NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1345

STATE OF LOUISIANA

VERSUS

FREDRICK GRIGSBY

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 04-04-0586, Section VII
Honorable Todd Hernandez, Judge Presiding

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Fredrick Grigsby

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered December 21, 2007

PARRO, J.

Defendant, Fredrick Grigsby, was charged by grand jury indictment with one count of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1 (Count I), and one count of second degree murder, a violation of LSA-R.S. 14:30.1 (Count II). Defendant pled not guilty to both counts and was tried before a jury. Following the presentation of evidence, the jury determined defendant was guilty as charged on both counts. The trial court sentenced defendant to a term of twenty-five years of imprisonment at hard labor for his conviction of attempted second degree murder (Count I) and to a term of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for his conviction of second degree murder (Count II), with the sentences to be served concurrently.

After consideration of defendant's assignments of errors, we affirm his convictions and sentences.

FACTS

On March 5, 2004, at approximately 11:00 p.m., Baton Rouge City Police Officers were dispatched to the scene of a homicide committed at 9292 South Choctaw Drive. Upon their arrival, the police officers found the body of Antonio Donahue inside his vehicle, a blue Oldsmobile Delta 88. The ensuing investigation revealed that a party had taken place at the nearby VFW Hall and that Donahue and his cousin, Derek East, were present. During this party, fighting erupted and eventually moved into the parking lot of the VFW Hall. Donahue and East decided to leave the area and got into Donahue's vehicle. In an effort to avoid the trouble brewing in the parking lot, Donahue and East contacted their friend, Damien Dorsey, who was still at the VFW Hall and told him they would drive back around the block to get him. Dorsey was asked to wait by the roadside so it would be easier to find him.

As Donahue drove along West Darryl Drive, a residential street in the vicinity of the VFW Hall, a dark-colored Jeep Cherokee overtook his vehicle. As the Jeep moved to pass Donahue's vehicle, gunfire erupted from the rear passenger window of the

Jeep. Because Donahue had let go of the steering wheel after being hit by bullets, East grabbed it and maneuvered the vehicle back to the VFW Hall, where he wound up striking a pole because Donahue's foot was stuck on the accelerator.

East was subsequently taken to the police station and shown a photographic line-up. East reviewed the photographs and identified Shannen Hudson as the person who fired a weapon from the rear passenger window of the Jeep. East was familiar with Hudson, and reported to the police that Hudson had been at the VFW Hall earlier. East indicated that he and Hudson had been previously incarcerated together and had a bad relationship.

The police later learned that Artrix "Kapone" Singleton was driving the Jeep and his cousin, Chris Singleton, was in the front passenger seat. Both were brought to the police station for questioning. After being advised of, and waiving, their **Miranda** rights, both Kapone and Chris gave statements describing how they left the VFW Hall after the police arrived, with defendant and Hudson seated in the back seat of the Jeep. According to the statements given by Kapone and Chris, as Kapone was passing Donahue's vehicle, defendant fired at it with an assault rifle and Hudson fired at it with a nine-millimeter pistol.

Despite his statement to the police and testimony to the grand jury identifying defendant as the one who fired the assault rifle, at trial, Kapone claimed he did not see anyone shooting. At trial, Kapone acknowledged that the gunshots came from the back right side window of the Jeep he was driving; however, he claimed he never turned to see who fired the shots. Although Kapone's trial testimony differed from his statement to the police and his grand jury testimony, he also admitted that he met with the prosecutor two days before trial and listened to his taped statement and said everything on the tape was correct.[1]

Justin Thomas was also present at the VFW Hall on the night of March 5, 2004. Thomas testified that he met friends, including Kapone, Chris, Hudson, and defendant

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[1] Following Kapone's testimony, the prosecutor requested an instanter bench warrant against him for perjury.

at the VFW Hall. According to Thomas, defendant became involved in several fights that escalated until the police arrived and stopped the party. Thomas was among the people who left the VFW Hall when the police arrived. Thomas testified that once in the parking lot, he and defendant were getting ready to resume fighting with a rival group, when one member of the rival group indicated he was going to shoot them. This caused Thomas and defendant to back away to Thomas's vehicle.

Thomas got into his vehicle to leave and defendant tried to join him, but Thomas told defendant to go with Kapone. Defendant then got into Kapone's Jeep. Thomas testified he followed Kapone's Jeep as it turned off Choctaw and then turned right again onto West Darryl Drive. Thomas observed the Jeep move to pass a slower moving vehicle on West Darryl Drive and then heard shots being fired from the Jeep. Thomas testified that he clearly saw defendant with a pistol firing shots at the slower moving vehicle.

Thomas testified that when he heard the shots, he reversed direction and drove away. After being contacted by Kapone, Thomas met him, Chris, Hudson, and defendant at a McDonald's restaurant at Airline Highway and Prescott. The group in the Jeep attempted to trade vehicles with Kapone's brother, who worked at this McDonald's, but the plan failed because the other car had mechanical problems. Defendant then got into Thomas's vehicle, the rest of the men returned to the Jeep, and everyone proceeded to the Renaissance Club on Plank Road, where they remained until it closed. Defendant told Thomas not to say anything about what he had seen earlier or he would hurt Thomas's family.

The next day, fearing he would be implicated in the shooting, Thomas obtained Chris's SKS rifle, along with his own weapon that he had not carried that night, and stored both at a house on Maplewood. When questioned by the police, Thomas indicated where the weapons had been hidden and retrieved them for the police.

Chris Singleton testified at trial and admitted he owned the SKS assault rifle that was used in the March 5, 2004 shooting.[2] Chris testified that he put this rifle in the back seat of Kapone's Jeep because he took it with him wherever he went. During the party at the VFW Hall, defendant became involved in several fights that escalated to encompass the men defendant had arrived with and another faction referred to as the "Sherwood Forest group." According to Chris, after the party at the VFW Hall was dispersed by the police, defendant was in the parking lot telling him and their other friends, "Y'all get to the car. I'm about to kill one of you [n------] out here." Chris testified that while in the parking lot, defendant had a nine-millimeter handgun in his hand.

Chris's testimony was consistent with statements and testimony of Kapone and Thomas in that defendant got into the Jeep and was seated in the back seat behind Kapone, who was driving. According to Chris, as they were traveling down West Darryl Drive, they overtook a slower moving car with its emergency lights flashing. As the Jeep began to pass this vehicle, defendant stated, "That's the [n------] right there," and then the shooting started. Chris stated that defendant was firing his SKS assault rifle at the other vehicle. Chris denied he fired a weapon during the incident.

Chris testified that after he gave his initial statement to the police, his family told him that they were being threatened as a result of Chris's plans to testify at trial. Chris explained that his girlfriend was also threatened that if he testified, she would be burned in her vehicle. Chris also stated that he had been shot at, and another family member was shot, as a result of attempts to intimidate Chris from testifying at defendant's trial. According to Chris, he indicated to the grand jury he had been threatened and then, after consulting with his family, identified defendant as the person who fired the SKS assault rifle at Donahue's vehicle.

Following his arrest on unrelated charges, Chris was housed near defendant in the parish jail. Defendant made several attempts to get Chris to sign an affidavit

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[2] At the time of trial, Chris was serving a two-year sentence for a conviction of an aggravated assault with a firearm in an unrelated matter.

exonerating him from these charges, and even attacked him in the visitation room.[3] Chris was the only witness to testify that Antonio Donahue and defendant had engaged in a fight at the VFW Hall.

Dr. E. Shannon Cooper, the Coroner for East Baton Rouge Parish, performed the autopsy on Donahue. Dr. Cooper was accepted by the trial court as an expert coroner. Dr. Cooper determined that Donahue was shot twice, once in the left leg and once in the chest. The bullet that entered Donahue's left leg traveled horizontally left to right, and could have been fatal. Dr. Cooper was able to retrieve the bullet from Donahue's left thigh, which was then turned over to the Baton Rouge City Police.

Donahue also sustained a gunshot wound to his chest. Dr. Cooper was able to remove the bullet from the soft tissue on the right side of Donahue's chest and turned it over to the Baton Rouge City Police. According to Dr. Cooper, the gunshot wound to Donahue's chest was the cause of his death because it punctured areas of Donahue's lungs and lacerated his heart.

Corporal Mindy Stewart of the Baton Rouge City Police Department Crime Scene Investigation Division examined Donahue's vehicle after it was recovered from the scene. Corporal Stewart inserted wooden dowels through the bullet holes in Donahue's vehicle to display the trajectory of the bullets that struck the vehicle. Corporal Stewart also removed bullet slugs from Donahue's vehicle. Dr. Cooper testified that Donahue's wounds were consistent with the trajectory of the bullets as shown by the wooden dowels.

Sergeant Paul Crause of the Baton Rouge City Police Department Crime Scene Investigation Division testified he recovered shell casings for a nine-millimeter Luger and a 7.62 x 39 millimeter weapon on West Darryl Drive the day after the shooting.

Patrick Lane, a forensic scientist at the Louisiana State Police Crime Lab, was

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[3] Prior to this incident, Chris had been charged in a matter wherein defendant sustained a gunshot to his abdomen. He was scheduled to be in court regarding this matter the following Monday. According to Chris, he expected the charges to be dismissed because defendant had informed the investigator that Chris was not the person who shot him. Because of this situation, Chris admitted that he had an interest in maintaining a good relationship with defendant.

qualified as an expert in firearms identification. Lane testified that the weapon seized in this case, which Chris also identified as being in the Jeep, was a semiautomatic version of an assault rifle. This particular rifle was identified as a 7.62 x 39 millimeter SKS. Lane test fired the weapon and compared the test cartridge casing to the casings recovered from West Darryl Drive. The test results indicated the recovered casings were absolutely fired from this weapon.

Lane also compared the bullet fragments recovered from Donahue's body and the headrest of his vehicle to the test bullet. Lane testified that although the markings on the fragments had the same class characteristics that would allow him to include the weapon seized as a source, the damage to the fragments resulting from striking the vehicle and Donahue could not allow him to observe sufficient detail to say that the weapon seized was the sole weapon of that caliber that could have fired those bullets.

The state also presented testimony from Ebonie Neal, who was a friend of defendant. According to Neal, on the night of March 5, 2004, defendant brought her vehicle to her while she was working at Bennigans, then left with Thomas to attend a party at the VFW Hall. After leaving work, Neal, accompanied by her cousin, Erica, drove to the VFW Hall. When they arrived, the police had closed the party, so she decided to go to the Renaissance Club, a dance club on Plank Road. She saw defendant at the Renaissance Club, but when fighting began there, she decided to leave.

As Neal was leaving the Renaissance Club, defendant asked her to pick him up at Chris's house and take him to his grandmother's house. Neal testified that defendant mentioned that he had "got into it with some boys" and that someone had been killed, but defendant did not indicate that he had committed the murder.

Neal picked defendant up in the parking lot of Chris's apartment complex and took him to his grandmother's house before she and her cousin went home for the evening. Neal called defendant when she got home and defendant asked her if she would do him a favor. Defendant specified that the favor would be, if anyone asked, to

state that he was with her that night. Neal stated that defendant told her he was on parole and wanted to avoid further trouble.

Defendant called Neal the next morning and asked her to take him downtown to the police station. Neal agreed, and after picking up defendant, they discussed what she would say in order to solidify defendant's alibi for the previous evening. After arriving at the police station, defendant spoke with the police officers first. Neal spoke with them later and stated that she and defendant were together the previous evening. Both Neal and defendant were allowed to leave the police station after their interviews.

The following day, March 7, 2004, a homicide detective contacted Neal. Neal testified that the detective told her that he was aware her statement was false and if she did not come down to his office and tell the truth, she would be arrested. Fearing arrest and wanting to keep the matter from her parents, Neal went to the police station and told the police what really happened. At trial, Neal admitted that she was testifying in order to avoid prosecution for obstruction of justice.

The defense presented testimony from Madeline Reaux, who claimed to be defendant's girlfriend from New Orleans. Reaux testified that she and defendant were living together at the time of this incident, but that defendant had gone to Baton Rouge for a court appearance. A few days following his return from Baton Rouge, defendant was arrested for the instant offenses. Reaux testified she never saw defendant with a weapon of any sort.

Defendant did not testify at trial.

SUFFICIENCY OF THE EVIDENCE

Defendant was convicted of one count of attempted second degree murder of Derek East and one count of second degree murder of Antonio Donahue. In challenging the sufficiency of the evidence, defendant argues that there is no independent evidence to suggest that he shot and killed Donahue or attempted to kill East, other than the self-serving testimony of three eyewitnesses who were involved in the shooting.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see LSA-C.Cr.P. art. 821(B). The **Jackson v. Virginia** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:30.1(A)(1) defines second degree murder, in pertinent part, as "the killing of a human being: [w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" Thus, to support the conviction for second degree murder, the state was required to show: (1) the killing of a human being; and (2) that defendant had the specific intent to kill or inflict great bodily harm. **State v. Morris**, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 00-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002).

Second degree murder is also defined as the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of assault by a drive-by shooting, even though he has no intent to kill or inflict great bodily harm. See LSA-R.S. 14:30.1(A)(2)(a). Assault by drive-by shooting is an assault committed with a firearm when an offender uses a motor vehicle to facilitate the assault. LSA-R.S. 14:37.1(A). The term "drive-by shooting" means the discharge of a firearm from a motor vehicle on a public street or highway with the intent either to kill, cause harm to, or frighten another person. LSA-R.S. 14:37.1(C).

Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

To be guilty of attempted murder, a defendant must have the specific intent to kill and not merely the specific intent to inflict great bodily harm. **State v. Maten**, 04-1718 (La. App. 1st Cir. 3/24/05), 899 So.2d 711, 716, writ denied, 05-1570 (La. 1/27/06), 922 So.2d 544. A "dangerous weapon" includes any gas, liquid, or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. LSA-R.S. 14:2(A)(3). Specific intent to kill can be implied by the intentional use of a deadly weapon such as a knife or a gun. See **State v. Brunet**, 95-0340 (La. App. 1st Cir. 4/30/96), 674 So.2d 344, 349, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that Donahue was killed by a gunshot wound to his chest fired by the 7.62 x 39 millimeter SKS assault rifle seized from a residence on Maplewood. Chris admitted that he owned this particular weapon and had placed it on the floor in the back of the Jeep driven by Kapone before they departed for the VFW Hall.

The evidence also reflected that prior to the shooting, defendant was involved in several fights inside the VFW Hall that escalated to the point where police intervention was required to restore order. At least one witness, Chris, testified that Donahue was one of the individuals who was fighting with defendant. Once defendant exited the VFW Hall, at least one witness saw him holding a nine-millimeter pistol in his hand and another witness heard defendant indicate he was "getting ready to kill" some of the men he had been fighting.

It is undisputed that defendant left the parking lot riding in the back seat of Kapone's Jeep. Kapone was driving, while Chris was seated in the front passenger seat. The only two people in the back seat of the Jeep were defendant, who was seated behind Kapone, and Hudson, who was seated behind Chris. As the Jeep proceeded to take the same route away from the VFW Hall as Donahue's vehicle, Kapone moved to pass Donahue on a residential street. As the Jeep began to pass Donahue's vehicle, defendant made a statement indicating he had recognized the men in Donahue's car.[4]

The state also proved that the gunfire originated from the rear passenger window of the Jeep driven by Kapone, where the only two people seated in the back were defendant and Hudson. Although Kapone initially told the police and the grand jury that defendant was the person who fired the SKS assault rifle at Donahue's vehicle, he recanted this testimony at trial and stated he did not know who fired what weapon.

Chris told the police and testified at trial that defendant was the person firing the SKS assault rifle at Donahue's vehicle. Chris described how the day after the shooting, defendant contacted him and stated he would tell the police that Chris was the shooter because Chris owned the weapon used in the shooting. Further, once incarcerated with Chris at the parish jail, defendant attempted to get Chris to sign an affidavit exonerating him from the shooting and eventually resorted to attacking him. Moreover, Chris testified that his girlfriend and members of his family had reported they had been threatened if Chris testified against defendant at trial.

Thomas testified that as he was following the Jeep Cherokee on West Darryl Drive, he clearly saw defendant firing a weapon from the back of the Jeep in the direction of Donahue's vehicle. Thomas described the weapon as a pistol, but also testified that he never saw Hudson firing a weapon at all.

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[4] Defendant's statement in the parking lot of the VFW Hall indicated he was "getting ready to kill some [n------]," and as the Jeep overtook Donahue's vehicle, defendant stated, "There's the [n------] right there." Clearly, it was rational for the jury to conclude that defendant was seeking to find Donahue and East and finish the altercation that had begun inside the VFW Hall.

Derek East was the only witness involved in the incident who testified the shooter was Hudson. However, East also admitted to having an ongoing feud with Hudson.

Finally, the state presented testimony from Neal indicating that defendant convinced her to lie to the police about being with her the night of the shooting. The jury could clearly conclude defendant was attempting to construct an alibi that placed him somewhere other than the back of Kapone's Jeep.

As a trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Where 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. On appeal, this court will not assess the credibility of the witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Pooler**, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 58, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

In finding defendant guilty of the attempted second degree murder of Derek East and the second degree murder of Antonio Donahue, the jury obviously chose to accept the testimony of those witnesses who testified that defendant fired the SKS assault rifle from the rear passenger window of the Jeep. The jury clearly was aware of any potential bias of each witness, but resolved credibility determinations in favor of the state. These credibility determinations will not be disturbed on appeal. We find the evidence sufficiently supports, beyond a reasonable doubt, defendant's convictions for attempted second degree murder and second degree murder.

This assignment of error is without merit.

GRAND JURY TESTIMONY

In this assignment of error, defendant argues that the trial court erred by denying defense counsel's requests for the grand jury transcripts of the state's witnesses even though defense counsel specifically indicated on the record that the

state's witnesses, who had testified before the grand jury, intentionally gave false testimony due to their involvement in the murder of Antonio Donahue.

As a general matter, a defendant is not entitled to production of a transcript of a secret grand jury proceeding against him, even for use at trial in conducting cross-examination. See LSA-C.Cr.P. art. 434. The purpose of this rule is not to protect a defendant or witness at a subsequent trial, but to encourage the full disclosure of information about the crime. However, the rule of secrecy is not absolute. In some situations, justice may require that discrete segments of grand jury transcripts be divulged for use in subsequent proceedings. A trial court may act upon a specific request stated with particularity and review grand jury transcripts in camera to determine if information contained therein is favorable to the accused and material to guilt or punishment. **State v. Higgins**, 03-1980 (La. 4/1/05), 898 So.2d 1219, 1241, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

The party seeking disclosure bears the burden to show a compelling necessity for breaking the indispensable secrecy of grand jury proceedings. He must show that, without the material, his case would be greatly prejudiced or that an injustice would be done. If allowed, disclosure must be closely confined to the limited portion of the material for which there is a particularized need. In any event, disclosure is left to the sound discretion of the trial court, whose ruling will not be reversed absent an abuse of that discretion. **State v. Higgins**, 898 So.2d at 1241.

In the instant case, defendant's request for grand jury testimony is based on his assertion that Kapone and Chris each gave statements to the police indicating that both defendant and Hudson fired weapons at Donahue's vehicle, but because Hudson was not indicted along with defendant, then Kapone and Chris must have testified inconsistently with such statements before the grand jury.

The trial court denied defendant's request for such disclosure and declined to conduct an in camera inspection of the testimony given before the grand jury. We find no abuse of the trial court's discretion in that ruling.

As the prosecutor explained in arguing against defendant's motion, the state had provided defense counsel with copies of the police reports containing statements made by Kapone and Chris to the police prior to their grand jury testimony. Thus, depending on how these witnesses testified at trial, the police reports could be used to impeach any inconsistencies that arose. Moreover, the prosecutor reminded defense counsel that if either of the Singletons' trial testimony differed from their statements to the police and their grand jury testimony, the state had a duty to notify the court if and when a new set of facts was revealed, but until that occurred, it was premature for the trial court to review the grand jury testimony.

What is precisely at issue is the testimony of Kapone. In his initial statement to the police, Kapone identified defendant as the individual who fired the SKS assault weapon (the weapon the state asserted was the murder weapon) at Donahue's vehicle. Kapone's statement to the police further identified Hudson as firing a nine-millimeter handgun at Donahue's vehicle. Presumably, Kapone provided grand jury testimony consistent with this statement. However, at trial, Kapone testified that he made such statements in order to satisfy the police and that he really did not know which person fired which weapon during the encounter. At trial, the only thing Kapone would admit was that both defendant and Hudson were in the back seat of his Jeep at the time the shooting started. Following Kapone's trial testimony, the state moved for an instanter bench warrant against Kapone for perjury.

There has been no showing how not having access to Kapone's grand jury testimony prejudiced defendant. Despite Kapone's trial testimony indicating he did not know who fired from the back seat of his Jeep, which merely placed defendant in a position of being a possible shooter, the fact that his trial testimony conflicted with a statement he provided the police less than three days following the incident was still available to defendant to use to attack Kapone's credibility. Thus, because the defense had ample opportunity to cross-examine Kapone on this inconsistency, we cannot say

the failure to provide transcripts of Kapone's grand jury testimony was detrimental to the defense in any way.

Chris also provided a statement to the police approximately two days following this incident, wherein he identified defendant as firing Chris's own SKS assault rifle at Donahue's vehicle and Hudson firing a nine-millimeter handgun at Donahue's vehicle. At trial, Chris admitted that when testifying before the grand jury, he stated that defendant had fired the nine-millimeter handgun and Hudson had fired the SKS assault rifle. Chris explained that he was untruthful before the grand jury because his family had been threatened. After he was able to consult with his family about the situation, Chris stated that he returned to the grand jury room and testified that defendant had fired the SKS assault rifle. Clearly, defense counsel was able to cross-examine Chris about these inconsistencies. Accordingly, there was no prejudice to defendant by the lack of a transcript of Chris's grand jury testimony.

This assignment of error is without merit.

JURY INSTRUCTION

In this assignment of error, defendant argues that the trial court's decision to change the jury instructions relative to how the jury should evaluate prior inconsistent statements was in direct violation of defendant's due process rights.

As the jury was deliberating, the jury foreperson submitted a question to the trial court seeking clarification on how to evaluate testimony that was inconsistent with the witness's testimony before the grand jury. The specific question of the jury was "[W]ith regard to the contradictory statements, is it the law that the sworn statement can only be used to show the testimony in court as false or impeach the court testimony where they are inconsistent?" The trial court instructed the jury under the current version of

LSA-C.E. art. 801(D)(1)(a) (as amended by 2004 La. Acts, No. 694, § 1).[5] On appeal, defense counsel contends that the former version of LSA-C.E. art. 801(D)(1)(a) should have been provided to the jury.[6]

The state argues that LSA-C.E. art. 801(D)(1)(a) is procedural law, and the controlling law in procedural matters is the law in existence at the time of trial. See **State v. Trosclair**, 584 So.2d 270, 281 (La. App. 1st Cir.), writ denied, 585 So.2d 575 (La. 1991). The state also cites **State v. Elmore**, 179 La. 1057, 155 So. 896, 898 (1934), for the proposition that procedural law, as it relates to criminal prosecutions, includes whatever is embraced by the three technical terms, namely, pleading, evidence, and practice. Moreover, the state cites to a case, **Jackson v. Dendy**, 93-0905 (La. App. 1st Cir. 6/24/94), 638 So.2d 1182, 1185, by this court, stating that testimonial privileges are considered procedural in nature.

Under the facts of this case, we find no error in the trial court's instructing the jury that a prior inconsistent statement by a witness was not hearsay. Further, we note that at all times present herein, whether at the time of the offense or the time of trial, a prior statement by a witness that was one of identification of a person made after perceiving the person was never considered hearsay, provided the declarant testified at the trial and was subject to cross-examination concerning the statement. LSA-C.E. art. 801(D)(1)(c). Practically speaking, the jury clearly needed further instruction regarding whether the previous identification of defendant as the person firing the SKS assault

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[5] The version of LSA-C.E. art. 801(D)(1)(a) in effect at the time of trial (2007) provides:

> **D.** A statement is not hearsay if:
> **(1) Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> (a) 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 [.]

[6] This version of LSA-C.E. art. 801(D)(1)(a) provided:

> **D.** A statement is not hearsay if:
> **(1) Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> (a) 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 [.]

rifle could be considered to prove the truth of the matter asserted. The trial court's use of language that instructed the jury that a prior statement to the police under these circumstances would not be hearsay, is not error.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.