STATE OF LOUISIANA

VERSUS

IRVIN HARRIS

NO. 15-KA-485

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 13-4308, DIVISION "B"
HONORABLE CORNELIUS E. REGAN, JUDGE PRESIDING

APRIL 13, 2016

ROBERT A. CHAISSON
JUDGE

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Robert A. Chaisson

JOHNSON, J., DISSENTS IN PART WITH REASONS

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Twenty-Fourth Judicial District
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AFFIRMED IN PART;
REVERSED IN PART

RAC

Defendant, Irvin Harris, appeals his convictions of second degree murder, illegal possession of a stolen firearm, and conspiracy to commit obstruction of justice. He challenges the sufficiency of the evidence used to convict him, as well as the admissibility of a recorded jailhouse telephone call in which he was a participant. For the reasons that follow, we affirm his convictions and sentences for second degree murder and illegal possession of a stolen firearm; however, we find that the State failed to produce sufficient evidence at trial to sustain defendant's conviction for conspiracy to commit obstruction of justice, and accordingly, we reverse his conviction and vacate his sentence on that count.

PROCEDURAL HISTORY

On February 20, 2014, the Jefferson Parish Grand Jury returned an indictment charging defendant with two counts of second degree murder, in violation of La. R.S. 14:30.1 (counts one and two); one count of illegal possession of a stolen firearm, in violation of La. R.S. 14:69.1 (count three); and one count of

conspiracy to commit obstruction of justice, in violation of La. R.S. 14:26 and 14:130.1 (count five).[1] At his arraignment, defendant pled not guilty.

Trial commenced before a twelve-person jury on December 9, 2014. After considering the evidence presented, the jury, on December 11, 2014, found defendant guilty as charged on all counts. Defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal, which were denied on January 12, 2015. Thereafter, on January 16, 2015, the trial court sentenced defendant to the following: life imprisonment without benefit of probation, parole, or suspension of sentence on counts one and two; five years at hard labor on count three; and twenty years at hard labor on count five, to be served concurrently. Defendant now appeals.

FACTS

This case stems from shootings that occurred shortly before midnight on August 13, 2013, in the 4000 block of Paige Janette Drive in the Woodmere Subdivision in Harvey, Louisiana. When the officers arrived on the scene, they observed two victims, Nikiayh Westerfield and Dave Harrison, in a Chevy Blazer that had been parked in the back section of the high crime neighborhood. Mr. Westerfield was in the driver's seat, and Mr. Harrison was in the passenger backseat, and they both had apparently suffered fatal gunshot wounds. Subsequent autopsies confirmed that the two men died from multiple gunshot wounds.

Detective Gary Barteet, the lead investigator, as well as other officers from the Jefferson Parish Sheriff's Office, surveyed the scene and recovered ballistics material, one black and red Nike sandal, and a cellular phone, which was subsequently determined to belong to defendant, from outside the vehicle. The

[1] In the indictment, the State also charged Jerremy Coleman with two counts of second degree murder, which were later amended to manslaughter, and one count of illegal possession of a stolen firearm. Tavis Joseph was charged with two counts of second degree murder, and Edward Harris and Kanetra Whyte were charged with conspiracy to commit obstruction of justice.

officers also obtained evidence from inside the vehicle, including ballistics material, two guns (a Kimber .40 caliber semiautomatic firearm and a Colt .38 caliber revolver), and three cell phones. In addition, the officers found a clear bag containing marijuana in Mr. Westerfield's hand and a wooden rosary in his lap. Further, Detective Barteet observed a blood transfer on the front passenger seat that suggested another person was in the vehicle.

Shortly after his arrival on the scene, Detective Barteet was alerted that a shooting victim had been brought to West Jefferson Hospital. Detective Tommy Gai of the Jefferson Parish Sheriff's Office proceeded to the hospital to interview the victim, Jerremy Coleman, and to determine whether there was any connection to the Woodmere shootings. Mr. Coleman told the officer that he was in the "Haydel August area" of Jefferson Parish with some friends, and an unknown individual shot him. In an effort to verify Mr. Coleman's statement, several officers canvassed the area and checked the shot spotter system,[2] but they found no indication that a shooting had occurred in the location specified by Mr. Coleman. As part of their investigation, police obtained and reviewed the surveillance video from West Jefferson Hospital, which showed Mr. Coleman's arrival at the emergency room in a black SUV. The video also showed two other individuals, later identified as defendant and Tavis Joseph, bringing him into the emergency room. Based on the time stamp in the surveillance video, Detective Barteet determined that they arrived at the hospital roughly eight minutes after the call was first broadcast relating to the homicides, which was an appropriate time frame for driving the distance between the Woodmere shootings and the hospital.

Thereafter, on August 15, 2013, officers stopped a GMC SUV, which had been flagged as a vehicle of interest in the investigation, and detained defendant,

[2] Detective Gai explained that the shot spotter system "is a system that is able to listen to specific sounds of gunfire. It is also able to triangulate the specific location of gunfire in a specific area."

the driver of the vehicle. Sergeant Jeff Rodrigue, a supervisor in the homicide section, arrived on the scene of the stop and observed, through the open doors of the SUV, an "obvious blood transfer" and a Nike slipper that was halfway underneath the carpet and was consistent with or nearly identical to the shoe found on the scene of the Woodmere shootings. Pursuant to the officer's request, defendant agreed to go back to the detective's bureau for an interview.

Once at the bureau, Sergeant Rodrigue advised defendant of his *Miranda*[3] rights and then questioned defendant about his whereabouts on the night of August 13, 2013.[4] According to Sergeant Rodrigue, defendant admitted that he was with Mr. Coleman in the black GMC SUV in the Woodmere Subdivision that night; however, defendant claimed that at some point, Mr. Coleman dropped him off at his girlfriend's house in Marrero and left. Defendant told Sergeant Rodrigue that Mr. Coleman's vehicle returned a short time later with Tavis Joseph, who informed him that Mr. Coleman had been shot. Defendant then got into the car to go drop Mr. Coleman off at the hospital. When Sergeant Rodrigue questioned defendant about his cell phone being on the murder scene, defendant first explained that he lost his phone that night and then said he must have left it with Mr. Coleman in the SUV. At that point, Sergeant Rodrigue left the interview room to take a phone call from Detective Barteet. As Sergeant Rodrigue walked into his office, defendant ran down the hallway and fled the building through the back door, leaving behind the cell phone that he had in his possession that night. The officers later discovered that the cell phone belonged to Mr. Coleman.

On the following day, defendant was located and arrested pursuant to a warrant. Subsequent to his arrest, defendant agreed to give a verbal statement to Detective Barteet. Prior to this statement, defendant was advised of his rights and

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[4] The statement that defendant provided to Sergeant Rodrigue was not recorded.

indicated that he understood and wished to waive those rights. During his conversation with Detective Barteet, defendant acknowledged that on the night of the shootings, he was with Mr. Coleman in Mr. Coleman's vehicle. However, when Mr. Coleman decided to go purchase some marijuana, defendant had Mr. Coleman drop him off at his girlfriend's residence on Rue Racine in Marrero. Defendant claimed that he left his phone in Mr. Coleman's vehicle to secure uninterrupted time with Kierra Jacks, his girlfriend. According to defendant, he learned a short time later that Mr. Coleman had been shot, and he then traveled with Mr. Joseph to the area discovering Mr. Coleman behind the wheel of his vehicle. Defendant also indicated that Mr. Coleman was operating the vehicle, which based on Detective Barteet's knowledge of Mr. Coleman's condition from being shot, was physically impossible. Detective Barteet thereafter interviewed Ms. Jacks to verify defendant's alibi. However, neither she nor any other person indicated that defendant was at her house on the night of the shootings.

In the present case, there were no eyewitnesses to the shootings. As a result, law enforcement officers relied on the information obtained from the recovered cell phones and the analysis of the physical evidence to assist in their investigation of the case. Based on the information obtained from the relevant phone calls and text messages from the recovered phones, Detective Barteet determined that Mr. Coleman planned to purchase some marijuana from Mr. Westerfield and that the parties corresponded about a price and a meeting place. Further, the text messages and phone calls between Mr. Westerfield and Mr. Coleman established that they were communicating in the half hour or so leading up to the shooting. In addition to phone calls and text messages, photographs and videos were recovered from the phones. Some of the photographs depicted Mr. Coleman wearing a rosary that appears to be the same rosary that was found in the car on one of the victims.

Additionally, there were pictures and videos that depicted defendant armed with a Glock and Mr. Coleman armed with a Kimber. Particularly, one photograph[5] from defendant's phone is of a Glock with the serial number HSB144; the gun is on the lap of someone wearing white pants, which was consistent with what defendant was wearing in other pictures. With regard to this particular Glock, Troy Savage testified he owned a Glock model 27, bearing serial number HSB144, which was stolen from his vehicle sometime between May 14 and 17, 2013.

Colonel Tim Scanlan, the laboratory services commander for the Jefferson Parish Sheriff's Office, participated in the processing of the vehicle the victims were found in and also conducted an examination of the ballistics evidence, including the two firearms recovered from the scene. According to Colonel Scanlan, although only the Kimber firearm and the Colt revolver were recovered from the scene, there were a total of five weapons involved in the shooting, and at least four were used. Based on the physical evidence recovered from both inside and outside of the vehicle, and the evidence recovered from the bodies of the victims, Colonel Scanlan was able to reach certain conclusions regarding how the shootings occurred. He maintained that two shots were fired into the vehicle while the front passenger door was open and noted that the casings found in the car were consistent with someone leaning in an open passenger door and firing a weapon. A transfer pattern of blood was found on the front passenger seat indicating some blood being wiped onto a surface.

Colonel Scanlan further testified that the Colt revolver recovered from the scene had two spent, fired cartridge casings in it with four empty chambers. With regard to the Kimber, he explained that this weapon tended to jam; he was able to determine that during the shootings, two rounds were fired, but the second one

[5] Through the examination and analysis of the cell phone, it was determined that this photograph was taken between July 22 and July 23, 2013.

jammed, thus making the weapon useless at that point. In addition to these two recovered weapons, Colonel Scanlan also determined that two 9 mm caliber weapons and one .40 caliber Glock were used in the crimes. According to Colonel Scanlan, the .40 caliber casings recovered outside the vehicle were linked to the stolen Glock based on his comparison to the test fire cartridges contained in the original gun box possessed by Mr. Savage.

Further, Colonel Scanlan testified that a review of the grouping of casings found at the scene indicated a "focused area of fire" from the rear towards the front driver's side, which was consistent with a stationary vehicle and a slightly mobile perpetrator. Additionally, Colonel Scanlan stated that the 9 mm casings recovered from inside the car were consistent with somebody going to the passenger side, reaching in, and firing two shots at one or both of the occupants of the vehicle, in a possible attempt to help an injured perpetrator get out the car. He also determined that at least one .40 caliber round consistent with being fired from a Glock was found in Mr. Westerfield's body. Colonel Scanlan expressed his opinion that the physical evidence in this case "is consistent with a typical contact cover type crime, where you have one person engaging face to face ... and then you have the people who are the cover." Colonel Scanlan added that shots were fired into the car from the contact person and the cover people, and that the scenario presented by the evidence is consistent with "the typical drug rip off," where someone shows up to buy drugs, but instead steals them.

In addition, David Cox, a forensic DNA analyst with the Jefferson Parish Sheriff's Office DNA Lab, examined various pieces of evidence in connection with the homicide investigation. In his analysis, Mr. Cox determined that a swab taken from the Kimber .40 caliber pistol and a swab of blood taken from the front

passenger seat of the Chevy Blazer contained DNA that was consistent with the profile from the reference sample of Mr. Coleman.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assigned error, defendant challenges the sufficiency of the evidence used to convict him of all four counts. In reviewing the sufficiency of evidence, an appellate court must determine that the evidence, whether direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Neal*, 00-674 (La. 6/29/01), 796 So.2d 649, 657, *cert. denied*, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002).

When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." The reviewing court is not required to determine whether another possible hypothesis of innocence suggested by the defendant offers an exculpatory explanation of events. Rather, the reviewing court must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational trier of fact could not have found proof of guilt beyond a reasonable doubt. *State v. Baham*, 14-653 (La. App. 5 Cir. 3/11/15), 169 So.3d 558, 566.

Second Degree Murder Convictions (Counts One and Two)

Second degree murder is defined in La. R.S. 14:30.1 as the killing of a human being when the offender 1) has specific intent to kill or to inflict great bodily harm; or 2) is engaged in the perpetration or attempted perpetration of one of several enumerated felonies, even though he has no intent to kill or to inflict

great bodily harm. *See State v. Lewis*, 05-170 (La. App. 5 Cir. 11/29/05), 917 So.2d 583, 589-90, *writ denied*, 06-757 (La. 12/15/06), 944 So.2d 1277. Encompassed within proving the elements of an offense is the necessity of proving the identity of the defendant as the perpetrator. Where the key issue is identification, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. *State v. Nelson*, 14-252 (La. App. 5 Cir. 3/11/15), 169 So.3d 493, 500, *writ denied*, 15-685 (La. 2/26/16), __ So.3d __.

In challenging the sufficiency of the evidence used to convict him of the two counts of second degree murder, defendant does not contest the sufficiency of the essential statutory elements of the offense; rather, he challenges his identity as the perpetrator. Defendant argues that the State was not able to exclude the hypothesis that he merely came upon the scene to bring Mr. Coleman to the hospital or that the shooter could have been wielding two firearms. Further, defendant contends that the State's attempt to disprove his alibi based on linking different pieces of evidence was insufficient to support his convictions for second degree murder. We find no merit to these arguments.

In the present case, there were no eyewitnesses to the shootings; however, the evidence produced by the State at trial clearly established defendant's identity as one of the perpetrators. Colonel Scanlan testified at trial that based on his examination of the evidence, five guns were involved, and four were used in the shootings. Further, his testimony suggested that more than one person was involved in the crime. Colonel Scanlan maintained that shots were fired from both the contact person and the cover people. Defendant's cell phone was found outside the vehicle at the scene of the shootings. A subsequent examination of defendant's cell phone revealed pictures of defendant armed with a Glock. In addition, pictures

recovered showed Mr. Coleman armed with a Kimber. One photograph in particular found on defendant's cell phone displayed a Glock with the serial number HSB144, which was stolen from Mr. Savage in May of 2013. The .40 caliber casings recovered outside the vehicle were linked to the stolen Glock based on a comparison to the test fire cartridges contained in the original gun box possessed by Mr. Savage. In addition, at least one .40 caliber round consistent with being fired from a Glock was found in Mr. Westerfield's body.

Moreover, defendant acknowledged being with Mr. Coleman both before and after the shootings, and Mr. Coleman was linked to the crime scene through DNA analysis. Mr. Cox, a DNA analyst, testified that a swab taken from the Kimber .40 caliber pistol and a swab of the blood taken from the front passenger seat of the Chevy Blazer contained DNA that was consistent with the profile from the reference sample of Mr. Coleman. Further, a single black and red Nike sandal was found outside the vehicle at the crime scene. This shoe matched the shoe found in defendant's vehicle at the time he was stopped by police. Also, the surveillance video from the hospital shows defendant arriving shortly after the time of the murders with the injured Mr. Coleman.

At trial, the State additionally presented evidence that disproved defendant's alibi that he was at his girlfriend's house and merely came upon the scene to bring his friend to the hospital. In particular, Detective Barteet testified that he interviewed defendant's girlfriend, and neither she nor any other person indicated that defendant was at her house on the night of the shootings. The State also produced testimony that defendant fled from the detective's bureau after being questioned about his involvement in the shootings. Evidence of flight, concealment, and attempt to avoid apprehension is relevant and admissible to prove consciousness of guilt from which the trier of fact may infer guilt. *State v.*

Lang, 13-21 (La. App. 5 Cir. 10/9/13), 128 So.3d 330, 336, *writ denied*, 13-2614 (La. 5/2/14), 138 So.3d 1244. Lastly, in the conversation recorded between defendant and his parents, they discussed the problem that defendant's phone was found at the crime scene and contemplated what they should do about it.

Given this abundance of circumstantial evidence, we find that the State proved beyond a reasonable doubt defendant's identity as the perpetrator. Although defendant's sufficiency argument is focused on the State's failure to prove his identity as the perpetrator, we nonetheless note that the State also proved that defendant had the specific intent to kill or inflict great bodily harm, which is a required element under the first definition of second degree murder set forth in La. R.S. 14:30.1(A)(1).

Specific criminal intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). The determination of specific intent is a question of fact. Specific intent may be inferred from the circumstances and from the defendant's actions, and the intent to kill or to inflict great bodily harm may be inferred from the extent and severity of the victim's injuries. *State v. Durand*, 07-4 (La. App. 5 Cir. 6/26/07), 963 So.2d 1028, 1034, *writ denied*, 07-1545 (La. 1/25/08), 973 So.2d 753. Further, a specific intent to kill may be inferred from the intentional use of a deadly weapon such as a knife or gun. *State v. Cochran*, 09-85 (La. App. 5 Cir. 6/23/09), 19 So.3d 497, 508, *writ denied*, 09-1742 (La. 3/26/10), 29 So.3d 1249. The act of aiming a lethal weapon and discharging it in the direction of the victim supports a finding by the trier of fact that the defendant acted with specific intent to kill. *State v. Gonzalez*, 07-449 (La. App. 5 Cir. 12/27/07), 975 So.2d 3, 8, *writ denied*, 08-228 (La. 9/19/08), 992 So.2d 949.

Given the evidence produced at trial, we find that the jury could have reasonably inferred that defendant had the specific intent to kill or inflict great bodily harm. The State presented evidence that the victims died from multiple gunshot wounds. Specifically, Dr. Dana Troxclair, a forensic pathologist who performed the autopsy on Dave Harrison, testified that he sustained four gunshot wounds, and Dr. Susan Garcia, a forensic pathologist who performed the autopsy on Nikiayh Westerfield, testified that he sustained nine identifiable wounds. In addition, the State presented evidence that the vehicle the victims were found in sustained substantial damage from gunfire, and ballistics material was recovered at the scene from both inside and outside the vehicle. Further, Colonel Scanlan testified that based on his analysis of the evidence, five weapons were involved, and four had been used in the shootings. He further expressed his belief, based on the evidence analyzed, that the shooters approached the vehicle in a calculated manner and targeted the victims. Thus, the State presented sufficient evidence to prove the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm.[6] *See State v. Fields*, 08-1223 (La. App. 4 Cir. 4/15/09), 10 So.3d 350, 355, *writ denied*, 09-1149 (La. 1/29/10), 25 So.3d 829 (where the appellate court noted that firing a gun into an automobile occupied by two people is sufficient evidence of the intention to kill one or more of the occupants of the vehicle).

Accordingly, based on the foregoing, we find that a rational trier of fact could have found that the evidence, although circumstantial, was sufficient under the *Jackson* standard to support defendant's second degree murder convictions.

[6] According to the jury instructions, the State prosecuted this case under both definitions of second degree murder: specific intent murder and murder while committing or attempting to commit armed robbery. Since we have found the evidence sufficient to establish specific intent murder, we find it unnecessary to address the sufficiency of the evidence under the felony murder definition.

Possession of a Stolen Firearm Conviction (Count Three)

Defendant further challenges the sufficiency of the evidence used to convict him of illegal possession of a stolen firearm. At the time of the commission of the crime, La. R.S. 14:69.1(A) defined illegal possession of a stolen firearm as "the intentional possessing, procuring, receiving, or concealing of a firearm which has been the subject of any robbery or theft under circumstances which indicate that the offender knew or should have known that the firearm was the subject of a robbery or theft." Therefore, based on this statutory provision, the State had to prove that defendant intentionally possessed a firearm, that the firearm was the subject of a robbery or theft, and that he knew or should have known the firearm was the subject of a robbery or theft. *State v. Johnson*, 09-862 (La. App. 3 Cir. 2/3/10), 28 So.3d 1263, 1270.

In Louisiana, mere possession of stolen property does not create a presumption that the person possessing the property received it with knowledge that it was stolen. Therefore, the State must prove defendant's guilty knowledge as it must prove every other essential element of the offense. Jurors may infer this guilty knowledge from the circumstances of the offense. The inference of guilty knowledge arising from the possession of stolen property is generally a much stronger one than the inference the possessor committed the theft. *State v. Chester*, 97-1001 (La. 12/19/97), 707 So.2d 973, 974.

With regard to his conviction for illegal possession of a stolen firearm, defendant asserts that the pictures from his cell phone introduced by the State failed to prove that he possessed the stolen firearm, and he further contends that the State provided no evidence that he knew or should have known that the firearm was stolen.

In the present case, the State presented the testimony of Troy Savage, the owner of the firearm at issue. Mr. Savage testified that his gun, a Glock model 27 .40 caliber handgun with a serial number of HSB144, had been stolen from his vehicle sometime between May 14 and 17, 2013. Mr. Savage further testified that he did not authorize defendant to remove the gun from his car and that he did not authorize defendant or anyone else to possess his gun between May 17, 2013, and August 17, 2013. The State presented evidence to show that the serial number on Mr. Savage's gun was clearly visible in a photograph on defendant's cell phone. Detective Steve Villere, an expert in digital forensics and mobile device analysis, testified that whoever was in possession of the phone also had possession of the Glock firearm between July 22 and 23, 2013. Additionally, the State presented evidence that the .40 caliber casings recovered outside the vehicle were linked to Mr. Savage's stolen Glock based on a comparison to the test fire cartridges contained in the original box possessed by Mr. Savage.

Detective Barteet testified that Glocks are popular guns that "are not the cheapest guns, and certainly not the most expensive." He stated that depending on the caliber, the price of the gun was about "400 to 600." Additionally, Detective Barteet testified that to his knowledge, defendant had no job at the time of his arrest, and he further agreed with the prosecutor's suggestion that "going out and buying guns of this type would kind of be out of reach."

In the present case, despite the fact that there was no direct evidence linking defendant to the theft of the firearm, we find that the evidence presented by the State was sufficient to prove the elements of the offense of illegal possession of a stolen firearm beyond a reasonable doubt. With regard to the element of guilty knowledge, we particularly note that a rational trier of fact could have reasonably inferred defendant's guilty knowledge that the gun was stolen based on the use of

this gun in a double murder, in which evidence established that defendant was one of the perpetrators. *See State v. Johnson*, 28 So.3d at 1272 (where the appellate court found that the evidence was sufficient to sustain the defendant's conviction for illegal possession of a stolen firearm despite the fact that there was no direct evidence linking the defendant to the theft of the firearm). Accordingly, we find no merit to the arguments raised by defendant in his challenge to the sufficiency of the evidence relating to his illegal possession of a stolen firearm conviction.

Conspiracy to Commit Obstruction of Justice Conviction (Count Five)

Defendant also challenges the sufficiency of the evidence regarding his conspiracy to commit obstruction of justice conviction. La. R.S. 14:130.1 defines obstruction of justice, in pertinent part, as follows:

> A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:
>
> (1) Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition of any object or substance either:
>
> (a) At the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation by state, local, or United States law enforcement officers; or
>
> (b) At the location of storage, transfer, or place of review of any such evidence.

Criminal conspiracy requires an agreement or combination of two or more persons for the specific purpose of committing any crime, an act in furtherance of the object of the agreement or combination, and specific intent. La. R.S. 14:26; *State v. McClure*, 14-253 (La. App. 5 Cir. 3/11/15), 169 So.3d 510, 523, *writ denied*, 15-684 (La. 2/26/16), __ So.3d __. The

second element of a criminal conspiracy, the overt act, need not be unlawful. It may be any act, innocent or illegal, accompanying or following the agreement, which is done in furtherance of its object. In prosecutions for criminal conspiracy, whether an overt act allegedly served to support the object of the conspiracy is a question for the jury. *State v. Lang*, 128 So.3d at 333.

In an attempt to prove this offense at trial, the State introduced a recorded jailhouse telephone call between Ed Harris, defendant's father who is incarcerated; Kanetra Whyte, defendant's mother; and defendant. In the telephone call, the parties discussed the fact that defendant dropped his phone and that "they got it." Upon learning this information, Ed Harris advised that "we just gotta figure out a reason for it being there." Ed Harris also advised defendant "to get some bleach too when he take a bath." In response, Ms. Whyte stated that he already did.

In addition to the recorded telephone conversation, the State introduced the testimony of Detective Barteet regarding the significance of this conversation. He explained that Ed Harris was serving a sentence for homicide. Detective Barteet acknowledged that using bleach in a bath is commonly done to destroy forensic evidence on a person's body. He stated: "... it is known to kill everything. It has been used to clean people and scenes." Detective Barteet also testified that defendant provided him with an explanation, as suggested by his father, for where the phone was.

Defendant contends that the evidence presented by the State was insufficient to sustain his conviction for conspiracy to commit obstruction of justice. He acknowledges that the phone call shows that he was conspiring with his mother and father to obstruct justice; however, defendant contends that the State failed to

prove any overt action in furtherance of the conspiracy, which is an essential element of the offense. We agree.

In the present case, the evidence reveals that defendant took a bath in bleach to remove any possible evidence prior to the phone call in which his father advised him to take that action. The jurisprudence suggests that the overt act must accompany or follow the agreement. Accordingly, since the act in this case occurred prior to any agreement between the parties, we find that the State failed in its burden of proving "an act in furtherance of the object of the agreement or combination." Moreover, although the parties discussed that defendant needed to come up with a reason that his cell phone was left at the scene, providing a false explanation to police does not constitute "tampering with evidence" as defined in La. R.S. 14:130.1(A). Thus, the parties' discussion about providing a false explanation for his phone being at the scene would not constitute conspiracy to obstruct justice.

In arguing that the evidence was sufficient to sustain defendant's conviction for conspiracy to obstruct justice, the State, in its appellate brief, mentions that threats were made during the course of the conversation. Using or threatening force against a person can also be a means of obstructing justice under certain circumstances. See La. R.S. 14:130.1(A)(2). However, as evidenced by the charges given to the jury, the State did not focus on this provision in attempting to prove conspiracy to obstruct justice, but rather relied on the tampering with evidence portion of the obstruction of justice statute. Nonetheless, out of an abundance of caution, we will briefly address the applicability of this provision to defendant's conspiracy charge.

In the recorded telephone call, the parties also discussed whether any witnesses were at the scene. At one point in the conversation, Ed Harris made a

threat about defendant's girlfriend, commenting that "she better not F---- say nothing," and "I hope she know how that gone turn out." Likewise, this evidence is not sufficient to sustain defendant's conviction for conspiracy to commit obstruction of justice. Although Mr. Harris made vague threats about defendant's girlfriend, the parties did not come to any sort of agreement about threatening defendant's girlfriend, nor is there any indication that she was ever threatened. In fact, Ms. Whyte merely laughed when Mr. Harris made his comments about defendant's girlfriend. In the present case, there is no doubt that defendant, his mother, and his father had a conversation about ways to hide defendant's involvement in the murders; however, the State failed to prove the essential elements needed to sustain a conviction for conspiracy to obstruct justice.

Based on the foregoing, we find that viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements of second degree murder and illegal possession of a stolen firearm beyond a reasonable doubt, and accordingly, we affirm those convictions. However, having found that the State failed to prove an essential element of the offense of conspiracy to commit obstruction of justice, we reverse that conviction.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assigned error, defendant asserts that the trial court erred in admitting into evidence the recorded jailhouse telephone call, referenced in the previous assignment of error, in which defendant, his mother, and his father participated. In their conversation, the parties were discussing actions defendant needed to take so as to not be implicated in the shootings. Defendant contends that this telephone call constituted inadmissible hearsay and that its admission violated

his constitutional right to confrontation since the declarants were not available to testify at trial.

The Sixth Amendment to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to confront witnesses against him. *State v. Jackson*, 03-883 (La. App. 5 Cir. 4/27/04), 880 So.2d 841, 852, *writ denied*, 04-1399 (La. 11/8/04), 885 So.2d 1118. The Confrontation Clause bars the admission of an out-of-court "testimonial" statement against a criminal defendant unless the declarant is unavailable, and the defendant had a proper opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

While the *Crawford* Court specifically declined to define "testimonial," it recognized that, at a minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations." *Crawford v. Washington*, 124 S.Ct. at 1374. The Supreme Court stated that "testimony" is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v. Washington*, 124 S.Ct. at 1364; *State v. Leonard*, 05-42 (La. App. 5 Cir. 7/26/05), 910 So.2d 977, 989, *writ denied*, 06-2241 (La. 6/1/07), 957 So.2d 165.

The Sixth Amendment bestows a right of confrontation to confront witnesses who "bear testimony" against him. According to the Supreme Court, an accuser making a formal statement to government officials bears testimony in a sense that a person making a casual remark to an acquaintance does not. Some examples of testimonial statements include affidavits, custodial examinations, depositions, prior testimony, confessions, or similar pretrial statements that declarants would reasonably expect to be used in a prosecution. *Crawford v.*

Washington, 124 S.Ct. at 1364; *State v. Owens*, 14-41 (La. App. 5 Cir. 9/24/14), 151 So.3d 86, 93, *writ denied*, 14-2252 (La. 10/2/15), 178 So.3d 582.

By contrast, non-testimonial statements do not cause the declarant to be a witness within the meaning of the Sixth Amendment and thus are not subject to the Confrontation Clause. *Davis v. Washington*, 126 S.Ct. at 2273. Phone calls from an inmate to another private citizen are generally non-testimonial. In *State v. Norah*, 12-1194 (La. App. 4 Cir. 12/11/13), 131 So.3d 172, 190, *writs denied*, 14-84 (La. 6/13/14), 140 So.3d 1188 and 14-82 (La. 6/20/14), 141 So.3d 287, the appellate court discussed the nature of inmate calls as follows:

> Phone calls from an inmate to another private citizen are generally 'non-testimonial.' These conversations are simply too attenuated in kind from a police interrogation. While inmates are warned that their calls are being recorded, the statements of inmates and those with whom they are speaking are 'non-testimonial' in that they are not attempting to prove some fact for introduction at trial such as when the police interrogate a suspect. These statements are not made 'to a police officer, during the course of an investigation, or in a structured setting designed to elicit responses that are intended to be used to prosecute him.' *Castro-Davis*, 612 F.3d at 65. These calls were conversations amongst friends, and in no way could be considered testimonial. [footnote omitted]

In *State v. Massey*, 11-357 (La. App. 5 Cir. 3/27/12), 91 So.3d 453, *writ denied*, 12-991 (La. 9/21/12), 98 So.3d 332, the trial court allowed a recorded telephone conversation of the co-defendant, who was incarcerated at the time, and his father to be admitted at trial. During the conversation, the co-defendant instructed his father to offer a witness five hundred dollars to make a statement that he was unable to identify the co-defendant and his brother as the persons who committed the crime. On appeal, the defendant complained that his right of confrontation was violated when he did not have the opportunity to cross-examine the co-defendant. This Court found that the recorded telephone conversation was made under circumstances that were non-testimonial in nature and thus did not

violate the defendant's Sixth Amendment right to confrontation and cross-examination of the declarant. *Massey*, 91 So.3d at 479.

Likewise, in the present case, we find that the recorded telephone conversation is non-testimonial under *Crawford* and does not violate defendant's right of confrontation. The statements contained in the recorded telephone conversation were spoken in casual conversation between defendant and his parents. Additionally, the parties had no expectation that their statements would be used in a prosecution, as they spoke informally and without coercion. *See State v. Lang*, 128 So.3d at 338-40.

Moreover, under La. C.E. art. 801(D)(3)(b), a statement is not hearsay if it is offered against a party, and it is made by a declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of the conspiracy, provided that a prima facie case of conspiracy is established. In *State v. Lobato*, 603 So.2d 739, 746 (La. 1992), the Louisiana Supreme Court explained that a prima facie case of conspiracy is presented when the State introduces evidence which, if unrebutted, would be sufficient to establish the facts of the conspiracy. Statements made by co-conspirators which are the object of a defendant's hearsay objection may be considered by the trial court in making its determination as to whether a prima facie case of conspiracy has been established.

Accordingly, based on the foregoing, we find that the trial court did not err in admitting the recorded jailhouse conversation into evidence. This assigned error is without merit.

ERRORS PATENT REVIEW

We have also reviewed the record for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556

So.2d 175 (La. App. 5 Cir. 1990). Our review reveals no errors that require corrective action.

DECREE

Accordingly, for the reasons set forth herein, we affirm defendant's convictions and sentences for second degree murder and illegal possession of a stolen firearm; however, we reverse his conviction for conspiracy to commit obstruction of justice and vacate his sentence on that count.

AFFIRMED IN PART;
REVERSED IN PART

STATE OF LOUISIANA

VERSUS

IRVIN HARRIS

NO. 15-KA-485

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

JOHNSON, J., DISSENTS IN PART WITH REASONS

While I agree with the majority in affirming Defendant's convictions for second degree murder and reversing his conviction for conspiracy to commit obstruction of justice, I disagree with affirming Defendant's conviction for illegal possession of a stolen firearm. Specifically, I do not find the evidence is sufficient to prove Defendant knew or should have known the firearm was stolen.

I cannot agree that a rational trier of fact could infer Defendant's guilty knowledge based on the price range of the gun and the use of the gun in a double murder. The evidence shows there were four guns used in this murder, and there was no evidence or suggestion that the other three guns were stolen. Additionally, a detective's testimony that to his knowledge Defendant had no job at the time of his arrest and the prosecutor's suggestion that "going out and buying guns of this type would kind of be out of reach" based on the gun's price range, does not prove beyond a reasonable doubt that Defendant knew or should have known the gun was stolen. In my opinion, the evidence only shows Defendant possessed the gun, and mere possession does not equate to guilty knowledge. Therefore, I would reverse Defendant's conviction and sentence for illegal possession of a stolen firearm. In all other respects, I agree with the majority's opinion.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **APRIL 13, 2016** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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15-KA-485

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