STATE OF LOUISIANA	*	**NO. 2012-KA-0625**
VERSUS	*	**COURT OF APPEAL**
SAMUEL E. MACK, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 482-029, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard, Judge Joy Cossich Lobrano)
LOBRANO, J., DISSENTS WITH REASONS

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JUNE 19, 2013

CONVICTION AND SENTENCE REVERSED

Defendant, Samuel Mack, was convicted of second degree murder and sentenced to life imprisonment at hard labor, without parole, probation, or suspension of sentence. Finding that the evidence was insufficient to convict, we reverse his conviction and sentence.

STATEMENT OF THE CASE

Defendant, Samuel E. Mack, was charged by grand jury indictment on November 20, 2008 with second degree murder, a violation of La. R.S. 14:30.1, and aggravated battery, a violation of La. R.S. 14:34. [1] He pled not guilty. Defendant's trial took place on August 24-25, 2011. A non-unanimous jury found him guilty as a principal to second degree murder by an 11-1 verdict. On September 14, 2011, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. This appeal followed.

[1] Defendant was jointly indicted with Ortiz T. Jackson. Jackson, the alleged shooter, was tried separately on November 17-19, 2010, and found guilty as charged. The alleged victim in the aggravated battery charge was Terakeithia Calloway. The State *nolle prosequied* the aggravated battery charge as to both defendants on September 8, 2011.

FACTS

The following is a summation of testimony adduced at defendant's trial involving the shooting death of Mark Westbrook, the victim.

Edgar Westbrook, the oldest brother of Mark Westbrook, identified a photograph of the victim.

New Orleans Police Department Assistant Police Communication Supervisor, Cindy Woods, the custodian of 911 records, introduced records that included an incident recall report and audiotape from the homicide. The 911 audiotape was played for the jury; the incident recall report was introduced for record purposes only and was not published to the jury.

James Bradley testified that the victim and he went to Lucky's Lounge located at Lane Street and Chef Menteur Highway, on July 10, 2008, at approximately 8:30 or 9:00 p.m. He described the victim as being like a brother to him. Other acquaintances at the lounge included Roderick "Rock" Mckinney, Edwin Nelson, Terekethia Calloway, and Ronald Ruffin, Bradley's uncle. Bradley admitted having a 1991 conviction for manslaughter; 1999 convictions for possession and possession with intent to distribute illegal drugs; and a 2007 conviction for stalking.

Bradley testified that the victim and he had a few drinks. He observed the victim dancing and laughing. Later, when he went outside to check on the victim, Rock McKinney told Bradley that he and the victim had had an argument. Bradley encouraged Rock to talk to the victim because he knew they were friends. Bradley said that Rock went towards the victim. Defendant followed Rock; while Bradley, Edwin Nelson, and some others walked behind defendant. The victim hollered at

them and asked why they were following him. Rock, who tried to calm the victim, replied that he just wanted to talk to the victim. The victim then said to defendant, "I know what you're about. I'm about that, too." Bradley heard defendant reply, "I ain't got no beef with you, Lil brother." Bradley said that as defendant walked away, he opened his cell phone and started dialing or texting. Bradley did not see defendant again that night.

Bradley testified that after the victim calmed down, they decided to leave. Before they left, the victim and Rock apologized to each other. Bradley said that as he and the victim got into their car to leave the club, Rock tapped on the car window. The victim rolled down his window, and Rock tried to stick his head in and hug the victim. The victim opened the door, got out, and he and Rock hugged each other. Terekethia Calloway, an acquaintance, walked up and told the victim he needed to stop drinking so much. She also hugged him. Bradley, who was then standing in the opened driver's door of the victim's car, said he then heard a shot. He was about three to four feet away from the victim at that point. He turned to see the shooter putting a gun to the back of the victim's head and firing a second shot. The victim fell to the ground, and the male shooter turned around and calmly walked off, in the opposite direction from Chef Menteur Highway.

Bradley said he got a good look at the shooter's face. He described the shooter as approximately six feet two inches tall, wearing a white T-shirt and blue jean shorts. At a later date, he said he met with detectives and selected Ortiz Jackson as the shooter from a photo line-up. Bradley made an in court identification of Jackson as the shooter. Bradley also identified photographs that showed the deceased victim lying on the ground after the shooting. Defendant objected to the introduction of these photographs into evidence. The objection was

overruled. Thereafter, Bradley identified defendant in court as the man to whom the victim had told, “I know what you’re about. I’m about that, too.”

On cross-examination, Bradley admitted that the victim had been drinking enough so that Bradley had decided to drive the victim home. Bradley acknowledged that defendant was not involved with him, the victim, or their group. Bradley stated that when he first observed defendant, that defendant had been standing by an ATM machine; he stated that defendant essentially was minding his own business. Bradley agreed that in a previous statement given to a homicide detective he had said he believed defendant interjected himself into the dispute between Rock and the victim in an attempt to stop the arguing.

Bradley admitted that he had told the detective that he did not know what the victim and defendant had said to each other because he was approximately a block away. Bradley conceded that he did not tell the detective that he saw defendant use a cellphone subsequent to the exchange of words between defendant and the victim. In regards to what the victim had said to defendant, Bradley confirmed that he recalled telling police that: “I don’t know what was said, but Mark was being hotheaded.” However, he explained on re-direct examination that as he walked towards the victim and defendant, that he heard the brief exchange referenced herein.

Edwin Nelson testified that he had been a lifelong friend of both the victim and James Bradley. He knew Rock McKinney and Terekethia Calloway from the neighborhood. Nelson had seen Ortiz Jackson before, and he said he knew defendant from seeing him at different clubs. He had previously seen defendant and Ortiz Jackson together a couple of times. Nelson acknowledged having prior

convictions for crimes involving automobiles, including unauthorized use of a motor vehicle, burglary, and theft.

Nelson testified that on the night in question, the victim and Rock McKinney got into an altercation over a female. The victim left the bar; and Nelson, Rock, Bradley, and defendant followed him outside. Although he characterized the argument between Rock and the victim as heated, he said no blows were thrown. At some point, he said that defendant interjected himself into the argument. He heard defendant say something to the victim. Nelson said defendant "was like, you know, 'I'm Sam Mack. You know what I could have done to you,' and you know, things of that nature, like threatening gestures." After defendant said those words, Nelson said that defendant backed up and flipped opened his cell phone. Nelson did not know if he dialed or texted. Defendant then walked towards the club. Nelson did not see him again that night.

Nelson said that he and the victim decided to leave about ten or fifteen minutes later. Rock approached the victim's car and gave him a hug. Nelson saw Terekethia Calloway and Ortiz Jackson walk towards the victim. He then saw Ortiz Jackson shoot the victim. Nelson, who was sitting nearby in his car when the shooting happened, then sped off. The police followed him to his house. Nelson returned to the scene and later, selected Ortiz Jackson as the shooter from a photo lineup. He also identified Jackson when Jackson was brought into court. Additionally, he identified defendant in court as the man who had "threatened" the victim.

Nelson confirmed on cross examination that the victim got angry at Rock when Rock placed a girl with whom the victim had been dancing in the middle between the two men. The victim and Rock had words and then, the victim

stormed out of the bar. Nelson followed the victim outside. He added that the defendant left the bar after him. He verified that his statement to the homicide officer on the night of the shooting provided that defendant was trying to break up the fight between the victim and Rock. Nelson also admitted that his initial statement in the police report did not say that defendant had threatened the victim. He claimed that he provided that information some time afterwards, at the time the police presented him with a photo lineup. He alleged he told the police at that time that "Sam Mack butted into the argument and he threatened him." Nelson testified that defendant first asked Rock McKinney "like, 'You all right? Like you need help?' " He said Rock replied that it was okay and that he had it. Nelson explained that defendant was "like back up" for Rock in Rock's argument with the victim—although Nelson said the victim and Rock were not going to fight. Nelson provided that he was not thinking too clearly when he first gave his statement that defendant was there to stop the fight. He confirmed that he also said in his statement that it was the victim who was having words with defendant. Although Nelson admitted that his initial statement made no reference to defendant's use of a cell phone, Nelson testified that defendant made a telephone call approximately thirty or forty-five minutes before the murder. Nelson did not recall defendant making the comment to the victim that "I ain't got no beef with you brother"

On redirect examination, Nelson reiterated that defendant interjected himself into the argument between the victim and Rock McKinney; that defendant initially talked to Rock; and that the victim reacted to defendant's talking to Rock. Nelson also said that in his opinion, defendant did not go outside to become a peacemaker. When asked if it became heated between defendant and the victim, Nelson replied:

"Yes, for a second." After it got heated, he heard defendant say to the victim- "You know who I am. You know what I can have done to you."

On re-cross examination, Nelson stated that as far as he knew, defendant had no beef with anyone when things were happening inside the bar. He did not see defendant involved in the altercation between Rock and the victim when they were inside the bar. He did not know if defendant was upset when Nelson first saw defendant because he only glanced at him and did not talk to him. He estimated that the exchange between defendant and the victim lasted approximately two to three minutes.

New Orleans Police Department Officer Gary Sallinger, assigned to the Scientific Criminal Investigation Division of the Crime Lab, processed the crime scene. He took photographs and collected evidence, including two CCI nine millimeter spent cartridge casings, a cell phone, and a "Scar Face" cell phone. Officer Sallinger identified the photographs and evidence.

Dr. Paul McGarry, qualified by stipulation as an expert in the fields of medicine and forensic medicine, performed the autopsy on the victim. Dr. McGarry testified that the victim sustained two gunshot wounds. The fatal bullet entered the back of his neck. The second bullet went through the top of the victim's left shoulder, traveled beneath the skin, and came out the front of the shoulder. He said the victim had ethanol/alcohol in his system, but no drugs.

The State's next witnesses, Norman Ray Clark, III and John Michael Rowe, testified from telephone records the State introduced into evidence.

Norman Ray Clark III, a custodian of records for Sprint, identified a call record made by Sprint for phone number 504-377-3431.[2] (Additional testimony referenced herein will establish the 377-3431 number as the number associated with Ortiz Jackson, hereinafter the "Jackson" number). The calls covered the period from July 5, 2008 through July 14, 2008. In particular, he noted that on the evening of the shooting, a call was made at 11:33 p.m. from 307-0046 (hereinafter, the unknown caller number) to the Jackson number. That call lasted for 118 seconds—just short of two minutes. He further testified that the Jackson number made two phone calls (the first was a voicemail) to 220-6855 (hereinafter, the defendant number) around 11:36 p.m. The next call from the Jackson number to the defendant number happened at 11:58 p.m. From that time, until 1:00 a.m, Clark relayed that a total of twelve calls took place between the Jackson number and the defendant number.

On cross-examination, Clark testified that he did not know to whom the Jackson number belonged. He also established that according to the record, no one used the defendant number to call or try to call the Jackson number between 11:36 p.m. to 11:54 p.m.; instead, the Jackson number initiated all the calls to the defendant number.

John Michael Rowe, a custodian of records for Verizon Wireless, identified records that contained cell site information, referencing location and an explanation form for calls details. He testified that call detail information and subscriber information linked phone number 220-6855 to Samuel E. Mack, the defendant. Rowe stated that the defendant number dialed the mobile telephone

[2] All telephone/cell phone numbers relevant to this case are in the 504 area code.

number of the unknown caller number, 307-0046, at 11:31:26 p.m. This call was made on July 10, 2008. On that same date, at 11:36 p.m., the Jackson number dialed the defendant number. Rowe testified that the Jackson number also called the defendant number at 11:58 p.m. He added that about eight calls were made from the Jackson number to the defendant number between 11:55 p.m on July 10, 2008 and 12:26 a.m. on July 11, 2008. He also noted a voice mail call made at 1:32 a.m., and calls made at 1:35 a.m.and 2:33 a.m.

Rowe testified on cross-examination that the unknown caller number made a call to the defendant number at 10:55 p.m. The call lasted about seventy-three seconds. He explained that the voice mail call placed at 11:36:27 p.m. from the Jackson number to the defendant number lasted sixteen seconds. The 11:36:53 p.m. call from the Jackson number to the defendant number lasted twenty-two seconds. The final call on July 10, 2008 from the Jackson number to the defendant number was at 11:58:33 p.m. It lasted forty-one seconds.

Mr. Rowe also disclosed on cross-examination that the Jackson number had called the defendant number as early as 1:22.33 a.m. on July 10, 2008. Mr. Rowe verified that fifteen calls and voice mails that began as early as 1:22:33 a.m. on July 10, 2008 to almost 3:00 a.m. on July 10, 2008, were made from the Jackson number to the defendant number. He also conceded that he could not say if several of the calls made amongst the numbers may have been "dropped" calls.

On redirect examination, Mr. Rowe reiterated that the 11:58.33 p.m. call from the Jackson number to the defendant number lasted forty-one seconds; the next call at 12: 00.5 a.m. was a voice mail call that lasted fifteen seconds; and the call at 12:05:55 a.m. from the Jackson number to the defendant number lasted about two and one-half minutes.

Orleans Parish District Attorney's Office Investigator Don Harris, a retired New Orleans Police Officer, testified that he determined that the Sprint cell phone number, 307-0046, was assigned to a person named Chris Carter as of the date of the trial. However, Sprint was unable to determine who had the number on July 10, 2008, the date of the homicide. He admitted that he was first asked by the State to check for the phone number's owner on the morning of trial.

New Orleans Police Department Detective Kevin Burns said that he investigated the homicide. His police report stated that police officers were dispatched at 11:54 p.m. to the shooting scene. He identified photographs of the crime scene. He testified that in his pre-interview of witnesses, before recorded statements were taken, that he learned of threats made by defendant to the victim. He said the threat was the comment, " 'Do you know who the F- -k I am,' and 'What I can have done to you.' " He maintained that he reported this information in his police report and that the witness or witnesses had given him that information in the early morning hours after the murder. Det. Burns advised that James Bradley and Edwin Nelson each identified Ortiz Jackson as the shooter.

Det. Burns testified that Jackson was subsequently arrested with a warrant at his residence. Recovered in the residence was a "boost cell phone," which the detective said was "typically" a prepaid cell phone "that's associated with Sprint." The police also recovered a loaded .38 caliber revolver and two boxes of .22 caliber ammunition. Det. Burns identified Jackson's phone number as being from the cell phone seized from his residence. He stated that the phone had been in a charger when seized. Det. Burns went into the cell phone and determined its number was "377-3431." Det. Burns also found defendant's cell phone number,

220-6855, saved in Jackson' s cell phone. He said defendant's number was listed in the "Contacts" folder of the 377-3431 cell phone as "M-a-c-k."

Det. Burns acknowledged on cross-examination that he had heard James Bradley testify that there had been no pre-interview before he gave his recorded statement. Det. Burns admitted that Bradley said nothing in his recorded statement about threatening comments defendant allegedly made to the victim. Det. Burns speculated that he may have inadvertently and accidentally attributed that information about the threat to Bradley. Defense counsel noted that only two eyewitnesses had testified at trial, Bradley and Edwin Nelson. Det. Burns confirmed that Bradley's recorded statement reflected that the victim and defendant argued; that the victim asked defendant why he was there; and that the victim told defendant that the defendant had nothing to do with the argument between the victim and Rock McKinney.

Det. Burns admitted that Edwin Nelson also told him that the defendant was trying to break up the fight between the victim and Rock; and as he attempted to do so, the victim, who was drunk, started to have words with the defendant. Det. Burns said that when the statement ended, Nelson then added that the defendant had made a cell phone call and talked to someone after he had walked away from the victim and Rock McKinney. Det. Burns noted that Bradley said defendant was dialing, whereas Nelson had said defendant actually talked to someone. Det. Burns also provided that his report indicated that Ronald Ruffin had identified defendant, instead of Jackson, as the shooter in a photo line-up.

Det. Burns confirmed that his review of the phone records showed that defendant had not made a direct phone call to the number of the shooter, Ortiz Jackson. His review showed that prior to the homicide, defendant's cell phone had

called the unknown caller and that it was the unknown caller who had called the Jackson number. He also said that after the unknown caller had called the Jackson number, that the Jackson number called another number before it contacted defendant's number. Det. Burns advised that he never attempted to learn the identity of the owner of the 307-0046 number.

On redirect examination, Det. Burns confirmed that his report maintained that it was James Bradley who claimed that defendant had made the statements: "Do you know who the F I am," and "Do you know what the F I can do to you?" However, he said that the statements could have been made by either Edwin Nelson or James Bradley. He reiterated that they were made on the night of the murder investigation.

Det. Burns also opined that Ronald Ruffin only presumptively selected the defendant as the shooter from a photo lineup because according to Ruffin, "the victim called him and said that Sam Mack was trying to kill him." Det. Burns stressed that Ruffin said he did not witness the shooting and was not at the club when Ruffin allegedly received the call from the victim, but rather Ruffin said that he was en route back to the club.

The State introduced the cell phone records into evidence. The records documented the following calls amongst the defendant number-220-6855, the Jackson number, 377-3431, and 307-3431, the unknown caller number, on the evening of the shooting.

9:13.57 p.m.: unknown caller number calls defendant number

10:09.10 p.m.: unknown caller number calls defendant number

10:09:22 p.m.: unknown caller number calls defendant number

10:55.20 p.m.: unknown caller number calls defendant number

11:31.26 p.m.: defendant number calls unknown caller number

11:32.22 p.m.: unknown caller number calls defendant number

11:33.13 p.m.: unknown caller calls Jackson number

11:36.26 p.m.: Jackson number calls defendant number

11:36.48 p.m.: Jackson number calls defendant number[3]

11:58.27 p.m.: Jackson number calls defendant number

As referenced herein, the phone records also revealed about twelve calls were made on July 11, 2008, in the early morning hours subsequent to the shooting between the Jackson number and the defendant number. They also show that in the early a.m. hours of the day of the shooting, July 10, 2008, that the Jackson number called the defendant number about fifteen times between 12:12.11 a.m. and 3:17.43 a.m. Later that day, the records show the defendant number called the Jackson number at 1:55.52 p.m. Additionally, they indicate that a series of seven calls took place between the Jackson number and the unknown caller number from 6:26.40 p.m. and 7:06.04 p.m.

Several phone calls also took place between the defendant number and the Jackson number on July 9, 2008. The defendant number called the Jackson number at 7:11.32 p.m. and 7:15.15 p.m. and the Jackson number called the defendant number at 8:25.35 p.m. and 10:28.12 p.m.

ERRORS PATENT

A review of the record reveals no errors on the face of the record.

[3] This call lasted until 11:37.16 p.m.; roughly 22 seconds.

ASSIGNMENTS OF ERROR

Defendant alleges that 1) the evidence was insufficient to support his conviction; 2) the trial court erred in admitting multiple gory crime scene photos whose probative value was substantially outweighed by their prejudicial effect; 3) the trial court erred in denying defendant's motion to declare La. C.C.P. art. 782(A) unconstitutional; and 4) defendant's sentence was unconstitutionally excessive.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant argues that the evidence is constitutionally insufficient to support the verdict.

This court set forth the applicable standard of review for sufficiency of the evidence in State v. Huckaby, 2000-1082, p. 32 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1093, 1111, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable

> hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

Huckaby, 2000-1082, p. 32, 809 So. 2d at 1111, quoting State v. Ragas, 98-0011, pp. 13-14 (La. App. 4 Cir. 7/28/99), 744 So. 2d 99, 106-107.

The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction. State v. Wells, 2010-1338, p. 5 (La. App. 4 Cir. 3/30/11), 64 So. 3d 303, 306. A factfinder's decision concerning the credibility of a witness will not be disturbed unless it is clearly contrary to the evidence. State v. James, 2009-1188, p. 4 (La. App. 4 Cir. 2/24/10), 32 So. 3d 993, 996.

Defendant was convicted of second degree murder, defined, in pertinent part, as the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). The parties to crimes are classified as principals or accessories after the fact. La. R.S. 14:23. La. R.S. 14:24 defines principals, stating that "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

To obtain a conviction for second degree murder under the circumstances of the instant case, the State had to prove that defendant was a principal to the killing of the victim, having the specific intent to kill or inflict great bodily harm upon the victim. La. R.S. 14:30.1. Specific intent "is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent

may be inferred from the circumstances surrounding the offense and the conduct of the defendant. State v. Bishop, 2001-2548, p. 4 (La. 1/14/03), 835 So. 2d 434, 437; State v. Summers, 2010-0341, p. 7 (La. App. 4 Cir. 12/1/10), 52 So. 3d 951, 956. Specific intent can be formed in an instant. State v. Cooks, 2011-0342, pp. 10-11 (La. App. 4 Cir. 12/14/11), 81 So. 3d 932, 939, writ denied, 2012-0112 (La. 5/18/12), 89 So. 3d 1189

The State's theory of the present case is that although defendant did not himself shoot and kill the victim, Mark Westbrook, he was a principal to second-degree murder because he aided or abetted Ortiz Jackson in the shooting or directly or indirectly counseled or procured Ortiz Jackson to commit the crime. The State relies primarily on testimony that defendant "threatened" the victim with the statement " 'Do you know who the F I am, and 'What I can have done to you'"; and evidence that after defendant was seen using a cell phone, the victim was shot to death about twenty minutes subsequent to a series of cell phone calls associated with defendant, Samuel Mack, Ortiz Jackson, the convicted shooter, and the unknown caller.

In opposition, defendant argues that evidence showing that he may have participated in phone calls within twenty minutes of the victim's shooting is legally insufficient to demonstrate that he possessed the requisite intent to kill or grievously harm the victim, which intent must be proven in order to convict defendant as a principal to second degree murder. Defendant relies in part on United States v. Williams, 264 F.3d 561 (5th Cir. 2001), United States v. Powers, 168 F.3d 741 (5th Cir. 1999), and United States v. Galvan, 693 F.2d 417 (5th Cir. 1982) to support his position that a record of a telephone call offered without evidence of the content of the call is insufficient to prove participation in a

criminal offense. Defendant notes that in Galvan, which involved conspiracy to import and distribute marijuana charges, the appellate court found that evidence which only consisted of a flurry of phone calls between the alleged conspirators, without any evidence of the subject of the phone calls, was insufficient to convict on the conspiracy charges.

The State counters that Galvan and the other cases referenced by defendant are not controlling to the facts of the present matter as those cases rely on federal authority rather than Louisiana law; and moreover, they involve evidence required to prove a conspiracy under federal law. The State contends that under both state and federal law, to demonstrate a conspiracy, the government must demonstrate that: 1) two or more people agreed to pursue an unlawful objective; 2) the defendant voluntarily agreed to join the conspiracy; and 3) one or more of the members of the conspiracy performed an overt act to further the objectives of the conspiracy. See United States v. Branch, 91 F.3d 699, 732 (5th Cir. 1996); La. R.S. 14:26(A). On the other hand, the State maintains that it only needed to show that defendant in the instant matter was a principal to second degree murder by presenting evidence that defendant "aid[ed], counsel[ed], command[ed], induce[ed], procure[ed] its commission,. See La. R.S. 14:24. The State avers that it met this evidentiary burden by presenting evidence that showed that 1) defendant intervened in a verbal altercation between the victim and Rock McKinney, on McKinney's behalf, and threatened the victim with the statement of what he could have "done" to him; 2) thereafter, defendant contacted through an intermediary, a cell number Det. Burns determined belonged to Jackson, the shooter; 3) twenty minutes later, Jackson approached the victim and fired two shots at him, killing him; and 4) three minutes thereafter, Jackson called defendant directly. The State

concludes that this evidence was sufficient to exclude every reasonably hypothesis of innocence in relation to defendant's involvement as a principal in the murder of the victim. However, this Court disagrees.

Upon review, the State does not present direct evidence to prove that defendant participated in the killing of the victim. Instead, it relies principally on a series of telephone calls that began at 11:31.36 p.m. from the defendant number to the unknown caller number and calls from the Jackson number to the defendant number shortly after the shooting as its proof that the defendant procured Ortiz Jackson to murder the victim. We therefore have a purely circumstantial case upon which the State bases its conviction.

When circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. The test of the sufficiency of circumstantial evidence is not whether it produces the same conviction as the positive testimony of an eyewitness, but whether it produces moral conviction such as would exclude every reasonable doubt. State v. Shapiro, 431 So.2d 372 at 385. The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. When we apply these precepts to the present matter, we find that the phone records upon which the State heavily relies to support defendant's conviction, also provide a reasonable hypothesis of innocence.

In particular, the phone records show that defendant, Jackson, and the unknown caller made numerous calls to each other before defendant Mack had his encounter with the victim. Notably, the unknown caller called the defendant number at 10:55.20 p.m., approximately thirty-five minutes before the defendant

made the 11:31.26 p.m. call to the unknown caller, the call which the State alleges triggered the sequence of calls that resulted in the "hit" on the victim. The unknown caller also made three other calls to the defendant number from 9:13.57 p.m. to 10:09.22 p.m. Although the State contends that the number of calls the Jackson number made to the defendant number after the shooting evidences defendant's guilt, the phone records document that the Jackson number called the defendant number even more times in the early morning hours of July 10, 2008, before the shooting happened. Based on this pattern of telephone calls among the unknown caller, Jackson, and defendant that occurred before defendant's encounter with the victim, the State did not exclude that another logical inference, other than to procure murder, could be drawn from these telephone calls; namely, that the defendant may have been returning the phone call of the unknown caller and/or that these calls were to discuss the business that pre-existed among them prior to defendant's interjection of himself into the altercation between the victim and Rock McKinney.

We are compelled to reach this conclusion in the absence of evidence, outside of phone records, that 1) defined the relationship among defendant, the unknown caller, and Jackson, so as to explain why Jackson would shoot the victim at defendant's bequest; 2) failed to identify the unknown caller so as to clarify why he would act as the intermediary between Jackson and defendant in arranging the victim's murder; 3) failed to show that defendant made any direct calls to Jackson to procure the victim's murder; and 4) most importantly, failed to document the substance of any conversation among defendant, Jackson, and the unknown caller.

It is established that where a case rests, as this one does, entirely upon circumstantial evidence, the circumstances must be so clearly proven that they

point not merely to the possibility or probability of guilt, but to the moral certainty of guilt. The inferences which may reasonably be drawn from the facts proven as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. State v. Shapiro at 387. In this matter, the State does not exclude every reasonable hypothesis of innocence for a rational juror to find defendant guilty beyond a reasonable doubt. The evidence is simply insufficient as a matter of law to convict. La. R.S. 15:438.

Because we find that the evidence was insufficient to convict, we pretermit discussion of defendant's other assignments of error.

For the foregoing reasons, the defendant's conviction and sentence are reversed.

CONVICTION AND SENTENCE REVERSED