

STATE OF LOUISIANA

NO. 17-KA-261

VERSUS

FIFTH CIRCUIT

JAMES DARBY

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 16-2002, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

November 15, 2017

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Jude G. Gravois,
Robert M. Murphy, and Stephen J. Windhorst

AFFIRMED

JGG

RMM

SJW

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GRAVOIS, J.

Defendant, James Darby, appeals his conviction for second degree murder, a violation of La. R.S. 14:30.1. On appeal, he argues that there was insufficient evidence to convict him. After thorough consideration of the evidence and the applicable law, we affirm defendant's conviction and sentence.

PROCEDURAL HISTORY

On April 7, 2016, a Jefferson Parish Grand Jury indicted defendant, James Darby, with the second degree murder of his former girlfriend, Tracey Marshall, a violation of La. R.S. 14:30.1. On April 8, 2016, defendant was arraigned and pled not guilty to said charge.

Defendant filed motions to suppress the evidence and statement, which were denied on September 9, 2016. Thereafter, on February 14-18, 2017, the case was tried before a twelve-person jury, which found defendant guilty as charged of second degree murder.

On February 21, 2017, defendant's motions for a new trial and post-verdict judgment of acquittal were denied. On that same date, after defendant waived sentencing delays, the trial court sentenced defendant to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

Defendant filed a written motion, and also made an oral motion, for reconsideration of sentence, which were denied. Defendant then filed a timely motion for an appeal following sentencing on February 21, 2017, which was granted that same day. On appeal, defendant contests the sufficiency of the evidence used to convict him of the second degree murder of Tracey Marshall.

FACTS

At approximately 9:40 p.m. on the evening of December 13, 2015, Deputy Henry Dejean of the Jefferson Parish Sheriff's Office responded to a call at 2409 Avenue Mont Marte in Terrytown, Louisiana, of shots fired in the area. Deputy

Dejean canvassed the area where he was told the gunshots had originated, but due to inclement weather, could not locate any evidence of a shooting. The following morning, the victim Tracey Marshall's neighbor, Kalie Alberti, called the police after she observed Ms. Marshall's head hanging out of the shattered driver's-side window of her vehicle in the parking lot of their condominium complex.

Ms. Marshall, who was employed by the Jefferson Parish Sheriff's Office as a deputy, had been in a long-term relationship with defendant before their break-up in November of 2015. As a result of their break-up, Ms. Marshall moved out of defendant's residence in New Orleans and into a condominium next door to Ms. Alberti. Ms. Alberti recalled that a few days before Ms. Marshall's murder, she received a phone call from defendant, who asked her whether she had seen Ms. Marshall because he had been unable to reach her. Defendant then told Ms. Alberti that he believed Ms. Marshall was seeing someone else based on his seeing a silver Expedition parked in the parking lot of Ms. Marshall's condominium. Ms. Alberti told defendant that the Expedition belonged to her (Ms. Alberti's) boyfriend and not to Ms. Marshall. Defendant concluded their conversation by explaining to Ms. Alberti that Ms. Marshall "owed" it to him to at least answer his phone call. Based on the information Ms. Alberti provided, defendant was developed as a suspect in Ms. Marshall's murder.

Jefferson Parish Sheriff's Office Deputy Ian Donahue was the first officer to arrive on the scene of the homicide. Upon arrival, Deputy Donahue discovered that Ms. Marshall's car window had been shattered and that she had been shot.¹ Dr. Susan Garcia, an expert in the field of forensic pathology, conducted an autopsy on Ms. Marshall. Dr. Garcia testified that the cause of Ms. Marshall's death was multiple gunshot wounds, and the manner of death was classified as a

¹ Deputy Donahue recalled having met Ms. Marshall on a previous occasion with regard to a battery complaint she wished to lodge against defendant on October 17, 2010, when defendant slapped her across the face after taking her phone and accusing her of having an affair with another man.

homicide. Dr. Garcia noted five separate entrance wounds located on various parts of the victim's body, including her chin, the left side of her arm, the left side of her head, and her upper back. Further, based on the imprints on Ms. Marshall's chin, Dr. Garcia opined that she was likely turned to her left, as if looking out of the window, when the first shot was fired, the imprints having been caused by the shattered window glass.

Deputy Donahue secured the scene of the homicide and began searching for evidence. An empty black gun holster was found a block away in a neighbor's yard and was submitted for DNA analysis, but had insufficient DNA for comparison. Detective Thomas Gai also participated in the recovery of evidence from the scene. A series of eight .45-caliber casings located near Ms. Marshall's vehicle, a projectile located next to a nearby dumpster, two projectiles located inside Ms. Marshall's vehicle, and Ms. Marshall's fully loaded service weapon were recovered, confirming that she had not fired her weapon at the time she was shot. Two cellular phones belonging to Ms. Marshall were also recovered. It was determined that the .45-caliber casings had been fired from the same weapon and were consistent with a Glock automatic pistol. The projectiles were further found to be consistent with .45-caliber class ammunition, and the gun holster discovered in the neighboring yard was determined to be capable of fitting a Glock .45-caliber pistol. Detective Gai testified that there was damage to the driver-side window, consistent with a projectile entering the window, and several bullet holes found inside the vehicle, which were consistent with gunshot rounds having been fired into the vehicle from the driver's side and exiting on the passenger side.

A neighbor, Gary Barnes, told the police that he had heard a series of gunshots around 9:30 p.m. on the night of December 13, 2015. When he glanced out of his window, he saw a vehicle cross his driveway at a high rate of speed,

disregarding the posted stop sign. He described the vehicle as a four-door medium-sized vehicle, dark in color, but that he could not see the driver.

The day following Ms. Marshall's murder, her boyfriend, Gerald Francis, contacted the Jefferson Parish Sheriff's Office after learning of her death. Pursuant to an interview with Mr. Francis, it was learned that Ms. Marshall and Mr. Francis had been dating for approximately two months prior to her murder. Around 6:15 p.m. on December 13, 2015, Ms. Marshall and Mr. Francis met at the Walgreens on St. Charles Avenue in New Orleans, each in their own vehicles. From there, they walked across the street to Houston's Restaurant for dinner, and then proceeded to the French Quarter where they listened to live music before concluding the evening at Club Good Times II. Mr. Francis then drove Ms. Marshall to her vehicle at the Walgreens where they parted ways. While on his way home, Mr. Francis spoke to Ms. Marshall on the phone until she reached her home in Terrytown. At that point, because it was raining heavily, Ms. Marshall advised Mr. Francis that she was going to wait in her car until the rain stopped. They were still talking when during their conversation, Ms. Marshall suddenly said "boy" as if "somebody scared her," and then her phone went dead.

Mr. Francis stated that he attempted to call Ms. Marshall back several times, and sent her text messages to see if everything was okay, but received no response. The following morning around 6:00 a.m., Mr. Francis again attempted to call and text Ms. Marshall as they typically spoke during Ms. Marshall's drive to work, but again he received no response.² Later that day, Mr. Francis was watching the news when he learned that Ms. Marshall had been murdered. It was at that time that he contacted the police.

² Detective Donahue obtained Mr. Francis' consent to search his cellular phone for text messages. The phone calls and text messages sent by Mr. Francis to Ms. Marshall on the evening of her murder and the following morning were admitted into evidence, corroborating his testimony.

Elizabeth Memtsas, a friend of Ms. Marshall, recalled a phone conversation she had with Ms. Marshall one day in 2015, where Ms. Marshall was very upset and voiced her desire to leave defendant, but stated that she was unable to do so because defendant would never allow it due to his jealous nature. She further recollected a time in 2015 when she and Ms. Marshall were shopping and noticed that defendant had been following them. She stated that Ms. Marshall told her to “stay calm,” then “exchanged words” with defendant before he drove off. In another instance, Ms. Memtsas heard defendant arguing with Ms. Marshall while he was on speakerphone and told Ms. Marshall that she needed to come back to him or else he would file false claims against her with the Sheriff’s Office’s Internal Affairs Department to ensure the loss of her job.

Gary Mitchell, a long-time friend of defendant, stated that he believed defendant and Ms. Marshall’s November 2015 break-up was amicable and recalled that defendant helped Ms. Marshall move out of his house and into her condominium. Defendant had explained to Mr. Mitchell that he and Ms. Marshall were separating for a while and that they planned on using their time apart to get their finances in order. As time passed, Mr. Mitchell explained that Ms. Marshall stopped answering defendant’s phone calls and text messages and that defendant had wanted to reconcile their relationship because he still loved her. Mr. Mitchell advised defendant to leave her alone and give her some space, to which defendant stated, “[d]on’t be surprised if she wind up dead.” Defendant further told Mr. Mitchell that he thought Ms. Marshall had “used” him and that “he wasn’t doing that no more ... and that he hoped she didn’t do him wrong,” or “you’d read about her.” On cross-examination, Mr. Mitchell explained that he could not remember the exact day the statement was made, but believed it was within a month before Ms. Marshall was killed. He further stated that he did not respond to defendant’s statement because he knew defendant loved her and that his heart was broken.

Mr. Mitchell also testified that on the morning of December 14, 2015, defendant texted him asking if he could borrow a car diagnostic tool to clear a code on a car he was working on.³ When he arrived at his house to pick the tool up, defendant advised him that he was leaving for Alabama the next day to renew his car registration. Mr. Mitchell offered to go with him, but defendant told him “no,” explaining that he was going to stay for a few days.

Christopher Boykin, also a long-time friend of defendant, testified that he knew defendant and Ms. Marshall were engaged, but then broke up when things did not work out. He recalled that defendant was “agitated” after the break-up because Ms. Marshall would not answer his phone calls, and that defendant felt “played.” Mr. Boykin testified that defendant was aggravated to the point where he said, “if she keep messing with him like that, they will find her stinking,” which Mr. Boykin believed to mean “dead.” Mr. Boykin explained that he did not think much of defendant’s comment because “it was just guys talking.”

Mr. Boykin saw defendant on December 14, 2015—the day following the murder—around 3:30-4:00 p.m., at which time defendant informed him that he was going to Alabama to take care of some paperwork for his car. On that same day, around 4:30-5:00 p.m., Mr. Boykin learned that Ms. Marshall had been murdered. He then called defendant, who was on his way to Alabama, and told him that Ms. Marshall had been found dead in her car. Defendant asked Mr. Boykin if he was serious, but Mr. Boykin thought defendant would have been “more distraught.” Mr. Boykin however was unable to continue their conversation because defendant’s phone cut out, and defendant never called him back.

Tanya Brumfield, a friend of defendant’s father and an acquaintance of Ms. Marshall, also recalled that near the time of Ms. Marshall’s murder, defendant

³ Betty Ateman, defendant’s aunt, testified that defendant had been working on her four-door Nissan Altima on December 13, 2015. She further testified that defendant returned her car to her on December 14, 2015, and that pursuant to the investigation of this case, the police came to her house to take pictures of her car.

called her to inquire if she could call Ms. Marshall on a three-way phone call for him because she had not been answering his calls. Ms. Brumfield told defendant she was not comfortable placing the call because she was aware they had just broken up, which prompted defendant to text Ms. Brumfield “who’s side you on? You know what she did me? She messed me over.”

An exigent circumstances request form was executed by Jefferson Parish Sheriff’s Detective Donald Zanutelli for defendant’s cell phone records. Based on these records, Detective Zanutelli was able to determine defendant’s location and provided the information to the U.S. Marshals who ultimately apprehended defendant in Alabama.⁴ A search warrant for defendant’s residence was also obtained and several of Ms. Marshall’s personal belongings were seized.

Detective Gabriel Faucetta of the Jefferson Parish Sheriff’s Office testified that analyses of Ms. Marshall’s and defendant’s cell phones were conducted. Based on the analysis of defendant’s cell phone, a text message sent by defendant to his son, dated December 6, 2015, was retrieved, which stated, “I real [sic] need that heater. I’m going go hunting myself.”⁵ Testimony from long-time friends Mitchell and Boykin, as well as defendant’s recorded statement, established that hunting was not one of defendant’s hobbies.

A web history analysis of defendant’s cell phone also showed that defendant accessed an application called “Android Lost” over three hundred times to determine Ms. Marshall’s location. Additionally, certain extractions from defendant’s cell phone revealed that on the afternoon of Ms. Marshall’s murder, a search was entered into defendant’s phone for a latitude and longitude coordinate

⁴ Defendant’s ex-girlfriend, Nancy Jemison, testified that on December 15, 2015, defendant showed up at her house in Tuscaloosa, Alabama, unannounced and looking “rough.” A close friend of defendant, David Rhea, also testified that on December 11, 2015, he spoke to defendant and invited him to Tuscaloosa, Alabama, for a billiards tournament, an invitation defendant declined. However, on December 14, 2015, defendant contacted Mr. Rhea to inform him that he was coming to Tuscaloosa and needed his assistance in finding the office for vehicle registration. Mr. Rhea explained that on that same date, defendant stayed at his house, where defendant informed Mr. Rhea that he and Ms. Marshall had broken up. No mention of Ms. Marshall’s murder was made.

⁵ There was no testimony presented regarding the meaning of the word “heater”; however, in closing, the State argued that “heater” was a word used for “firearm.”

matching the location of Ms. Marshall's residence. Also, at approximately 8:21 p.m. on December 13, 2015, it was established that defendant's cell phone accessed Google Maps to pin point the location of the Walgreens and Houston's Restaurant visited by Ms. Marshall on the night she was murdered. And an analysis of the cell phone tower information obtained from the use of defendant's phone on the night of Ms. Marshall's murder placed defendant's cell phone near the location where Ms. Marshall was on her date with Mr. Francis, then near Ms. Marshall's residence at the time of her death, and finally traveling back over the Crescent City Connection Bridge towards defendant's residence at a time after the murder.⁶

After his arrest, defendant gave a statement to the police in which he stated that he was driving his aunt's green Nissan Altima at approximately 8:00 p.m. down St. Charles Avenue when he saw Ms. Marshall with another man. He then observed Ms. Marshall get into her truck at the Walgreens on St. Charles. He further admitted that upon seeing this, he drove to the Westbank where he then decided against driving all the way to Ms. Marshall's house, and instead, elected to stop at a local Westbank SnoBall stand before turning around and driving home. However, defendant later admitted that he did in fact drive near Ms. Marshall's residence, where he parked in a neighboring driveway, exited his vehicle, but then decided against approaching Ms. Marshall and instead drove home, past Mr. Barnes' residence. The driveway where defendant admitted he parked was approximately six car lengths from Ms. Marshall's vehicle at the time of her death.

The State presented prior convictions and bad acts committed by defendant. The first incident occurred on April 2, 2011, when Ms. Marshall went to the police station to report frightening text messages she had received from defendant, her ex-

⁶ Defendant admitted in his statement to the police that he had his cellular phone with him the entire night leading up to and after Ms. Marshall's murder.

boyfriend at the time. In the text messages, summarized by Agent Sean Williams of the Jefferson Parish Sheriff's Office, defendant wrote that he was "getting ready to self-destruct," that he was "very angry and upset" with Ms. Marshall, that he was on his way to Ms. Marshall's house, and that he was "prepared to go to jail and suffer the consequences that his actions would cause." On May 6, 2011, defendant was placed under arrest for cyberstalking and making threatening phone calls to Ms. Marshall. The second documented incident occurred on April 12, 2011, when Ms. Marshall filed a police report, stating that defendant had broken into her residence armed with a firearm and would not leave when asked.

The State also presented evidence regarding an April 30, 2011 phone call defendant made to Ms. Marshall in which he asked why she was pressing charges against him, and an incident on July 27, 2011, where Ms. Marshall filed a complaint asserting that defendant had made harassing phone calls to her at her place of employment, again urging Ms. Marshall to drop the charges against him. As a result, a protective order was issued, prohibiting defendant from having any contact with Ms. Marshall.

Defendant pled guilty to cyberstalking Ms. Marshall in 2011 and to a separate incident for unauthorized entry of an inhabited dwelling in 1992 in which he broke into an ex-girlfriend's house and, after two failed attempts at firing his gun at his ex-girlfriend's new boyfriend, he struck the boyfriend with his firearm causing injury.

ASSIGNMENT OF ERROR

Sufficiency of the evidence

In his sole assignment of error, defendant argues the evidence was insufficient to uphold the conviction.⁷ He maintains that the State's evidence

⁷ The proper procedural vehicle for raising the issue of the sufficiency of the evidence is a motion for post-verdict judgment of acquittal. La. C.Cr.P. art. 821; *State v. Lande*, 06-24 (La. App. 5 Cir. 6/28/06), 934 So.2d 280, 289 n.18, writ denied, 06-1894 (La. 4/20/07), 954 So.2d 154 (citing *State v. Allen*, 440 So.2d 1330, 1331 (La.

consisted solely of circumstantial evidence that he was in the area at the time of the murder and shared a tumultuous past with Ms. Marshall. Accordingly, defendant concludes there was no corroborating evidence presented to identify him as the perpetrator and that the State failed to exclude at least one reasonable hypothesis of innocence—namely, that Mr. Francis committed the crime.

The appropriate standard of review for determining the sufficiency of the evidence was established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). According to *Jackson*, the reviewing court must decide, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*, 443 U.S. at 319. See also *State v. Ortiz*, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998); *State v. Holmes*, 98-490 (La. App. 5 Cir. 3/10/99), 735 So.2d 687, 690.

Evidence may be either direct or circumstantial. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common experience. *State v. Williams*, 05-59 (La. App. 5 Cir. 5/31/05), 904 So.2d 830, 833. When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 provides that ““assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.”” *State v. Wooten*, 99-181 (La. App. 5 Cir. 6/1/99), 738 So.2d 672, 675, writ denied, 99-2057 (La. 1/14/00), 753 So.2d 208. This is not a separate test from the *Jackson* standard, but rather provides a helpful basis for determining the existence of reasonable doubt. *Id.* All evidence, both direct and circumstantial,

1983)). Here, defendant raises the same sufficiency ground on appeal as he did for the basis of his motion for post-verdict judgment of acquittal.

must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *Wooten*, 738 So.2d at 675.

As it pertains to the instant case, second degree murder is defined as the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm.⁸ La. R.S. 14:30.1.

Specific intent is defined as “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). Whether a defendant possessed the requisite intent in a criminal case is a question for the trier of fact, and a review of the correctness of this determination is guided by the *Jackson* standard. *State v. Spears*, 05-0964 (La. 4/4/06), 929 So.2d 1219, 1224; *State v. Gant*, 06-232 (La. App. 5 Cir. 9/26/06), 942 So.2d 1099, 1111, *writ denied*, 06-2529 (La. 5/4/07), 956 So.2d 599. 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. *Id.* The act of aiming a lethal weapon and discharging it in the victim’s direction supports a finding by the trier of fact that the defendant acted with specific intent to kill. *Id.* In addition, flight and attempt to avoid apprehension are circumstances from which a trier of fact may infer a guilty conscience. *Id.*

In addition to proving the statutory elements of the charged offense at trial, the State is required to prove the defendant’s identity as the perpetrator. *State v. Draughn*, 05-1825 (La. 1/17/07), 950 So.2d 583, 593, *cert. denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007). “As a general matter, when the key issue is the defendant’s identity as the perpetrator, rather than whether the crime was committed, the [s]tate is required to negate any reasonable probability of

⁸ The trial court instructed the jury that in order to find defendant guilty of second degree murder, it must find defendant killed Ms. Marshall and that he acted with specific intent to kill or inflict great bodily harm.

misidentification.” *Id.* (quoting *State v. Neal*, 00-0674 (La. 6/29/01), 796 So.2d 649, 658, *cert. denied*, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002)).

Identification can be inferred from all the facts and circumstances that are in evidence. *State v. Amato*, 96-0606 (La. App. 1 Cir. 6/30/97), 698 So.2d 972, *writs denied*, 97-2626, 97-2644 (La. 2/20/98), 709 So.2d 772.

In the present matter, it is undisputed that Tracey Marshall was the victim of a homicide. Thus, defendant’s only contention is that the evidence used to convict him of second degree murder is insufficient due to the lack of evidence identifying him as the perpetrator of the crime.

Upon review, we find that the circumstantial evidence in this case is sufficient to identify defendant as the perpetrator of Ms. Marshall’s murder beyond a reasonable doubt, and sufficient to negate any reasonable probability of misidentification. At trial, the State presented evidence that defendant and Ms. Marshall had been in a very tumultuous relationship leading up to their break-up in November of 2015. Prior to their break-up, the State presented evidence that Ms. Marshall was the recipient of numerous harassing and threatening phone calls and text messages sent by defendant in which he warned Ms. Marshall that he was going to “self-destruct” and was “prepared to go to jail and suffer the consequences.” As a result of defendant’s harassing behavior, defendant pled guilty to cyberstalking Ms. Marshall, and a protective order was issued. Defendant’s jealous nature and his control over Ms. Marshall was further recalled by Ms. Marshall’s friend, Ms. Memtsas, who testified about defendant following Ms. Marshall and another instance when defendant threatened that if Ms. Marshall did not come back to him, he would ensure the loss of her job.

Ms. Marshall moved out of defendant’s residence in November of 2015. According to defendant’s close friends, defendant wanted to reconcile their relationship, but Ms. Marshall would not return his phone calls or text messages.

The testimony of the witnesses at trial established that in the weeks leading up to Ms. Marshall's murder, defendant stalked her and made threats on her life, telling friends "don't be surprised if she wind up dead," "that you'd read about her," and "if she keep messing with me like that, they will find her stinking." Because Ms. Marshall would not return his calls, defendant he contacted her friends and neighbors in order to initiate contact with her. Ms. Alberti, a neighbor, testified that a few days before Ms. Marshall was murdered, defendant had reached out to her, inquiring as to whether Ms. Marshall was dating anyone, and questioning Ms. Alberti about an unfamiliar vehicle that he had seen parked in the lot of the condominium complex where Ms. Marshall lived. Ms. Brumfield, an acquaintance of Ms. Marshall, also testified that defendant had called her in hopes that she would place a three-way call to Ms. Marshall so he could speak to her because she had not been answering his phone calls.

Ms. Marshall was later found brutally shot five times while sitting in her vehicle outside of her residence. Defendant's cell phone records from the night of Ms. Marshall's murder showed that he had accessed an application on his phone called "Android Lost" to determine Ms. Marshall's location at the Walgreens on St. Charles Avenue. This information was corroborated by defendant himself who, in his statement to the police, admitted that he was driving down St. Charles when he happened to see Ms. Marshall and another man at the Walgreens across from Houston's Restaurant. The phone records along with defendant's statement also establish that after having seen Ms. Marshall, defendant traveled to her residence on the Westbank where he sat in his vehicle in a neighboring driveway, approximately six car lengths away from the scene of the crime at the time of Ms. Marshall's death. The testimony further established that Ms. Marshall was sitting in her vehicle on the phone with her boyfriend, Mr. Francis, when she was startled by someone or something before her phone cut off.

The timeline of events presented by the State further proved that immediately after Ms. Marshall's phone hung up, shots were fired, and a call was placed to 9-1-1 by a neighbor to report the sound of gunfire. Further, the testimony of neighbor Mr. Barnes established that a dark-colored, four-door vehicle sped down his street following the gunfire, and defendant admitted that he had driven his aunt's green four-door Nissan Altima down Mr. Barnes' street on the night of the murder. The following day, defendant fled to Alabama, and while en route, was informed by Mr. Boykin that Ms. Marshall had been killed, provoking little emotional response.

Based on the foregoing, including the prior death threats made by defendant regarding Ms. Marshall, the history of defendant and Ms. Marshall's relationship, defendant's admissions regarding his whereabouts on the night of the murder, neighboring witnesses' testimony, defendant's cell phone records, and defendant's flight to Alabama following the murder, we find that the State negated any reasonable probability of misidentification, and under the *Jackson* standard, hold that the evidence was sufficient to support the jury's second degree murder verdict. This assignment of error is without merit.

ERRORS PATENT REVIEW

The record was reviewed 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). The review indicates that the trial court's advisal to defendant regarding the time within which he may file for post-conviction relief is somewhat incomplete.⁹ Accordingly, defendant is advised by way of this opinion that no application for post-conviction relief, including applications which seek an

⁹ The transcript indicates that the trial judge advised defendant that he had "two years from the date of judgment and conviction when sentence becomes final in which to seek an application for Post Conviction Relief." The minute entry indicates that defendant has "two (2) years after judgment of conviction and sentence has become final to seek post-conviction relief." The transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922.¹⁰

CONCLUSION

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

AFFIRMED

¹⁰ It is well settled that if a trial court provides an incomplete advisal, pursuant to La. C.Cr.P. art. 930.8, the appellate court may correct this error by informing the defendant of the applicable prescriptive period for post-conviction relief. *See State v. Neely*, 08-707 (La. App. 5 Cir. 12/16/08), 3 So.3d 532, 538, *writ denied*, 09-0248 (La. 10/30/09), 21 So.3d 272; *State v. Davenport*, 08-463 (La. App. 5 Cir. 11/25/08), 2 So.3d 445, 451, *writ denied*, 09-0158 (La. 10/16/09), 19 So.3d 473.

SUSAN M. CHEHARDY
CHIEF JUDGE

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MARC E. JOHNSON
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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 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-261

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE NANCY A. MILLER (DISTRICT JUDGE)

TERRY M. BOUDREAUX (APPELLEE)

HOLLI HERRLE-CASTILLO (APPELLANT)

THOMAS J. BUTLER (APPELLEE)

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