NOTICE
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2011 IL App (4th) 100475-U

Filed 12/20/11

NO. 4-10-0475

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
PAUL F. MORICONI,	)	No. 09CF770
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine M. McCarthy,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held:* The State failed to prove that defendant induced a hit-and-run driver to hide in his apartment, for purposes of the charge of obstructing justice (720 ILCS 5/31-4(b) (West 2008)), and that defendant affirmatively concealed from the police his knowledge of the offense, for purposes of the charge of concealing a fugitive (720 ILCS 5/31-5 (West 2008)); but the jury could have reasonably found that defendant aided a fugitive (720 ILCS 5/31-5 (West 2008)) by harboring the hit-and-run driver with the intent to prevent his apprehension.

¶ 2 A jury found defendant, Paul F. Moriconi, guilty of obstructing justice (720 ILCS 5/31-4(b) (West 2008)), concealing a fugitive (720 ILCS 5/31-5 (West 2008)), and aiding a fugitive (720 ILCS 5/31-5 (West 2008)), and the trial court sentenced him to concurrent 30-month terms of conditional discharge.

¶ 3 Defendant appeals on two grounds. First, he argues the evidence is insufficient to sustain any of the convictions, and, second, he argues that the convictions of concealing a fugitive

and aiding a fugitive should be vacated because they are predicated on the same act that forms the basis of the charge of obstructing justice.

¶ 4 We do not reach defendant's second argument, because we partly agree with his first argument. We agree the evidence is insufficient to sustain the convictions of obstructing justice (count I of the information) and concealing a fugitive (count II), but under our deferential standard of review, we find sufficient evidence to sustain the conviction of aiding a fugitive (count III). Therefore, we affirm the trial court's judgment in part and reverse it in part. We affirm the conviction of count III but reverse the convictions of counts I and II.

¶ 5 I. BACKGROUND

¶ 6 A. Mark Terlecki's Testimony

¶ 7 In the early morning of August 25, 2009, a Springfield police officer, Mark Terlecki, was called to an accident on Toronto Road, near its intersection with North Cotton Hill Road. When Terlecki arrived, he saw a man, Timothy Dunbar, standing over a body in the road, and behind Dunbar, a full-sized pickup truck was parked. The victim, as it turned out, was Anthony Mabie, and according to the stipulated testimony of Dr. Jessica Bowman, the cause of his death was blunt-force trauma consistent with being struck by motor vehicles.

¶ 8 Dunbar told Terlecki he had been coming from Bootleggers in his truck when he saw two dark full-sized pickup trucks hit the pedestrian. According to Dunbar, these two trucks just kept going, heading west.

¶ 9 Because Dunbar said he had come from Bootleggers, Terlecki went there. Bootleggers was a tavern. The bar was upstairs, and the basement was an apartment. Terlecki knocked on two doors, "the front door and the side door." He knocked "pretty loud[ly]," with his

hands and his flashlight, calling out that he was the Springfield police. There was no response.

¶ 10 Noticing that several vehicles were parked in the parking lot, he went over and took a closer look at them, writing down their license-plate numbers. When running the numbers, he found out that one of the vehicles, a pickup truck, belonged to Timothy Ladage.

¶ 11 B. Timothy Ladage's Testimony

¶ 12 Ladage went to Bootleggers at approximately 10:30 p.m. on August 24, 2009, after getting off work at Subway. He had been frequenting this tavern for some two years. He even had worked there for two or three months and consequently knew its owner, defendant. Ladage had six or seven beers at Bootleggers that night, enough to get a "buzz." Defendant introduced him to another patron, Dunbar. Mabie and James Hoke were at Bootleggers, too. Ladage already was acquainted with them.

¶ 13 The bar closed at 1 a.m., and Ladage, who had been in the beer garden, left at about 1:45 a.m., the same time as Dunbar and Hoke. The three of them climbed into their pickup trucks and drove out of the parking lot: Dunbar first, followed by Ladage, followed by Hoke. They went west on Toronto Road. This line of three trucks was traveling at about 45 miles per hour, when Ladage, second in line, saw Dunbar swerve sharply to the south side of the road. At that instant, Ladage saw an object in the road. It looked like a white bag. There was no time to stop. Ladage ran over the object, and it was like hitting a speed bump at a very fast speed.

¶ 14 Ladage made a U-turn and pulled into the Lake Point apartment complex. Dunbar pulled his truck around in front of the object in the road. Hoke, who likewise had run over the object, turned around and stopped to talk with Dunbar, and then he, too, pulled into the apartment complex. Ladage ran up to Hoke's truck and asked him what they had run over. Hoke looked at

Ladage "and frantically sa[id], [']I don't know. I think it was a human.['] " Hoke then said, " [']I am leaving. I don't have a driver's license.['] " Ladage replied, ['W]ell, I am going back to Bootleggers.['] "

¶ 15 At trial, Ladage insisted he had not intended to run and hide. It was just that he was more frightened than he ever had been in his life and he did not know what to do. He decided that Bootleggers was the closest place to go to, closer than his parents' house (where he lived). He knew that, in the past, defendant had allowed patrons to stay in his basement apartment when they felt they should not be driving. He knew that defendant would let him stay there and that all he had to do was ask.

¶ 16 So, Ladage headed back east on Toronto Road, toward Bootleggers. He got out his cell phone and called defendant. Ladage testified: "[I told] him I ran over an object in the road. I think it was human. James Hoke said he was pretty sure it was human." Defense counsel asked Ladage:

> "Q. You called Paul on your cellphone?
>
> A. Yes.
>
> Q. Asked him if you could stay in his apartment, right?
>
> A. After I told him what happened.
>
> Q. Okay, okay. You did not tell Paul that you wanted him to hide you, did you?
>
> A. No.
>
> Q. Nor did Paul offer to hide you, did he?
>
> A. No."

¶ 17 Ladage pulled into the parking lot of Bootleggers and got out of his truck. Defendant emerged from the side door of the Bootleggers building, which was the door to his apartment. Ladage told him, again, that there had been an object in the road and that Hoke had said he thought it was a human. Ladage and defendant discussed what to do. Ladage wanted to hide his truck by moving it inside the gate of the beer garden. Defendant rejected that idea, telling him that, if he was going to move the truck, he should "move it to the back of the parking area." Ladage parked near the door to defendant's apartment. They went inside the apartment, sat down on the couch, and talked the matter over for an hour. Defendant then went to his bed, about three feet from the couch, in the same big room. Ladage stayed on the couch, watching TV, unable to sleep. During the night, defendant rolled around on his bed and coughed a lot. Ladage did not know if defendant ever fell asleep. Ladage remained awake on the couch and made several calls to friends. He "[h]ad thoughts in [his] mind all night."

¶ 18 At 3 a.m. on August 25, 2009, Ladage heard a knock on the door to the apartment—not on the outer door to the foyer but on the inner door. Ladage did not answer the door; fear had him glued to the couch. Defendant did not stir in his bed either.

¶ 19 Around 6:45 a.m., when it was light outside, Ladage again heard a knock on the door. He was still lying on the couch. This time, defendant rose from his bed and answered the door. Ladage heard the visitor's voice outside, a man's voice, but he could not see the visitor. Defendant was in his boxer shorts and told the visitor, " ['L]et me put some clothes on. I'll meet you upstairs.['] " Defendant then put some clothes on and, via an internal door, went upstairs to the bar. Before going upstairs, he told Ladage, " [']I won't say anything to them about you.['] "

¶ 20 He did not tell Ladage where to stay, however; nor did he tell Ladage to hide.

¶ 21 Bootleggers was equipped with a video surveillance system, and by watching a monitor in the apartment, one could see what was going on upstairs. Ladage saw on the monitor that defendant was upstairs talking with the police, men with badges and holstered pistols. The conversation lasted about 45 minutes.

¶ 22 After the police left, Ladage went upstairs to the bar. The prosecutor asked him:

> "Q. Now when you first meet Paul up there, tell us about that conversation.
>
> A. He says that they were wanting to know about the accident that occurred on Toronto Road, he didn't tell them anything about me, and he had told me to wash my truck off.
>
> Q. Now I want to go back. As best you can remember, exactly what was said when you went back up there, okay? Paul Moriconi tells you what in relation to the conversation he had with the police earlier?
>
> A. He said they didn't ask anything about my truck or me. He just said they were wanting to know if he knew anything about the accident.
>
> Q. Did he tell you anything else?
>
> A. No.
>
> Q. You mentioned he said something about going to wash your truck?
>
> A. Yes.

Q. What did he say in relation to that?

A. He told me to take my truck to the north end of town and wash it off and nobody would know anything."

¶ 23 When Ladage went upstairs after the police left, defendant's cousin, Bill Heaton, was behind the bar, cleaning. Defense counsel asked Ladage:

"Q. You told him that, told Mr. Heaton that, and Paul was right there. You told him you may have run over a dog or coyote, right?

A. An object in the road.

Q. You told him dog or coyote, didn't you?

A. Yes.

Q. And Mr. Heaton told you, that is nothing to be scared about, right?

A. Right.

Q. It's then after a little while later you told him that you may have run over an object in the road? You used those words, correct?

A. Yes.

Q. And then you said it may have been a body?

A. Yes.

Q. You told him that?

A. Yes.

Q. Now both Mr. Heaton and Paul, after you told them that,

said, you need to be calling your parents and getting a lawyer, right?

A. Yes.

Q. And after Paul and Mr. Heaton tell you, hey, call your parents, get a lawyer, that is exactly what you did do, right?

A. Yes.

Q. It was at 8:31 in the morning that you called your mom, right? Do you know the time?

A. About then, yes."

¶ 24 At 10:30 a.m. on August 25, 2009, Ladage left Bootleggers, went home, and spoke with his mother. A little after 12 p.m., Ladage met with an attorney, Scott Sabin. Then, accompanied by Sabin, he went to the police station and made a statement.

¶ 25 Two detectives, Josh Stuenkel and Mark Pointer, were present for the statement. By that time, Ladage's truck was at home. He had not cleaned the truck or done anything to it. The prosecutor told Ladage:

"Q. Tell us what happens next.

A. After the statement?

Q. Yes.

A. Returned back home. They wanted to tow my truck, so I returned back home to my truck, me and Scott Sabin. Crime scene technicians come over. A tow truck arrives. They asked me if there is anything else I want to tell them about anything that happened. Since my truck is present, I say, well, yes, Paul had told me to take

my truck and wash it off.

Q. And you didn't wash it, correct?

A. Correct."

¶ 26 On cross-examination, Ladage testified that during the actual meeting in the police station, when Stuenkel and Pointer asked him if he had washed his truck, he did not "say anything at that point about, ['W]ell, Paul told me to take my truck out to the north end.[']" It was not until the police arrived at his parents' house, to oversee the towing of his truck, that he mentioned this advice from defendant.

¶ 27 In a separate proceeding, Ladage pleaded guilty to aggravated leaving the scene of an accident.

¶ 28 C. Ken Scarlett's Testimony

¶ 29 Ken Scarlett, a sergeant with the Springfield police department, testified that as the investigation unfolded, it soon became apparent that Dunbar "had more information than he initially let on." His status changed from being a witness to being a suspect. For one thing, blood on his truck suggested he was involved in the accident and that he was not merely (as he initially presented himself) an onlooker. Also, video surveillance footage from Lake Point Apartments actually showed the crash, and "Mr. Dunbar's vehicle was involved as well as two additional full size pick-up trucks."

¶ 30 One of the trucks, in the video footage from Lake Point Apartments, was Ladage's truck, the same truck that was parked outside Bootleggers (among other vehicles). The police, however, did not make the connection. They did not become aware of Ladage's involvement until he came the police station around 2 p.m. on August 25, 2009, and made a statement.

¶ 31 D. Ryan Sims's Testimony

¶ 32 Ryan Sims, a detective with the Springfield police department, was called to the police station in the early morning of August 25, 2009, to investigate the accident on Toronto Road. After being debriefed, he knew little more than this: (1) Dunbar said that two dark pickup trucks might have been involved in the accident and (2) Dunbar said he was coming from Bootleggers when he witnessed the accident.

¶ 33 Sims went to Bootleggers around 7 a.m. on August 25, 2009. His partner, a detective named Welsh, came along. Sims knocked on the basement door. Defendant came to the door, and Sims could not remember if defendant opened the door a crack or opened it wide. The detectives had "a very brief encounter with him" at the door of his residence; they told him they wanted to talk with him. Defendant responded, " [']I'll meet you at the main entrance of Bootleggers.['] " Sims did not try to look inside the apartment. Instead, he and Welsh walked around to the main entrance of the building, as defendant had directed, and defendant unlocked the door and let them into the bar.

¶ 34 The detectives explained to defendant that they were investigating an accident in which a pedestrian had been run over. Sims "began to ask him more specifically about Tim Dunbar because that was really all the information they had at the time."

¶ 35 Defendant told them that Dunbar arrived at the bar around 11 p.m. the previous evening. He arrived alone and stayed until closing time. Defendant pointed out the corner of the bar where Dunbar had been sitting and where defendant had been sitting beside him.

¶ 36 Sims asked defendant "who else was [Dunbar] talking to," and defendant answered "Max, the guy that used to own the California Sports Bar and Grill." Defendant also mentioned someone named Mike. Six to eight people were in the bar at closing, defendant said—but that number seemed to vary during the conversation. He said that three, four, or five people left at the

same time as Dunbar.

¶ 37 Sims asked defendant who the bartender was the previous evening, and defendant answered that her name was Maria but he did not know her phone number or her last name, because she was new. Defendant added, however, that she would be working at 3 p.m. that day if the detectives wished to talk with her.

¶ 38 Sims also asked defendant about the vehicles in the parking lot. Sims testified:

> "I asked him about why the vehicles were there, and he said several were his. Several were other patrons that had asked or left their vehicles because, presumably, they didn't want—were intoxicated or whatever the case may be, and he didn't seem to have a problem with that. Seemed plausible at the time. Didn't ask a lot of additional questions about it.
>
> Q. Do you recall—did you ask him specifically if Tim Ladage's vehicle was there?
>
> A. I didn't know anything about Mr. Ladage at that time."

¶ 39 On cross-examination, defense counsel asked Sims:

> "Q. You asked Paul about the cars in the parking lot, right?
>
> A. Yes.
>
> Q. You were still inside the tavern building?
>
> A. At the time we asked, yes.
>
> Q. He said, well, some are mine, some are people that left them here that aren't comfortable driving home?

A. Along those lines.

Q. That was the extent of the conversation you had about the cars or trucks or anything else in the parking lot.

A. That is all I recall about that exchange, yes."

¶ 40 Toward the end of the interview, defendant asked the detectives who was the pedestrian who had got hit. Sims told him it was Mabie. Defendant then revealed that Mabie was in the bar the previous night but that defendant made him leave around 12:15 or 12:30 a.m. because he was bothering the female customers.

¶ 41 At no point did defendant tell the detectives that (1) Ladage was one of the patrons in the bar during the late evening of August 24, 2009, and the early morning of August 25, 2009; (2) Ladage's truck was parked outside because he was too scared to drive home, to his parents' house, after running over Mabie's body on Toronto Road; or (3) Ladage presently was in defendant's apartment, downstairs. Nor did the detectives ask defendant any questions specifically about Ladage—because during the morning of August 25, 2009, they did not yet know about Ladage.

¶ 42 They learned about Ladage later that same day, at 1:30 p.m. on August 25, 2009, when he came to the police station and made a statement.

¶ 43 The next day, on August 26, 2009, Sims and other police officers returned to Bootleggers with a warrant to search the video surveillance equipment there. As defendant's computer was being disassembled, Sims took defendant aside and "challenged him about the information that [they] had learned" and asked him why "he had not been completely truthful the first time [they] talked."

¶ 44 The prosecutor asked Sims:

"Q. And do you recall exactly what he said and you said to him?

A. I confronted him that we were told there was a suspect in the basement at the time we were at Bootleggers the previous morning.

Q. Do you recall what his response was?

A. His response was we had not asked him the right questions."

¶ 45 II. ANALYSIS

¶ 46 A. Count I: Obstructing Justice

¶ 47 Count I of the information charged defendant with obstructing justice (720 ILCS 5/31-4(b) (West 2008)). According to count I, he obstructed justice on or about August 25, 2009, by doing the following:

"[D]efendant knowingly induced Timothy Ladage, a witness having knowledge material to the traffic crash that killed Anthony Mabie and with the intent to prevent the apprehension of Timothy Ladage to conceal himself in the basement of Bootlegger's, located at 1220 Toronto, Springfield, Sangamon County, Illinois, while the police were upstairs investigating the crash ***."

¶ 48 The trial court instructed the jury that to prove defendant guilty of obstructing justice, the State had to prove the following three propositions:

"*First Proposition*[:] That Timothy Ladage was a witness

having knowledge material to the traffic accident that caused the death of Anthony Mabie; and

Second Proposition[:] That the defendant knowingly induced Timothy Ladage to conceal himself; and

Third Proposition[:] That the defendant did so with the intent to prevent the apprehension of Timothy Ladage." See 720 ILCS 5/31-4(b) (West 2008).

¶ 49 Defendant does not appear to dispute that the State proved the first proposition in the quoted instruction (that Ladage knew something important about the traffic accident). He disputes, however, that the State proved the second proposition (that he knowingly induced Ladage to conceal himself) and therefore the third proposition (that he did so with the intent to prevent Ladage from being apprehended).

¶ 50 The record appears to contain no evidence that defendant induced Ladage to conceal himself—or that Ladage needed any inducing. Granted, it was the jury's function to determine whether the elements of obstructing justice had been proved, and we review that determination deferentially. We look at the evidence in a light most favorable to the prosecution, allowing all reasonable inferences to be drawn in favor of the prosecution (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), and we ask whether any rational trier of fact could have found the elements of obstructing justice to be proved beyond a reasonable doubt (*People v. Davison*, 233 Ill. 2d 30, 43 (2009)).

¶ 51 We do not see how any rational trier of fact could have found the element of inducement to be proved beyond a reasonable doubt. Again, that element, as stated in the

instruction, is that "the defendant knowingly induced Timothy Ladage to conceal himself." To "induce" someone to do something means to "succeed in persuading or influencing (someone) to do something." The New Oxford American Dictionary 861 (2d ed. 2005). Defendant did not persuade or influence Ladage to come to his apartment. Rather, Ladage called defendant on the telephone, requesting permission to come over, and defendant gave him permission. At no time after Ladage arrived did defendant tell him to hide anywhere inside the apartment.

¶ 52 Admittedly, Ladage did not rise from the couch in defendant's apartment and answer the door at 3 a.m., when Terlecki pounded on the door with his hand and his flashlight, announcing he was the police; and Ladage did not go upstairs with defendant at 6:45 a.m. and join him in his conversation with the police. But the question, for purposes of count I, is not whether Ladage concealed himself from the police while he was in defendant's apartment. Instead, the question is whether defendant induced Ladage to conceal himself in the apartment. The record appears to contain no evidence that he did so.

¶ 53 The State disagrees. The State argues that when defendant assured Ladage, immediately before going upstairs to talk with the police, that he would say nothing about him, he thereby "impliedly instructed Ladage to *keep concealing himself* in the basement apartment while defendant went upstairs to deflect the investigation." (Emphasis added.) But the issue is whether defendant "induced Timothy Ladage to conceal himself," not whether he "induced Timothy Ladage to continue concealing himself" after Ladage already had begun, on his own initiative, to conceal himself. See 720 ILCS 5/31-4(b) (West 2008) ("[i]nduces a witness *** to *** conceal himself"). If Ladage already was concealing himself in the apartment when defendant went upstairs to talk with the police, defendant could not have induced him, at that point, to conceal himself in the apartment.

Defendant could not have induced Ladage to do something after Ladage already had begun doing it. In other words, one cannot intelligibly say that defendant "succeeded in persuading" Ladage to do something that Ladage already was in the process of doing and hence already had chosen to do. See The New Oxford American Dictionary 861 (2d ed. 2005).

¶ 54 Besides, the mere statement "I won't say anything to the police" cannot reasonably be understood as advice to continue hiding. It merely was a declarative statement, a statement of how defendant intended to comport himself. It was neutral as to Ladage.

¶ 55 B. Count II: Concealing a Fugitive

¶ 56 Count II of the information charged defendant with concealing a fugitive (720 ILCS 5/31-5 (West 2008)). According to count II, defendant concealed a fugitive on or about August 25, 2009, by doing the following:

> "[D]efendant, knowing Timothy Ladage committed the offense of leaving the scene of an accident in violation of Section 11-401 of Act 5 of Chapter 625 of the Illinois Compiled Statutes [(625 ILCS 5/11-401 (West 2008))], and with the intent to prevent Timothy Ladage's apprehension, concealed his knowledge that the offense of leaving the scene of an accident had been committed by Timothy Ladage ***."

¶ 57 The trial court instructed the jury that to prove defendant guilty of concealing a fugitive, the State had to prove the following five propositions:

> "*First Proposition*: That the defendant is not a husband, wife, parent, child, brother, or sister to the offender; and

Second Proposition: That Timothy Ladage had committed the offense of leaving the scene of an accident; and

Third Proposition: That the defendant knew that Timothy Ladage had committed the offense of leaving the scene of an accident; and

Fourth Proposition: That the defendant concealed his knowledge that the offense of leaving the scene of an accident had been committed; and

Fifth Proposition: That the defendant did so with the intent to prevent the apprehension of Timothy Ladage." See 720 ILCS 5/31-5 (West 2008).

¶ 58 Defendant does not appear to dispute that the State proved the first, second, and third propositions. He disputes, however, that the State proved the fourth proposition. In his view, the State failed to prove, beyond a reasonable doubt, that on or about August 25, 2009, he concealed knowledge that Ladage had fled the scene of an accident. And, of course, if defendant is correct that the State failed to prove his concealment of this knowledge, the State necessarily failed to prove he concealed this knowledge with the intent to prevent Ladage's apprehension.

¶ 59 Defendant does not deny that he refrained from telling the police what he knew about Ladage—*i.e.*, that Ladage was one of the persons who had fled the scene after running over someone and that Ladage presently was downstairs in defendant's apartment—but defendant argues that the police failed to ask him the "right questions," the questions that would have elicited this information. He reasons that unless the police asked him the right questions and he answered those questions

untruthfully, he was not proved guilty of count II, because, in the statute defining the offense of concealing or aiding a fugitive (720 ILCS 5/31-5 (West 2008)), the phrase "concealing his knowledge that an offense has been committed" means an "affirmative act of concealment" (*People v. Donelson*, 45 Ill. App. 3d 609, 611 (1977)), not a mere failure to come forward with information (*id.* at 610).

¶ 60 Indeed, we have held that merely keeping quiet about a crime is not "conceal[ing one's] knowledge that an offense has been committed," within the meaning of section 31-5 (720 ILCS 5/31-5 (West 2008)). *Donelson*, 45 Ill. App. 3d at 610. Otherwise, to avoid committing the felony of concealing a fugitive, everyone would have to call the police every time they witnessed a misdemeanor, such as speeding. *Id.* at 612. Because it would be unreasonable to suppose that the legislature intended to create such an oppressive system (*id.*) and because, at common law, a person did not become an accessory after the fact merely by remaining silent about an offense (*id.* at 610), "conceal[ing one's] knowledge that an offense has been committed" must mean an "affirmative act of concealment" (*id.* at 611).

¶ 61 What does it mean to "affirmatively conceal one's knowledge that an offense has been committed"? The only way to do so is to lie about one's knowledge of the offense. An affirmative (as opposed to a passive) concealment of one's own knowledge is a lie. *United States v. Weekley*, 389 F. Supp. 2d 1293, 1301 (S.D. Ala. 2005) (interpreting the federal misprision of felony statute (18 U.S.C. § 4 (2000))); *Donelson*, 45 Ill. App. 3d at 611 (reasoning by analogy to cases interpreting the federal misprision of felony statute). A lie misrepresents, and thereby affirmatively conceals, what one knows. If, instead of keeping quiet, a person makes a statement and, in so doing, lies to the police about what he or she knows regarding an offense, that person commits an affirmative act

of concealment. See *People v. Brogan*, 352 Ill. App. 3d 477, 495 (2004) (upholding the defendant's conviction of concealing a fugitive, because, among other reasons, "the defendant's representations to Sergeant Black reach[ed] far beyond a passive nondisclosure of the events of that evening and into a full-fledged misrepresentation of what transpired").

¶ 62 Surely, most would agree that lying is an affirmative act and that denying knowledge of an offense when in fact one knows something about an offense is a lie—and, as such, an affirmative concealment of one's own knowledge. Nevertheless, some opinions of the appellate court suggest that a false denial of knowledge does not qualify as an affirmative act of concealment. *People v. Hammond*, 214 Ill. App. 3d 125, 134 (1991); *People v. Thomas*, 198 Ill. App. 3d 1035, 1037-38 (1990). This view rests ultimately on a misinterpretation and misapplication of *People v. Vath*, 38 Ill. App. 3d 389 (1976). See *Thomas*, 198 Ill. App. 3d at 1038) (citing *Vath* in support of the suggestion that the defendant "could have [falsely] denied any knowledge whatsoever of the identity of the shooter" without incurring criminal liability for concealing a fugitive).

¶ 63 In *Vath*, the defendant was charged not with concealing a fugitive but with a quite different offense, concealment of a homicidal death (Ill. Rev. Stat. 1975, ch. 38, par. 9-3.1). *Vath*, 38 Ill. App. 3d at 390. Unlike the statute defining the offense of concealing a fugitive, the statute defining the offense of concealment of a homicidal death, section 9-3.1, said nothing about concealing *knowledge*. Instead, section 9-3.1 provided: " 'A person commits the offense of concealment of homicidal death when he *conceals the death* of any other person with knowledge that such other person has died by homicidal means.' " (Emphasis added.) *Id.* at 392 (quoting Ill. Rev. Stat. 1975, ch. 38, par. 9-3.1). Consequently, the appellate court interpreted section 9-3.1 as applying only to "situations where the body itself [was] concealed or where the homicidal nature of

death [was] actively concealed, as in making a homicide appear an accident." *Id.* at 395. The defendant in *Vath* did neither of those things. After William L. Loveless's body was discovered, the defendant denied any knowledge that Loveless had died—and in that respect, he lied (in the State's view). *Id.* at 391-92. But this lie was not a concealment of a homicidal death as that offense was defined in section 9-3.1, because the lie concealed neither Loveless's death nor the homicidal nature of his death. *Id.* at 395-96. The appellate court explained: "[The] [d]efendant's denial of any knowledge to the police officer occurred after the discovery of the body and, while obviously designed to conceal involvement or even guilt, could not have concealed the death of the deceased or the homicidal means of death." *Id.* at 395.

¶ 64 To be sure, in *Vath*, the appellate court quoted several authorities in support of the idea that "concealment," in section 9-3.1, meant "active concealment" and that the mere passive failure to disclose a crime was not an active concealment. *Vath*, 38 Ill. App. 3d at 392-95. In that discussion, however, the appellate court meant to rebut the State's alternative argument that by remaining silent between the time he was present at the scene of the crime and the time the body was discovered, the defendant "concealed a homicidal death" within the meaning of section 9-3.1. *Id.* at 391-92.

¶ 65 The State contended, in *Vath*, that the defendant concealed a homicidal death both by keeping quiet during that interval and by falsely denying his knowledge of Loveless's death after the body was discovered. *Vath*, 38 Ill. App. 3d at 391-92. Because of how section 9-3.1 was worded, however, that denial did not meet the statutory description of a "concealment of a homicidal death."

¶ 66 Thus, in *Vath*, the appellate court never questioned that a false denial of knowledge

was an affirmative concealment of knowledge. (Plainly, it is.) Rather, the appellate court held that the defendant's affirmative concealment of his knowledge, *i.e.*, his allegedly false denial of knowledge of Loveless's death, was not the particular type of affirmative concealment that section 9-3.1 criminalized.

¶ 67 In short, a false denial of knowledge is a lie, and a lie is an affirmative concealment of one's own knowledge, for purposes of the offense of concealing a fugitive. If a lie were not an affirmative concealment of one's own knowledge, it would be difficult to imagine what would be. Indeed, under the most recent case law, *Brogan* (published before the events in the present case), a deliberate misrepresentation regarding an offense does count as an affirmative concealment. *Brogan*, 352 Ill. App. 3d at 495.

¶ 68 Defendant denies he made any deliberate, outright misrepresentations to the police. He argues he gave accurate answers to the detectives' questions—accurate as far as the answers went. He admits that his nondisclosure of what he knew—his expectation that the detectives ask him the "right questions"—might have been "distasteful," but he insists, all the same, that the detectives did indeed fail to ask him the right questions and that consequently his concealment of knowledge, in his answers, was passive rather than affirmative.

¶ 69 The State argues, on the other hand, that "[the] police did ask the right questions, including (1) if defendant 'knew anything about the accident,' (2) if he knew the names of the other patrons, and (3) why the vehicles were parked in the lot," and that "defendant provided untrue answers about the vehicles and the patrons." Let us consider those three questions one at a time, along with the answers that defendant gave (insomuch as the record contains any evidence of his answers).

¶ 70 1. *The Question "Do You Know Anything About the Accident?"*

¶ 71 When the police left Bootleggers after talking with defendant for approximately 45 minutes, Ladage came upstairs from the apartment, and according to Ladage's testimony, defendant told him about his conversation with the police. Ladage testified:

> "A. He says they were wanting to know about the accident that occurred on Toronto Road, he didn't tell them anything about me, and he had told me to wash my truck off.
>
> Q. Now I want to go back. As best you can remember, exactly what was said when you went back up there, okay? Paul Moriconi tells you what in relation to the conversation he had with the police earlier?
>
> A. He said they didn't ask anything about my truck or me. He just said they were wanting to know if he knew anything about the accident.
>
> Q. Did he tell you anything else?
>
> A. No."

The record does not seem to reveal specifically what answer defendant gave to the question, "Do you know anything about the accident that occurred on Toronto Road?"—assuming the detectives formulated the question that way, and that is far from clear. He might have given no answer. He might have deflected the question by discussing some tangential matter or by responding with a question of his own. We just do not know.

¶ 72 The State argues: "[I]t can be reasonably inferred that defendant lied about not

knowing 'anything' concerning the accident because police left without becoming aware at all of Ladage's involvement." This so-called "inference" is speculation, and a conviction cannot rest on speculation (*People v. Ehlert*, 211 Ill. 2d 192, 215 (2004)). Before sustaining a conviction on the basis of an answer defendant gave to a question by the police, we would like to know exactly what question the police asked and exactly what answer the defendant gave.

¶ 73 2. *Defendant's Representations to the Police Regarding the Patrons Who Left at Closing Time*

¶ 74 At trial, defense counsel asked Sims:

> "Q. You asked [defendant] about whether there were other people in the bar when Tim [Dunbar] was in the bar, and he said there were about six to eight people at closing?
>
> A. Yes. That seemed to vary as we talked, but he said there were others, and we also asked for their names."

The only names defendant gave were "Max," "Mike," and Anthony Mabie—not Timothy Ladage.

¶ 75 This does not appear to be a lie, though; it is merely a failure to come forward with all the information. The appellate court has held that giving incomplete information, which is true as far as it goes, is not an affirmative act of concealment for purposes of the offense of concealing a fugitive. *Thomas*, 198 Ill. App. 3d at 1038. In *Thomas*, the defendant initially gave only a physical description of the shooter and only the shooter's first name (Ron), even though he knew that the shooter was his first cousin, Ronald Batson. *Id.* at 1036. In reversing the defendant's conviction of concealing a fugitive, the First District held that by giving the detective police information about the identity of the shooter, the defendant "did not undertake an affirmative act necessary for the offense of concealing a fugitive." *Id.* at 1038.

¶ 76 Like the defendant's statement in *Thomas*, defendant's statement regarding the names of patrons appears to be true as far as it goes—anyway, we are aware of no evidence that it is false (for all that appears in the record, there might have been a Max, and there might have been a Mike). He did not purport to name all of the six to eight patrons who were in the bar that night. His failure to disclose that Ladage was one of the patrons was a failure to come forward with information, not an affirmative act of concealment. See *Donelson*, 45 Ill. App. 3d at 611.

¶ 77 3. *Defendant's Representation to the Police About the Vehicles in the Parking Lot*

¶ 78 The State argues that defendant "provided untrue answers about the vehicles and the patrons." Sims testified he asked defendant "why the vehicles were there" in the Bootleggers parking lot. According to Sims, defendant told him that "several were his" and that "[s]everal were other patrons that had asked or left their vehicles because, presumably, they didn't want—were intoxicated or whatever the case may be, and he didn't seem to have a problem with it." On cross-examination, Sims agreed that defendant had told him something along the lines of " ['W]ell, some are mine, some are people that left them here that aren't comfortable driving home.['] "

¶ 79 Again, it is unclear how this limited amount of information was a lie. Granted, defendant did not reveal to Sims that one of the trucks belonged to Ladage, who had left it there because he had run over a man's body on Toronto Road, and that he was staying in defendant's apartment until he decided what to do next. But it does not follow that what defendant told Sims about the vehicles, as far as it went, was untrue. For all that we know, several of the vehicles in the parking lot did belong to defendant, and several of the vehicles belonged to patrons who had consumed too much alcohol to drive home. Defendant did not purport to give an explanation for all of the vehicles; he gave an explanation for "some" of them: some were his, and some belonged

to patrons who were not comfortable driving home. "Some" plus "some" does not necessarily equal "all"; it might equal "some."

¶ 80 C. Count III: Aiding a Fugitive

¶ 81 Count III of the information charges defendant with aiding a fugitive (720 ILCS 5/31-5 (West 2008)). According to count III, defendant aided a fugitive on August 25, 2009, by doing the following:

> "[D]efendant, knowing Timothy Ladage committed the offense of leaving the scene of an accident in violation of Section 11-401 of Act 5 of Chapter 625 of the Illinois Compiled Statutes [(625 ILCS 5/11-401 (West 2008))], and with the intent to prevent Timothy Ladage's apprehension, harbored, aided or concealed Timothy Ladage in Bootleggers ***."

¶ 82 The trial court instructed the jury that to prove defendant guilty of aiding a fugitive, the State had to prove the following five propositions:

> "*First Proposition*: That the defendant is not a husband, wife, parent, child, brother, or sister to the offender; and
>
> *Second Proposition*: That Timothy Ladage had committed the offense of leaving the scene of an accident; and
>
> *Third Proposition*: That the defendant knew that Timothy Ladage had committed the offense of leaving the scene of an accident; and
>
> *Fourth Proposition*: That the defendant harbored, aided, or

concealed Timothy Ladage; and

Fifth Proposition: That the defendant did so with the intent to prevent the apprehension of Timothy Ladage." See 720 ILCS 5/31-5 (West 2008).

¶ 83 Defendant does not appear to dispute the first three propositions, but he argues the State failed to prove the fourth and fifth propositions. He insists that by allowing Ladage to sleep on the couch in his apartment for the rest of the night, he did not harbor, aid, or conceal Ladage but, instead, simply allowed a former employee to sleep on his couch—as he had allowed plenty of other visitors to do in the past.

¶ 84 Nevertheless, by allowing Ladage to sleep in his apartment overnight, defendant "harbored" him. To "harbor" means to "shelter or hide." The New Oxford American Dictionary 768 (2d ed. 2005). Providing shelter, refuge, or lodging to a fugitive is tantamount to harboring the fugitive. *United States v. Hill*, 279 F.3d 731, 738 (9th Cir. 2002); see *People v. Crousore*, 406 N.W.2d 280, 283 (Mich. Ct. App. 1987); *Dennis v. State*, 102 N.E.2d 650, 653-54 (Ind. 1952); *State v. Pringle*, 266 P. 196, 197 (Wash. 1928).

¶ 85 Harboring Ladage, however, does not render defendant criminally liable under section 31-5 (720 ILCS 5/31-5 (West 2008)) unless defendant harbored him with the intent to prevent his apprehension. Defendant argues there was insufficient evidence of his intent to prevent Ladage from being apprehended, considering that (1) he refused to allow Ladage to hide his truck in the beer garden, as Ladage had requested; (2) he had allowed many others to stay overnight in his apartment, for innocent reasons, in the past; and (3) as soon as the police left Bootleggers, he advised Ladage to tell his parents what had happened and to seek legal counsel.

¶ 86 But those circumstances do not necessarily negate an intent on defendant's part to aid Ladage in avoiding apprehension at least for the time being. A person can conceal a fugitive in a residence even though the person has had plenty of visitors over, for other reasons, in the past.

¶ 87 As for defendant's refusal to allow Ladage to park in the beer garden, defendant could have considered that idea to be detrimental to the goal of helping Ladage avoid apprehension. If the police had seen the truck in the beer garden, it would have invited inquiry, whereas if the police had seen the truck in the parking lot, with the rest of the vehicles (albeit in the back of the parking lot), it would have been less apt to attract their attention.

¶ 88 Advising defendant to confide in his parents and to seek legal counsel does not necessarily negate an intent to help Ladage avoid apprehension, either. Arguably, this advice by defendant merely shows that, in his view, it should be up to Ladage and his parents whether to go to the police: Ladage should be apprehended if and when he is ready to be apprehended—and not before.

¶ 89 Looking at the evidence in a light most favorable to the prosecution, we conclude that a rational jury could find, beyond a reasonable doubt, that defendant harbored Ladage with the intent to prevent his apprehension. It would be fair to assume that when the police knocked on the door of defendant's apartment at 6:45 a.m. on August 25, 2009, defendant had a pretty good idea of why they were there: because of the pedestrian killed the previous night on Toronto Road. Defendant knew there was a hit-and-run driver: the man reclining on his couch. And he knew the police would be very keen on finding out who the hit-and-run driver was so that they could arrest him. Defendant all but declared his intent to prevent Ladage's apprehension when he promised Ladage, immediately before going upstairs to talk with the police, that he would say nothing about him. That intent is

further evident in defendant's materially incomplete answers to the detectives' questions and in his advice to Ladage "to take [his] truck to the north end of town and wash it off and nobody would know anything."

¶ 90 III. CONCLUSION

¶ 91 For the foregoing reasons, we reverse the convictions on count I and II of the information but affirm the conviction on count III. As part of our judgment we award the State $75 against defendant as costs of this appeal.

¶ 92 Affirmed in part and reversed in part.

¶ 93 JUSTICE COOK, dissenting:

¶ 94 I respectfully dissent and would affirm the decision of the trial court in its entirety.

¶ 95 Defendant is the owner of Bootleggers, a tavern on Toronto Road. Defendant made Anthony Mabie leave around 12:15 or 12:30 a.m., on August 25, 2009, because he was bothering the female customers. That night, defendant introduced Timothy Ladage to Timothy Dunbar, another patron. Ladage was already acquainted with Mabie and James Hoke. The bar closed at 1 a.m., and Dunbar, Ladage and Hoke left in their pickup trucks about 1:45 a.m., traveling west on Toronto Road. Ladage had had six or seven beers. All three vehicles ran over Mabie.

¶ 96 Ladage called defendant on his cell phone and told him he had run over a human on Toronto Road and asked defendant if he could stay in defendant's apartment. Ladage knew that in the past, defendant had allowed patrons to stay in his basement apartment when they felt they should not be driving. Ladage pulled into the parking lot of Bootleggers. Defendant emerged from the side door of Bootleggers, the door to defendant's apartment. Ladage wanted to hide his truck by moving it inside the gate of the beer garden. Defendant rejected that idea, telling Ladage that if he was going to move the truck, he should "move it to the back of the parking area." The two went inside the apartment and talked the matter over for an hour. Defendant then went to his bed and Ladage stayed on the couch in the same big room, unable to sleep.

¶ 97 At 3 a.m., there was a knock on the door to the apartment. Neither Ladage nor defendant answered the door.

¶ 98 Around 6:45 a.m., there was another knock on the door. Defendant rose from his bed and answered the door. Defendant told the visitor, "let me put some clothes on. I'll meet you upstairs." Defendant put some clothes on and went upstairs to the bar, via an internal door. Before

going upstairs, he told Ladage, "I won't say anything to them about you." Defendant spoke to the police for about 45 minutes. After they left, Ladage went upstairs to the bar. Defendant told Ladage the police were wanting to know if he knew anything about the accident, and he didn't tell them anything about Ladage. Defendant told Ladage to take his truck to the north end of town and wash it off and nobody would know anything.

¶ 99 Officers Sims and Welsh were the ones who spoke to defendant. The detectives said they were investigating an accident in which a pedestrian had been killed. They specifically asked defendant about Dunbar, because that was the only information they had at the time. Officer Sims asked defendant who Dunbar was talking to in the bar, and defendant replied Max and Mike, but did not mention Timothy Ladage or James Hoke. Officer Sims asked about the vehicles in the parking lot. Defendant replied that several were his and several were those of patrons who left their vehicles because they were intoxicated or whatever. Defendant did not mention that one of the vehicles belonged to Ladage, who was then downstairs in the apartment.

¶ 100 When Ladage went upstairs, defendant's cousin, Bill Heaton was there, cleaning the bar. Ladage told Heaton that he may have run over a dog or a coyote, and Heaton told him that was nothing to be scared about. A little while later, Ladage told Heaton that it might have been a body. Heaton and defendant then told Ladage that he needed to be calling his parents and getting a lawyer. Ladage called his mother at 8:31 a.m.

¶ 101 In *Thomas*, defendant was charged with concealing a fugitive. Defendant gave some information to the police, but did not disclose that the assailant, "Ron," was defendant's cousin. The opinion does not set out the questions asked by the police, and apparently defendant's answers were not misrepresentations, only incomplete. *Thomas* held that the term "conceals" requires more than

a failure to come forward with information, that an "affirmative act" is required. *Thomas*, 198 Ill. App. 3d at 1037, 556 N.E.2d 721, 723.

¶ 102 A defendant can only prevail in a challenge to the sufficiency of the evidence if no reasonable fact finder could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *Brogan*, 352 Ill. App. 3d at 493, 816 N.E.2d 643, 657. The mental state of "knowledge" is ordinarily proven by circumstantial evidence as opposed to direct proof. *Brogan*, 352 Ill. App. 3d at 493, 816 N.E.2d at 657. In *Brogan*, defendant was convicted of concealing a fugitive. The court held that defendant's actions were not akin to those where a defendant gives incomplete information, but involved specific actions and responses to specific questions. "Finally, the defendant's representations to Sergeant Black reach far beyond a passive nondisclosure of the events of that evening and into a full-fledged misrepresentation of what transpired." *Brogan*, 352 Ill. App. 3d at 495, 816 N.E.2d at 658.

¶ 103 The same is true in the present case. Defendant was not just a passive bystander. He had served the six or seven beers which Ladage had consumed. He knew that Ladage had run over Mabie when he allowed Ladage to conceal himself in his apartment. Defendant's control of the situation is indicated by defendant's direction that Ladage move the truck to the back of the parking area, defendant telling Ladage that he would not say anything about him to the police, and defendant telling Ladage to take his truck to the north end of town and wash it off. Defendant's representations to the police were not simply a passive nondisclosure of the events, they were not true. Defendant was specifically asked who Dunbar was talking to in the bar, and misrepresented that Dunbar was only speaking to Max and Mike. Defendant was specifically asked whose vehicles were in the parking lot, and replied they belonged to patrons who had left them, when in fact one of the vehicles

belonged to Ladage, who was then downstairs in the apartment and whom defendant was trying to protect.

¶ 104 The jury could have concluded that defendant "induced" Ladage to conceal himself. Defendant's conduct, including granting permission for Ladage to stay in his apartment, clearly influenced the actions Ladage took. The fact that defendant instructed Ladage to keep concealing himself when defendant went upstairs to talk to the police officers suggests that was also defendant's intent when he allowed Ladage to stay in his apartment.