commit, whether they are the killer or an accomplice. But they may be held accountable only when their guilt has been established beyond a reasonable doubt. To that end, at least three safeguards are built into our criminal-justice system to ensure that only the guilty are punished.

{¶ 3} The first safeguard is Crim.R. 29, which provides that “after the evidence on either side is closed, [the court] shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment * * * if the evidence is insufficient to sustain a conviction of such offense or offenses.” This means that a trial court must ensure that the state’s evidence “is legally sufficient as a matter of law to support the jury verdict,” *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). The evidence is legally sufficient to support a criminal conviction

1. Because we do not have the record in the case before us, references to the facts in this opinion are pulled from the court of appeals’ opinion, *State v. Shepard*, 8th Dist. Cuyahoga No. 112225, 2023-Ohio-4791.

if “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 *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in Smith* at 102, fn. 4, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 4} “A light most favorable” is a term of art that is susceptible to conjecture and speculation to illuminate the darkness of unknown and unknowable facts, and applying it can therefore transmogrify otherwise innocuous comments and behavior into incriminating evidence. *See State v. McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 90 (Donnelly, J., dissenting) (a figurative searchlight was employed to convert “innuendo, speculation, and conjecture” into evidence). Basically, the criminal-justice system may fail when the trier of fact fills in gaps with guesswork. I am concerned that that may have happened in this case.

{¶ 5} The next and most important safeguard is the jury. Convincing 12 jurors beyond a reasonable doubt that a particular person committed a crime or that a crime was even committed is a heavy burden. Even so, juries are not infallible, especially in cases involving the intentional taking of another’s life.

{¶ 6} The third safeguard is the appellate process, which functions primarily through the courts of appeals, though that process is often constrained by the relevant standards of review and whether and to what extent the record is available. Moreover, there exists an inherent pressure to not second-guess the decision of the jury.

{¶ 7} In this case, the defendant—appellant, Robert Shepard—was sentenced to life in prison on circumstantial evidence based principally on two sets of facts. The first set of facts is that Shepard was riding a dirt bike owned by the murder victim—who was shot to death—and that Shepard was seen riding that bike near the car that was linked to the murder and left the bike near the location where the victim was shot. Viewing these facts in a light most favorable to the prosecution, it is possible to conclude that Shepard was intentionally acting in concert with the unknown shooter by riding the bike to lure the victim to the location of the shooting. But while possible, there is no direct evidence that this is what happened; there is no testimony about what, if anything, was said by Shepard or the car’s occupants when the car and the bike were close to each other. Although possible, has this conclusion been established by the facts beyond a reasonable doubt?

{¶ 8} The second set of facts that sealed Shepard's fate is that he had received phone calls from and had placed calls to another person who has never been identified. Again, it is possible that those unrecorded, unsubstantiated calls were part of a plan to lure the victim to the location of the shooting. And again, while possible, there is no direct evidence and there was no testimony about what was said, if anything, during the calls. Again, while possible, have these facts been established to prove guilt beyond a reasonable doubt?

{¶ 9} Ordinarily the three safeguards described above are sufficient to ensure that only the guilty are punished. I do not allege that Shepard is innocent, and I have no basis on which to reach that conclusion. Nevertheless, I am concerned that speculation in this case has been mistaken for circumstantial evidence and that Shepard has received a life sentence based solely on that speculation.

{¶ 10} Also, nothing in the court of appeals' opinion suggests that it considered Shepard's mens rea, which must be proved beyond a reasonable doubt. *See* R.C. 2903.01(A).

{¶ 11} I consider a defendant's being sentenced to life in prison based solely on circumstantial evidence a matter of public or great general interest, especially when the evidence does show that he was not the killer and was not present during the killing, and when the identity of the killer is unknown. I would accept jurisdiction to consider whether Shepard has been unjustly convicted. I dissent.

BRUNNER, J., concurs in the foregoing opinion.
