STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA **2006 KA 1542**

PARISH OF IBERVILLE

VS.

18TH JUDICIAL DISTRICT

CHAD G. ANDERSON **COURT NO. 114003**

This Court, ex proprio motu, **GRANTS A REHEARING** for the sole purpose of **RE-ISSUING** this Court's opinion in the captioned matter to correct a clerical error and any confusion such error may have caused. More specifically, the last sentence of the first paragraph of this Court's opinion has been changed to conclude with the sentence, "We affirm the conviction and sentence."

Signed this 27th day of February 2007.

Randolph H. Parro by

JUDGE, COURT OF APPEAL

JUDGE, COURT OF APPEAL

Page McClendon by

JUDGE, COURT OF APPEAL

NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

VERSUS

CHAD G. ANDERSON

RHP by

On Appeal from the 18th Judicial District Court
Parish of Iberville, Louisiana
Docket No. 1140-03, Division "D"
Honorable William C. Dupont, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered February 27, 2007

McClendon, J., concurs in part and assigns reasons by

PARRO, J.

The defendant, Chad G. Anderson, was charged by bill of indictment with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant filed a motion for new trial, which was denied. The defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals, asserting two assignments of error. We affirm the conviction and sentence.

FACTS

On May 16, 2003, at about 3:50 a.m. in the city of Plaquemine, Lieutenant James Snelson and Sergeant David White, both with the Iberville Parish Sheriff's Office, were on duty writing reports near the intersection of Louisiana Highway 1 and Louisiana Highway 75 when they heard six gunshots in the area of Barrow Street.[1] Less than a mile away, the officers arrived on Barrow Street about fifteen seconds later. Sergeant White followed a Ford Taurus that was in the area. After a short pursuit by Sergeant White and several other units, the Taurus pulled over on Center Street. The four people that were removed from the car were Bradley Thompson, Russell Thomas, Jeross Banks, and Cordis Gales (hereinafter "the group"). No weapons were found on any person or in the car. The group was taken to the investigative division at the courthouse for questioning. Lieutenant Snelson found Barakka Miles, the victim, shot to death in a ditch near the corner of Barrow Street and Joe Davis Street.

Brittany Washington, the defendant's girlfriend at the time of the shooting, testified at trial that she dropped the defendant off in Plaquemine on May 15, 2003, at about 10:15 p.m. According to Washington's written statement to the police, the defendant was going to Plaquemine to get money for Washington's prom. The

[1] The officers were in separate units.

the police. Thompson testified that he never saw Barakka, and he did not know who killed him. He also had no knowledge that the defendant was looking for money that night. Thompson also stated that earlier that night he noticed a bulge in the defendant's jogging pants. When he asked what it was, the defendant told him it was a .38.

Stephen Engolio, Chief Criminal Deputy for the Iberville Parish Sheriff's Office, testified at trial that he sat in on the interviews of the group and that these four witnesses told him that the defendant was the suspect. The defendant made contact with the Sheriff's Office by telephone, and Chief Engolio attempted to get the defendant to turn himself in. Chief Engolio testified that the defendant told him that he did not kill Miles. The defendant told him that he had come to Plaquemine to try to make some money because his girlfriend needed some money. He got into the car with the group, they went to the store, and then they dropped him off in the back of town. At that point, someone named "Flugi" gave the defendant a ride home. Chief Engolio further testified that when the defendant was brought in, the defendant denied ever telling Chief Engolio what he had told him on the phone.

Detective Eric Ponson with the Iberville Parish Sheriff's Office was the lead detective on the case. He testified at trial that he collected evidence at the crime scene. He found a spent bullet on the corner of Barrow Street and Joe Davis Street. He found another bullet embedded in the wall of a house that was behind where Miles was lying, as well as a bullet casing in a garbage can at that house. He also retrieved a bullet that was recovered from the autopsy of Miles. He found no weapon near Miles's body. He found $80 in Miles's wallet.

Charles Watson, Jr. testified at trial as an expert in firearms examination. He stated that he performed tests on the three bullets and the one shell casing recovered by Detective Ponson. He concluded that all four bullets were fired from the same gun and that the type of gun was a .38 revolver.

Dr. Alfredo Suarez, a pathologist, was called to interpret the findings of Dr. Tracey, the pathologist who performed the autopsy on Miles and who was unavailable for trial. Dr. Suarez testified that Miles had four gunshot wounds, two of which could

not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982).

Prior to the 2006 amendment, LSA-R.S. 14:20 provided, in pertinent part:

> A homicide is justifiable:
>
> (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

In the case at hand, the testimony and evidence at trial established that Miles, the victim, was shot and killed, and that the weapon used was a .38 revolver. Washington, Banks, and Thomas each gave a written statement to the police, which incriminated the defendant. Thomas also gave a second written statement. These statements were submitted into evidence.[4] At trial, Washington, Banks, and Thomas

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[4] Washington's written statement is as follows:

> On May 18, 2003 Chad said that he was going to [Plaquemine] to make some $ for prom (May 19, 2003). . . . I dropped him off around 10:15 - 10:30. . . . The next morning . . . I met Chad in the car with his brother Terrance on Madison Street. . . . He told me his boys were wild, I ask him what do you mean. He said they think I killed somebody, I said what happened. He said, I did it did what (sic)? Kill 'em. I said Why? Whaaat! I tried to rob him, his gun got stuck and my boy L said "Kill dat nigga" and so he did. After Chad told me this I asked him were they looking for you? He said he didn't know. We went to my friends (sic) Robin house to use the phone (She wasn't home, her brother was) He dialed the # to the police station and I asked her was there a warrant for his arrest, she said no. It was getting late so I dropped him off on North 16th Street.

Banks's written statement is as follows:

> The night of the shooting I was in the car with noonie, Chad, Brad, Russell. Chad was talking about jacking a car. Until he seen Barakar (sic) and said he was gonna get him. Then, Chad jumped out the car with a scull (sic) hat on the top of his head. A few minutes later I heard shoots (sic). I remember he had a black gun in his hand, and was very hyped up. I also want to note I don't know what he was about to do.

Thomas's first written statement is as follows:

> On 05-16-03 I was a passenger in a Ford driven by Bradley Thompson. [T]here were 3 other passenger (sic) in the vehicle Jeross Banks, Cordis Gailes. We rode on Barrow St. in plaq, it was approximately 4:00 am We passed a person on Barrow St. When Chad Anderson who also was a passenger in the Front seat asked who is that "Nigger" Jeross Banks said that is Baraka (sic) Miles. Chad then said stop let me out. Bradley kept driving and drove to Ferdinand St. and Chad got out of the vehicle before Chad got out. Bradley asked Chad what type of gun he had. Chad said that [it] was a .38 cal.

Thomas's second written statement is as follows:

> On 5-16-03 at approx 2:00 a/m . . . "T-Tribe" (Chad) [the defendant] told Bradley to give him a ride to Washington St. . . . When we got to the stop sign on the corner of Pear St. & Ferdinand St. "T-Tribe" (Chad) saw a black male walking on Ferdinand St toward Pear St. "T-Tribe" asked who that guy was and Jeross told him it was Barakka. "T-Tribe" (Chad) got excited and yelled "Let Me Out! Let Me Out!" "T-Tribe" (Chad) jumped out the car at the stop sign on Pear St & Ferdinand St. We drove off & went east on Washington St. because we knew something was about to happen because when we were on Jetson Ave, Bradley asked "T-Tribe" what kind of gun that is he was holding and "T-Tribe" told him it was a 38. This was after "T-Tribe" (Chad) asked for the ride to Washington St. "T-Tribe" was exited (sic) and I thought

denied the veracity of their statements. Washington and Banks testified that their statements were false, and that they wrote them out of fear. Thomas testified that he did not read or write his statements but only signed them, and that most of the content in them was false.[5] Thompson testified that after someone in his car identified a man standing by a trailer as Barakka, the defendant "hopped out" of the car with a handgun. Moments later, Thompson heard gunshots.[6] No weapon was found near Miles's body, and there was no testimony or evidence introduced which suggested that the defendant shot Miles in self-defense.

The jurors apparently concluded that the version of events described by Thompson's trial testimony and/or in the statements of Washington, Banks, and Thomas to the police was more believable than the version of events described by the trial testimony of Washington, Banks, and Thomas.[7] Given the conflicting testimony adduced at trial, it would seem that all of the witnesses could not have been completely truthful about what actually occurred. The decision of the jury obviously came down to the issue of credibility.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of

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> they, "T-Tribe & Barakka", was gone (sic) fight, so we kept going east on Washington St. We wanted to see what was going to happen between them, "T-Tribe & Barraka (sic)", so . . . We went back to the corner of Pear St and Ferdinand St and waited approx. 30 second (sic), but we didn't see "T-Tribe" or Barakka. We drove . . . onto Barrow St and headed to La. 1. We saw a deputy had someone stopped on the corner of Barrow & Frank St. We kept straight and took a right on La. 1 and was immediated (sic) stopped by police on Center St. I had no knowledge that T-Tribe was going to do what he did. I thought he was going to fight him and he "T-Tribe" was upset like he wanted to fight. I did not see the shooting.

[5] We note that the handwriting in Thomas's first statement is quite dissimilar to the handwriting in his second statement.

[6] Thompson testified that he heard a "couple of shots." A prosecutor asked, "What kind of shots? Gunshots?" Thompson responded, "I guess."

[7] While the statements of Washington, Banks, and Thomas to the police were admissible to attack credibility, see LSA-C.E. art. 607(D)(2), pursuant to LSA-C.E. art. 801(D)(1)(a), which was amended by 2004 La. Acts, No. 694, § 1, these earlier out-of-court statements were also admissible for their assertive value. See George W. Pugh et al., Handbook on Louisiana Evidence Law 471-472, authors' note no. 9 to LSA-C.E. art. 607 (2006).

guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the state, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of second degree murder.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that an improper jury charge by the trial court requires reversal of his conviction. Specifically, the defendant contends that the erroneous charge on the use of prior inconsistent statements contributed to the guilty verdict.

The jury charge at issue is the following: "The testimony of a witness may be discredited by showing that the witness made a prior statement which contradicts or is inconsistent with the present testimony. Such prior statements are admitted only to discredit the witness, not to show that the statements are true."

At trial, neither defense counsel made an objection to this jury charge. Moreover, not only did defense counsel fail to lodge an objection, they acquiesced to the instruction after discussing the issue at the bench with the trial court and prosecutors. Following is the relevant portion of that side bar discussion:

> Mr. Clayton [prosecutor]: You read to them, the prior inconsistent statement can only be used for impeachment and not for the truth asserted therein. That's not the law. They've changed the law. The new law is --
>
> The Court: Why didn't y'all catch that when I gave y'all copies.

Mr. Larpenteur [prosecutor]: We just missed it.

The Court: I mean, still, you're giving them the wrong law. You can read them this statement here. Just read it to them and be done with it, it's the Code.

Mr. Nelson [defense counsel]: But I think he gave y'all the opportunity to find that.

Mr. Clayton: He did. And if y'all hold that against us, there it is.

Mr. Nelson: And I think to give it to them now they're going to take it out of context.

Mr. D'Aquila [defense counsel]: They're going to take it out of context.

Mr. Clayton: You want to just let it go?

Mr. Maley: If they don't understand it, if they have any questions about that, if they ask a question about that come back out and he needs to give them the correct law.

Mr. Ward [prosecutor]: At that point we'll have to.

The Court: At that time. That's why I gave it to y'all ahead of time.

Mr. Clayton: You're right.

Erroneous instructions or failure to give jury instructions are not errors patent, and absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See **State v. Tipton**, 95-2483 (La. App. 1st Cir. 12/29/97), 705 So.2d 1142, 1147; see also LSA-C.Cr.P. arts. 801(C), 841, and 920(2).

The lack of a contemporaneous objection notwithstanding, we note a misstatement of the law in the defendant's brief. In his brief, following the quoted jury charge, the defendant states, "Thus, the jury was told that the testimony they heard under oath was to be used to discredit that witness, but not to discredit their prior statements. If the testimony was inconsistent with the statements, it could not be used for the truth of what was being asserted."

The defendant further states:

> If the jury had been properly instructed, they could have considered that the statements induced by the police under less than ideal conformity with the law made those statements unreliable. As it was, the jury was told in effect that it could only consider the testimony and recantations for its impeachment value, thus negating their importance for the truth asserted. Thus, had the jury been properly charged, it may have concluded that a reasonable doubt existed that connected Mr. Anderson to Mr. Miles' death.

Under LSA-C.E. art. 607(D)(2) and either version of LSA-C.E. art. 801(D)(1)(a),[8] a prior inconsistent statement of a witness can be used to impeach the testimony of that witness. The jury charge, insofar as it states the law regarding impeaching testimony with prior inconsistent statements, is accurate. The defendant's understanding of the jury charge, however, which amounts to an inversion of the law, is that inconsistent testimony can be used to impeach prior statements. Thus, according to the defendant, the testimony of the recanting witnesses, but for the improper jury charge, could have been used to impeach their written statements to the police, which incriminated the defendant. Since the jury charge, however, instructed that an inconsistent statement can be used only to impeach and not for its assertive value, the defendant maintains that he was prejudiced because the inconsistent trial testimony could not be accepted for its truth. In other words, the defendant argues that the truthful testimony of the recanting witnesses would have established the falsity of the written statements; and if the written statements were false, then the only evidence at trial which incriminated the defendant was the testimony of Thompson.

The defendant's argument is baseless as the entire line of reasoning, from premise to conclusion, is faulty. Moreover, the jury charge favored the defendant and was adverse to the prosecution. Under the 2004 revision to LSA-C.E. art. 801(D)(1)(a), which is the controlling law in the present matter, the jury could have considered the truthfulness of the written statements to the police which incriminated the defendant.[9] However, since the jury was instructed not to consider prior inconsistent statements for their assertive value (the law prior to the 2004 revision to LSA-C.E. art. 801(D)(1)(a)),

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[8] Prior to the 2004 revision, Article 801(D)(1)(a) provided that a prior statement by a witness is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony and was given under oath subject to the penalty of perjury at the accused's preliminary examination or the accused's prior trial and the witness was subject to cross-examination by the accused. Following the 2004 revision, Article 801(D)(1)(a) now provides that a prior statement by a witness is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is, in a criminal case, inconsistent with his testimony, provided that the proponent has first fairly directed the witness' attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement. Thus, while prior inconsistent statements can be used to attack credibility under LSA-C.E. art. 607(D)(2), pursuant to the 2004 revision to LSA-C.E. art. 801(D)(1)(a), such non-hearsay statements are admissible for their assertive value, as well. See George W. Pugh et al., Handbook on Louisiana Evidence Law 471-472, authors' note no. 9 to LSA-C.E. art. 607 (2006).

[9] See n.7.

this instruction inured to the benefit of the defendant and to the detriment of the prosecution.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA **NO. 2006 KA 1542**

VERSUS

CHAD G. ANDERSON

MCLENDON, J., CONCURS IN PART.

The majority opinion fails to note that the defendant's sentence was not imposed at hard labor, as required by La. R.S. 14:30.1(B). As such, the defendant received an illegally lenient sentence. Under La. Code Crim. P. art. 882(A), an illegally lenient sentence may be corrected at any time by an appellate court on review. Accordingly, I would vacate the sentence and remand to the trial court to amend the sentence to include the mandatory "hard labor" language. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), ___ So.2d ___, ___, 2006 WL 3805138 (en banc).