

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-1890**
VERSUS * **COURT OF APPEAL**
TIFFANY A. SCHRIBER * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 403-362, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * *
Judge David S. Gorbaty
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(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris,
Sr., Judge David S. Gorbaty)

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**CONVICTION AFFIRMED; SENTENCE VACATED,
AND REMANDED FOR RESENTENCING**

Tiffany A. Schriber appeals her conviction for attempted second degree murder, claiming that the evidence was insufficient to support the conviction, and that several procedural errors that occurred during her trial should have resulted in a mistrial. Additionally, she claims that her sentence is excessive. For the following reasons, we affirm the conviction, vacate the sentence, and remand to the trial court for resentencing.

STATEMENT OF THE CASE:

Defendant Tiffany A. Schriber was charged by bill of information on December 2, 1998, with attempted second degree murder, a violation of La. Rev. Stat. 14:(27)30.1. Ms. Schriber was found guilty as charged at the conclusion of a four-day trial by a twelve-person jury. She was sentenced one year later to twenty-five years at hard labor, with credit for time served, with her parole eligibility to be determined by the Department of Corrections.

FACTS:

Carl Neuenhous, who lived at 7300 Lakeshore Drive in July 1998, testified that at approximately 10:00 p.m. on the night of the shooting, Rev. David Ord knocked at his door and told him that there had been a shooting. He followed the man to Dr. Abril's condo, two doors down from his. Mr. Neuenhous testified that before he would enter the condo, he had Rev. Ord go in and retrieve the gun, and took it back to his condo, where he placed it in the kitchen cabinet. While there, he asked his wife to call 911, a tape of which was played for the jury, and went downstairs to open a garage security gate for emergency medical personnel.

Greather Neuenhous, testifying for the defense, stated that she knew Dr. Abril only casually from the condo. On the night of the shootings, she spoke with Rev. Ord for five, seven or ten minutes after she stepped off the elevator. He had a drink in his hand, and mentioned that he was a minister. After talking with Rev. Ord, Mrs. Neuenhous went inside of her condo. She was talking on the telephone when Rev. Ord knocked on the door and informed Mr. Neuenhous that there had been a shooting. She telephoned 911 and went to Dr. Abril's condo where she found Dr. Abril saying that she could not move her legs, and she could not believe Ms. Schriber had done this. Ms. Neuenhous stated that Ms. Schriber was bleeding much more than

Dr. Abril, and that she kept repeating “Maria” and “Kian.”

Rev. David Ord, a Unitarian minister, testified that he had become friends with Ms. Schriber and Dr. Abril, and had begun counseling them about five months prior to the shooting. Rev. Ord described Dr. Abril as a very controlling person. He sensed a great deal of hostility between the two women, mostly generated by Dr. Abril. She did not like things that Ms. Schriber did like smoking, leaving shoes around in the condo and wet laundry in the washing machine, and going out to drink and “party” with her friends. Rev. Ord characterized both women as emotional reactionaries. Dr. Abril had made Ms. Schriber move out when the couple separated some time prior to this incident, but later asked her to return because she missed Ms. Schriber, who was a nurturing surrogate mother to Dr. Abril’s daughter. Although Ms. Schriber was reluctant to give up her apartment, she did as the doctor wanted her to do. Within a couple of weeks before the shooting, Dr. Abril had questioned her sexual orientation and whether her relationship with Ms. Schriber was the best thing for her. Rev. Ord described Dr. Abril as hot and cold emotionally, and controlling. For example, one moment she would indicate that she might want to end the relationship, and the next would be cuddling with Ms. Schriber.

When Rev. Ord arrived on the night of the shooting for a regularly

scheduled counseling session, Ms. Schriber met him downstairs and told him she thought Dr. Abril was very angry, and that she would prefer to be away from the condo that evening. Rev. Ord suggested that she come to the condo with him to talk about the problem. He said Ms. Schriber expressed her fear that Dr. Abril wanted to end the relationship, and if that happened, Dr. Abril would have her shot because she “knew so much.” Once inside the condo, Rev. Ord talked with Dr. Abril on the back balcony, while Ms. Schriber moved on and off the balcony. Both women seemed to be bothered by something. Dr. Abril became particularly angry when Ms. Schriber mentioned that she had talked to Dr. Abril’s previous lover, Sylvia, about the way Dr. Abril had treated Sylvia.

Rev. Ord went inside and began preparing the dinner he had brought with him. From the kitchen, he watched the two women on the balcony, and noted some pushing away and attempts to “cuddle.” Something suddenly sparked Dr. Abril to tell Ms. Schriber to get out. Ms. Schriber was visibly stunned, and asked Dr. Abril if she really wanted her out. Dr. Abril replied yes, that she did not want to be in the relationship. Rev. Ord attempted to get Dr. Abril to calm down, pointing out that it was late, but he got the impression that she did not care, and would put Ms. Schriber out on the street. Because of Ms. Schriber’s emotional state, he offered to let her stay

with him, and Ms. Schriber went upstairs to pack. Rev. Ord chastised Dr. Abril when she snickered, “She is packing. Do you hear that?” However, he said Ms. Schriber did not hear the comments. Ms. Schriber continued to go up and down the stairs, each time expressing disbelief that Dr. Abril was kicking her out for talking to Sylvia. Dr. Abril demanded that Ms. Schriber return some jewelry she had given Ms. Schriber. Ms. Schriber sat down, and Rev. Ord noticed something flash in her hand, which he assumed was a purse. He denied ever seeing a gun. Ms. Schriber then asked Rev. Ord to leave because she and Dr. Abril needed to sort out the jewelry and say goodbye. Rev. Ord was comfortable with leaving because, although Ms. Schriber was “totally blown away” emotionally, she was not raging, and seemed resigned to her fate. He knew that Ms. Schriber had been drinking, but did not perceive her as inebriated. It was about 10:15 p.m. when Rev. Ord stepped outside onto the front balcony, probably with a glass of wine, his third since arriving at approximately 7:00 p.m. Rev. Ord said he briefly spoke with one of Dr. Abril’s neighbors. After she returned to her condo, he heard Dr. Abril call out his name, but before he could open the door, he heard a gunshot. He said he could not get the door open, and believed Dr. Abril opened it. He had to push open the door because her body was blocking his entrance. Ms. Schriber was on the other side of the room,

pointing a gun at him, and saying, “Oh, God, oh, God.” Ms. Schriber then shot herself in the abdomen. Rev. Ord stated that he did not believe Ms. Schriber intended to kill Dr. Abril, but that her emotions took over.

Rev. Ord stated on cross-examination that, in his opinion, Dr. Abril was in a “different league” than Ms. Schriber with respect to her economic and educational status. He found that Dr. Abril controlled Ms. Schriber, who took the wife role in the relationship. He felt Ms. Schriber was frightened of Dr. Abril, believing that she had connections and could have people hurt if she desired. He admitted that he found Dr. Abril to be an intimidating person. Rev. Ord based his belief that Ms. Schriber did not intend to kill Dr. Abril on the fact that when he and the neighbor were rendering aid to the two women, Ms. Schriber repeatedly asked them to, “Go to Maria. Take care of Maria. Leave me. Take care of Maria.”

New Orleans Police Detective Cyril Davillier responded to the shooting at 10:50 p.m. After speaking with Rev. Ord, he entered the condo and found Dr. Abril on the floor in the kitchen, and Ms. Schriber on the floor in the dining room. Both were bleeding “a great deal.” Dr. Abril showed him that she could not move her legs. At trial, Det. Davillier identified the gun, which was loaded when he found it in Mr. Neuenhous’ condo. Rev. Ord told the detective that he had been counseling Ms. Schriber and Dr.

Abril, when Ms. Schriber asked him to step outside of the condo. Rev. Ord told the detective that he stepped outside, and then heard a gunshot.

Dr. Maria Abril testified that Ms. Schriber was involved in another relationship with a woman named Bridgette, when they met. Dr. Abril stated that Ms. Schriber began to pursue her, and when Ms. Schriber and Bridgette broke up, Ms. Schriber moved into the Lakeshore Drive condominium with Dr. Abril and the doctor's then six-year-old daughter, Kian. Dr. Abril stated that because she employed a maid, Ms. Schriber did not have to do anything around the house. Ms. Schriber would occasionally pick up Dr. Abril's daughter after school. The two women had lived together for about a year when Ms. Schriber confessed that she had been in love with her old girlfriend, Bridgette, throughout that year, but had just come to realize that she loved Dr. Abril. Dr. Abril told her that she did not know if she could remain in the relationship. The next day, Ms. Schriber moved out while Dr. Abril was at work. Dr. Abril testified that during the first year of the relationship, she had given Ms. Schriber a \$14,000 diamond ring to symbolize her commitment to the relationship. She also gave Ms. Schriber other jewelry worth \$3,000-\$4,000, and clothing worth \$10,000. Dr. Abril also gave Ms. Schriber \$5000-\$6,000 to put in her bank account for spending money. She stated that because she owned two automobiles,

she encouraged Ms. Schriber to sell her truck.

Dr. Abril testified that sometime after the couple's first breakup, she went to Ms. Schriber's place of employment in an attempt to retrieve the diamond ring. She claimed that she knew of no other way to contact Ms. Schriber. Ms. Schriber was angry that she had bothered her at work, and had a manager order Dr. Abril to leave because she was trespassing. Dr. Abril waited for Ms. Schriber across the street, and when Ms. Schriber left work, Dr. Abril followed her to Lafreniere Park, where they talked for two hours. Ms. Schriber telephoned her the next day and told her that she told fellow employees that Dr. Abril had threatened her with a gun. At trial, Dr. Abril denied this, stating that the only gun she owned was kept at her office.

Dr. Abril admitted that she prescribed a mild anti-depressant for Ms. Schriber after they resumed their relationship. She denied prescribing Prozac because she believed it would be dangerous, as Ms. Schriber drank alcohol. She said Ms. Schriber obtained Prozac from her personal physician. The couple began counseling with someone that Ms. Schriber had been seeing during the break-up, but Dr. Abril believed the person to be unqualified. The couple agreed to begin counseling with Rev. Ord. Dr. Abril testified that many times during the counseling sessions she told Ms. Schriber that she considered ending the relationship because of Ms.

Schriber's drinking, smoking and irresponsibility. Dr. Abril had discovered a lump in her breast and feared she had cancer. After finding out that the lump was benign, she felt she had been given a second chance, and made the decision to follow a healthier lifestyle.

On the day of the shooting, Dr. Abril came home from work and told Ms. Schriber that she was in a bad mood and wanted to be alone. She went to her room until Rev. Ord arrived. She claimed that once the session began, she immediately stated that she wanted to end the relationship that night. Because Ms. Schriber had taken Dr. Abril's things the first time she moved out, Dr. Abril insisted that Ms. Schriber leave that night. Dr. Abril testified that she offered to pay for a hotel room, but also knew that Ms. Schriber could stay with either her parents in Metairie or another friend. Dr. Abril denied that she was putting Ms. Schriber "out on the street." Although she wished to stay on the balcony, Rev. Ord insisted that she come into the kitchen while he cooked pasta. Ms. Schriber went upstairs and returned to sit facing Dr. Abril. Ms. Schriber told Rev. Ord that he did not need to be there, and he proceeded to leave. Dr. Abril stated that she could see Ms. Schriber pointing a gun at her, and could not understand why Rev. Ord was leaving. In the hospital, she asked Rev. Ord why he left, and he stated that he had not seen the gun because he was not wearing his contacts.

Before Ms. Schriber shot her, Dr. Abril asked why she was doing it, to which Ms. Schriber replied, "If I can't have you no one else can." Dr. Abril said that was when she realized Ms. Schriber was going to kill her. She jumped from her stool and ran past Ms. Schriber into the kitchen, hoping to shield herself behind the dishwasher. She said Ms. Schriber had to have fallen on the floor before shooting her, because of the angle that the bullet struck. She knew immediately that she was paralyzed. As she held herself up on the counter, Dr. Abril heard Rev. Ord saying he could not get in the door, so she pushed herself onto the door, opened it, and fell to the floor.

Dr. Abril stated on cross-examination that she first met Ms. Schriber at a birthday party in June 1996. Dr. Abril was then living with Sylvia. She admitted that she and Sylvia quarreled, and that she had once slapped her. Dr. Abril claimed that she, Ms. Schriber and Bridgette shared a bed one night after a day of swimming, and that the next morning, Ms. Schriber made sexual overtures to her, and they had sex. On another occasion, Dr. Abril watched Ms. Schriber and Bridgette have sex. She denied that the three women had sex together. Dr. Abril insisted that Ms. Schriber pursued her.

Dr. Abril said she had performed chelation therapy on Ms. Schriber, as well as on herself and her daughter, explaining that chelation therapy is an

alternative medical treatment designed to remove toxic metals and calcium from the body. When questioned about medicines she kept at home, Dr. Abril admitted that she kept a bottle of Xanax. She claimed that she obtained the pills after her father died, at Ms. Schriber's urging, and only took one pill the day before the breast biopsy. She denied ever giving any to Ms. Schriber. She also denied that she encouraged Ms. Schriber to leave her job at Loyola for the one at Crown Buick.

During their break-up, Dr. Abril admitted going to Crown Buick and following Ms. Schriber after she left work, but denied making threats. Ms. Schriber returned the ring to her several months later. Sometime later, Dr. Abril said Ms. Schriber pulled up alongside her on Canal Street, and suggested that they have dinner to celebrate Dr. Abril's birthday. Dr. Abril agreed, and the two women ended up back at Ms. Schriber's apartment, where they had sex. They resumed their relationship shortly thereafter. Dr. Abril again gave Ms. Schriber the diamond ring. Dr. Abril claimed that Ms. Schriber moved back in with her after her apartment lease expired.

Dr. Abril admitted that she contacted Tim McElroy, the first assistant district attorney for the Parish of Orleans, whom she knew from elementary or high school, and expressed her objection to any plea bargain in the case.

Bridgette Breaux testified that she had a relationship with Ms. Schriber, beginning in 1990. They purchased a home together in 1992 or 1993. Ms. Schriber purchased a gun for personal protection during the time they lived together. Ms. Breaux testified that Ms. Schriber never displayed any violence or aggression toward her during the time they lived together, and said Ms. Schriber did not even yell at her during their six-year relationship. The two women always talked out their problems. Ms. Breaux said Ms. Schriber's drinking was a problem for her, because Ms. Schriber became argumentative when she drank. She recalled meeting Dr. Abril at a party in June 1996, and in August of that year she and Ms. Schriber started going sailing with the doctor on her sailboat. Around Labor Day weekend 1996, she and Ms. Schriber separated, because Ms. Schriber wanted to be with Dr. Abril. Ms. Breaux admitted that, to her despair, the three women engaged in group sex once, with all three participating. She once had a conversation with Dr. Abril during which Dr. Abril admitted she was a controlling person and that she believed in controlling her partners. Ms. Breaux found her to be a controlling person, and felt that Dr. Abril taking her out to dinner and cocktails at the Yacht Club and buying her sailing clothes were controlling actions. She recalled a discussion during which she told Dr. Abril that she did not want to have anything to do with her anymore.

Betty Collins testified that Dr. Abril had been her treating physician, and the two had become friends. At some point, Dr. Abril prescribed Xanax and Prozac for her. She met Ms. Schriber when she took her automobile to Crown Buick for repair, the two struck up a conversation, and she became friendly with Ms. Schriber and Bridgette Breaux. She introduced Ms. Schriber to Dr. Abril at a 1995 Christmas party at Dr. Abril's condo. A friendship later developed between Dr. Abril, Ms. Schriber and Ms. Breaux. It was Ms. Collins' opinion that Ms. Schriber and Dr. Abril were not a good match. Ms. Collins was aware of the incident at Crown Buick. Ms. Schriber told her that Dr. Abril caused a big scene, and threatened to hire someone to kill her. Ms. Collins said she received a telephone call from a police officer on the night of the shooting, who was attempting to locate Dr. Abril's daughter.

Ms. Collins testified on cross-examination that she continued to see Ms. Schriber occasionally after the shooting, talked on the phone, and once went out for a drink. She had not heard from Dr. Abril since she got out of the hospital. She said because of her professional relationship with Dr. Abril, she chose not to socialize with her that much, but did go out to dinner with the couple several times. She did not recall them arguing. Ms. Collins testified that Dr. Abril did not treat people very well, including herself at

times. However, she maintained her friendship with Dr. Abril because she believed this was just Dr. Abril's personality. She conceded that after Ms. Schriber and Dr. Abril broke up the first time, she might have told Ms. Schriber that it was for the better. Ms. Collins said on redirect examination that defendant and Dr. Abril's daughter had a good relationship.

John Francioni, a manager at Crown Buick GMC, testified that one day at work, Ms. Schriber, who worked in the business office, asked him to have Dr. Abril leave the premises. Ms. Schriber seemed upset that Dr. Abril was waiting for her outside. Mr. Francioni had met Dr. Abril before, and was aware of the relationship. He asked Dr. Abril to leave, and told her he would call the police if she did not. Dr. Abril said she needed to talk to Ms. Schriber about something, and he informed her that Ms. Schriber would get off work at 5:00 p.m. He recalled that Dr. Abril moved her car across the street. He later walked Ms. Schriber to her car because she was still upset and seemed "scared." He remembered that Dr. Abril followed Ms. Schriber. Mr. Francioni recalled a child being in Dr. Abril's car.

Cynthia Apfell testified that she met Ms. Schriber and Dr. Abril in the summer of 1997 at a retreat for women. She and her husband later socialized with the two women. She observed that Ms. Schriber was in a subservient position in the relationship; she was the caregiver, while Dr.

Abril was the provider. She recalled the first breakup between the two women. Ms. Apfell attended an event with Dr. Abril, Ms. Schriber and several others. Although Dr. Abril was paying particular attention to another woman in the group, Ms. Apfell stated that she never saw Ms. Schriber go into a rage. Ms. Apfell heard of the incident at Crown Buick, and she advised Ms. Schriber to give the ring back.

Ms. Apfell testified on cross-examination that she thought Dr. Abril was a wonderful person. Dr. Abril gave her a small gift once, but Ms. Apfell did not consider that manipulative. She did not believe Ms. Schriber had a drinking problem. She never saw Dr. Abril physically threaten Ms. Schriber. However, she found Dr. Abril to be verbally abusive, and recalled one evening at dinner when Dr. Abril scolded Ms. Schriber for wanting to order an expensive dish. Dr. Abril explained to Mrs. Apfell that she had to pay for it, just as she had to pay for everything. Mrs. Apfell testified on redirect examination that she had seen Dr. Abril make condescending remarks to Ms. Schriber, such as telling her she was not smart enough or was too thin. Ms. Schriber always tried to please Dr. Abril, but Dr. Abril made her feel like she was never good enough, like she was a second class citizen. In Mrs. Apfell's opinion, Ms. Schriber never felt like an equal in the relationship, referring to Ms. Schriber as Dr. Abril's handmaiden.

Molly Ferguson, a licensed professional counselor with a master's degree in counseling, first met Ms. Schriber in July 1997, when she sought counseling because of relationship problems with Dr. Abril. Ms. Ferguson found the relationship described by Ms. Schriber to be very controlling on Dr. Abril's part. For example, Ms. Schriber explained to her that Dr. Abril would often say she was going to be home at a certain time, but would be late, thus preventing Ms. Schriber from going with friends or family as she had planned. Ms. Schriber admitted to Ms. Ferguson that she drank alcohol, and that she also took drugs prescribed by Dr. Abril, first Buspar, and then Prozac. Ms. Ferguson determined that she needed to work with Ms. Schriber to help her reestablish her own identity, and to help her with security issues. Ms. Schriber related that she was insecure in the relationship because she never knew when Dr. Abril might order her to get out. Ms. Ferguson felt that Ms. Schriber was almost always on edge, and was afraid of Dr. Abril, believing her to be very vindictive. Dr. Abril attended two counseling sessions with Ms. Schriber. After the second session, neither woman returned, and Ms. Ferguson did not hear from Ms. Schriber again until after the shooting. Ms. Ferguson testified that Ms. Schriber expressed constant remorse about the shooting. Ms. Ferguson opined that Ms. Schriber was the victim of psychological abuse, based on

what Ms. Schriber had told her, and the two joint counseling sessions with Dr. Abril. She based her opinion on the facts that Dr. Abril isolated Ms. Schriber, controlled everything she did, and made her feel it was her fault when anything went wrong in the relationship. Ms. Ferguson characterized the relationship as a very emotionally abusive situation.

Ms. Ferguson referred to a March 1999 report she prepared after the shooting for one of Ms. Schriber's attorneys. It indicated a diagnosis of adjustment disorder with depressed mood. She found Ms. Schriber displayed dependent personality features—but not enough traits to categorize her as having a dependent personality disorder. She said that although Ms. Schriber had crying bouts, she was still able to work and carry on normal functioning. She noted that when she first saw Ms. Schriber she was not eating and was losing weight. Although she described Ms. Schriber and Dr. Abril as having a problem with intermittent explosive disorder, she admitted that this diagnosis was provisional, because the term usually applied to physical violence, which was not the case in their relationship. It was more accurate to state that they had big fights over little things. Ms. Ferguson's notes indicated that Ms. Schriber was taking Prozac, and had taken Xanax along with something for a sprained foot. Ms. Schriber told her that she took Xanax on the night of the shooting. Ms. Ferguson stated that

the drugs, Xanax in particular, could cause impairment of brain functioning, and could increase the intoxicating effects of alcohol. Ms. Ferguson believed the relationship between Ms. Schriber and Dr. Abril was abusive, and that Ms. Schriber was a victim of emotional domestic violence. It was her impression that Ms. Schriber was deprived of emotional support, that she perceived a danger of harm from Dr. Abril, and that Dr. Abril and Ms. Schriber were both jealous and possessive. Ms. Ferguson noted that Ms. Schriber was “shocked” by Dr. Abril’s “behavior of rage and sudden ending of their relationship,” considering that they had been going to counseling and working on their relationship. She further noted that Ms. Schriber reacted with behavior common to victims of domestic abuse. She also believed that the effects of the Xanax and alcohol added to Ms. Schriber’s confusion on the night of the shooting.

Dale Standifer, the executive director of the Metropolitan Battered Women’s Program, held a master’s degree in social work. She was qualified as an expert in the field of battered women’s syndrome. She described the different stages of battered women’s syndrome. First, a woman may experience a one-time occurrence of battering. She stays in the relationship, not knowing what really happened, believing it will never happen again. Then, she may begin to realize there is a problem, and experience fear,

anxiety and/or guilt. If she does not get help at this stage, then she may move into the third stage, where she feels there is no way out. She may have sought help, but nothing stops the abuse. She may feel that nothing is going to make it end except a desperate act such as suicide or homicide. Ms. Standifer stated that an abusive relationship is characterized by one person using isolation and psychological and emotional abuse to gain power over the partner. The person continually puts down the partner, eventually robbing her of her self-esteem. Ms. Standifer conducted two interviews with Ms. Schriber, each lasting more than one hour. It was her opinion that there were enough patterns in the relationship for her to conclude that Ms. Schriber had reached the third stage where she felt she had no option open to her. She believed that psychological abuse was more damaging than physical abuse, as broken bones heal, but psychological damage could last forever. She believed that Ms. Schriber's shooting of herself after shooting Dr. Abril was illustrative of Ms. Schriber having lost all hope.

Ms. Standifer agreed on cross-examination that Ms. Schriber understood what she was doing when she shot Dr. Abril, but had simply reached a point where she could not take it anymore. However, Ms. Standifer qualified her answer by stating that she did not know how clearly Ms. Schriber's was thinking in light of the effect of drugs and alcohol. She

believed Ms. Schriber was justified in shooting Dr. Abril because she was a victim of battered woman's syndrome. Ms. Standifer admitted that because Ms. Schriber was charged with a serious offense, she might have made self-serving statements during the interview.

Kevin Schriber, defendant's brother, testified that he often visited his sister and Bridgette Breaux in their home. He said they were a happy couple. He saw his sister much less after she ended her relationship with Bridgette and started living with Dr. Abril. He met Dr. Abril only once, when he, Ms. Schriber and Bridgette were having a drink with Bridgette in a bar. Dr. Abril made quite a scene; and he felt his sister was threatened. He told Dr. Abril to leave him and his family alone. After Ms. Schriber and Dr. Abril broke up the first time, his sister asked him to return the diamond ring for her, because she did not want to see Dr. Abril.

Gail Howard testified that she got to know Ms. Schriber when they worked in the same office at Loyola University. She once met Dr. Abril at a party, and was aware of the relationship between the two women. She saw Ms. Schriber several times after she left Loyola, and thought she seemed very anxious. Ms. Howard said Ms. Schriber told her she was taking medication for stress given to her by Dr. Abril. Ms. Howard testified that Ms. Schriber was a responsible, competent and well-liked person while at

Loyola. She knew of no one at Loyola who was not extremely surprised to hear of the shooting. Ms. Schriber did not have a reputation as a violent person. Ms. Howard stated on cross-examination that she probably would have remembered if Ms. Schriber had told her she was taking Prozac.

Amy Francioni testified that she had worked in an office at Loyola University with Ms. Schriber. She knew both Bridgette Breaux and Dr. Abril, and had been to Dr. Abril's condo. She knew Ms. Schriber had a gun. Ms. Francioni believed Ms. Schriber left Loyola for Crown Buick because people were giving her trouble. She recalled the episode at the "Back to the Beach" festival, when Dr. Abril barely spoke to Ms. Schriber and focused on another woman, after which the couple broke up. Ms. Schriber told her about the Crown Buick incident, during which she understood Dr. Abril harassed defendant. She believed Ms. Schriber was afraid of Dr. Abril. Ms. Francioni said she knew that Ms. Schriber got pills from Dr. Abril, such as Prozac and Xanax.

On the night of the shooting, Ms. Francioni received a telephone call from Ms. Schriber. She recalled that the call came between 10:00 p.m. and 10:30 p.m., because she was watching the news at the time. Ms. Schriber told her that Dr. Abril was threatening her, and that all she could do was defend her self. Ms. Francioni asked Ms. Schriber if she wanted her to come

pick her up, but Ms. Schriber said she was in the middle of a counseling session and could not leave. Ms. Schriber promised to call back, but did not. Ms. Francioni thought defendant sounded “disconnected,” like she had been drinking or something. She said on cross-examination that it never crossed her mind that defendant would use her gun that night. Ms. Francioni did not find Dr. Abril to be very welcoming when she would visit the condo. She never saw Dr. Abril threaten or strike Ms. Schriber, nor did she ever see any bruises. Ms. Schriber told her that she felt threatened, and was controlled and unhappy. Ms. Francioni saw Ms. Schriber take pills, and was told that Dr. Abril gave them to her. Ms. Francioni said on redirect examination that she saw samples of Xanax, Prozac, and antibiotics, as well as vitamins in Dr. Abril’s apartment, and agreed with defense counsel’s statement that there was an “extraordinary” amount of pills in the residence.

Kelly Williams testified that he worked with Ms. Schriber at Crown Buick. He later started a lawn care business, and one of his customers was Dr. Abril, who owned a lot in Kenner. He received a telephone call from Ms. Schriber at approximately 9:30 p.m. on the night of the shooting. Ms. Schriber told him, “she [Dr. Abril] keeps threatening me, she keeps threatening me,” and “I think she is going to have me taken care of.” However, Mr. Kelly said he was half asleep, and told Ms. Schriber he would

have to call her back. Mr. Williams said Ms. Schriber told him previously that Dr. Abril could have people taken care of. Mr. Williams said on cross-examination that Ms. Schriber's telephone call that night did not sound very urgent, and that he would have done something if it had.

Deborah Faust, an attorney, drafted a last will and testament for defendant in July 1995, in which she left Bridgette Breaux all of her interest in their home. Ms. Schriber telephoned her in October 1996, asking how to nullify the will. Ms. Faust did not hear from Ms. Schriber again until after August 1997, when she called to say that a "powerful" person was harassing her and had come to Crown Buick while she was working. Ms. Schriber wanted to know what she could do. Ms. Faust advised that she could get a peace bond or a restraining order. She did not hear from Ms. Schriber again.

Dr. Harminder Mallik was qualified by stipulation as an expert in the field of medicine, forensic psychiatry and pharmacology. He evaluated Ms. Schriber in two sessions, one in February 1999, and one in March 1999, the sessions lasting a total of five and half hours. He also reviewed police reports in the case, a psychological evaluation by Dr. Philip, a report by a psychiatrist, Ms. Schriber's medical records, and the reports prepared by Molly Ferguson and Dale Standifer. He also interviewed Rev. Ord, Cynthia Apfell and Kelly Williams.

Dr. Mallik testified that Xanax was one of several benzodiazepines, a class of drugs used to bring down anxiety levels in persons experiencing anxiety disorders, panic disorders, post traumatic stress disorders, etc. He said Prozac was an antidepressant. Dr. Mallik viewed some medical records reflecting that Ms. Schriber was on Prozac, Anaprox and Synthoid, a medication prescribed for hyperthyroidism. Dr. Mallik stated that Prozac had reported side effects such as nervousness and agitation, and said that suicide was a risk when combined with alcohol and other medications. Dr. Mallik said that tests on blood drawn from Ms. Schriber at 11:05 p.m. on the night of the shooting showed a blood alcohol concentration of .137, exceeding the legal intoxication level. Dr. Mallik stated that as a forensic psychiatrist he was familiar with La. Rev. Stat. 14:15(2), providing that intoxication is a defense to a prosecution for a crime when it has precluded the presence of specific criminal intent. He testified that to a reasonable degree of medical certainty, considering a host of factors, including Ms. Schriber's personality traits/psychological makeup, her underlying intoxicated state, benzodiazepine (Xanax) abuse, and the emotionally charged situation, she was precluded from having the capacity to form the specific intent to kill Dr. Abril.

Dr. Mallik stated on cross-examination that Ms. Schriber also told him

she had taken Prozac on the day of the shooting, in addition to Xanax, but that she did not tell him this until after she had been charged in the instant case. He acknowledged that a report by a psychiatrist who interviewed Ms. Schriber while she was in Charity Hospital reflected that defendant had reported having had two beers and a glass of wine, and had taken Xanax. He noted, however, that it was later reported that Ms. Schriber was “restarted” on Prozac, which he interpreted as meaning she had used it prior to that point. He relied on a personality inventory performed by a psychiatrist, Dr. Griffin, which reflected Ms. Schriber had narcissistic and histrionic personality traits. Dr. Mallik agreed with Dr. Griffin’s assessment, and stated that interviews with Ms. Schriber’s friends indicated that she was self-absorbed and needed to be the center of attention. She displayed rapidly shifting and shallow expression of emotions. These were traits of a histrionic personality. She also demonstrated narcissistic traits, such as having a grandiose sense of self-importance.

Dr. Mallik reviewed a toxicology report, and agreed that Ms. Schriber’s urine on the night of the shooting was negative for benzodiazepine. However, when asked whether the absence of benzodiazepine in her system changed his opinion as whether Ms. Schriber was able to form specific intent to kill, he replied, “Not really.” Dr. Mallik

also said that Xanax, a drug in the benzodiazepine class, normally eliminates from the system in six to eleven hours. However, the presence of Prozac in her system would have prolonged the elimination. He said the drug could show up in the urine in three hours, two hours, or fifteen minutes. He said medication can affect an individual as early as fifteen minutes after ingestion. Dr. Mallik also noted that Ms. Schriber was taking twenty to forty vitamins a day and undergoing weekly intravenous chelation therapy. The State introduced an article that indicated Prozac actually diminishes the hypnotic or sedative effects of alcohol, and in some cases, protects against the adverse effect of alcohol. Dr. Mallik did not refute this, and explained that he never said Prozac enhanced the effect of alcohol. When asked whether it was possible that Ms. Schriber told him that she had taken Prozac and Xanax, along with alcohol, simply to escape criminal responsibility for her actions, he replied that anything was possible. Dr. Mallik did not agree that Ms. Schriber shot Dr. Abril because she was being put out of the home, because he did not know the reason. He was more inclined to believe that the fact that Ms. Schriber was intoxicated, and that they were in an emotionally charged argument, showed her intent was not to kill, but to “complete a threat with a threat.” He said the police report reflected that Dr. Abril had threatened that if Ms. Schriber did not give back the ring it would

be delivered with her finger. Dr. Mallik said he was unaware that before she shot Dr. Abril, Ms. Schriber said, "If I can't have you no one else will." He admitted that this information was relevant, and conceded that while Ms. Schriber could not have had the specific intent to kill, she "formulated something."

Dr. Mallik confirmed on redirect examination that he formed his opinion based, in part, on the report by Molly Ferguson, which reflected that in July 1997 Ms. Schriber was taking Prozac, Xanax and using alcohol.

Dawn Schriber, defendant's older sister, testified that she knew Bridgette Breaux quite well, but had only been in Dr. Abril's company two or three times. She said her sister often visited her parents with Dr. Abril's daughter, Kian. She stated that her sister was "different" after she began her relationship with Dr. Abril, but she was not sure about her sister's actual health. She recalled seeing her sister at their parents' home twice with an I.V. bag, which she was told contained vitamins. Ms. Schriber said her sister did not want to discuss her first break up with Dr. Abril, but she knew that she was upset and withdrawn. Ms. Schriber testified that when her sister moved back into their parents' home after the first break up, she had boxes of pharmaceutical samples with her. On one occasion before the breakup, Ms. Schriber told her sister that she was not feeling well, and her sister

opened the trunk of the car, revealing an assortment of medicines, and offered her an antibiotic. She recalled hearing that Dr. Abril repeatedly telephoned defendant at Crown Buick, and one day went to her sister's job and refused to leave until defendant gave back the ring to her. Tiffany told her that Dr. Abril was going to "take care of her" if she did not return the ring. Ms. Schriber said defendant never told anyone in the family that she had resumed her relationship with Dr. Abril. She realized it when she saw defendant at a niece's birthday party wearing the ring again. This was a month before the shooting. She did not learn they had been living together until after the shooting.

On cross-examination, Ms. Schriber stated that she did not think Dr. Abril's alleged threat about the ring was a threat to defendant's life, but that it could have been a threat of harm. Ms. Schriber did not find Dr. Abril to be friendly. She recalled that her sister sold her truck because Dr. Abril did not like it. Ms. Schriber never heard of any violent episodes between defendant and Dr. Abril.

Viola Schriber, defendant's mother, knew Bridgette Breaux and Dr. Abril. She agreed that Dr. Abril was from a different economical and cultural class. After her daughter became involved with Dr. Abril, she came to her mother's home with an intravenous drug bag attached to her. She

found this very unusual because her daughter did not like to get shots as a child. She understood the bag to contain vitamins prescribed by Dr. Abril. During the couples' first break up, Tiffany told her mother that she was afraid of what was going to happen to her, because Dr. Abril could get things done. She did not inquire any further because she did not pry into her adult children's lives. She testified that Tiffany told her that Dr. Abril had gone to Crown Buick and caused a commotion. She wanted Tiffany to tell someone about the incident, and believed Tiffany subsequently contacted an attorney. Mrs. Schriber knew at some point that her daughter had resumed her relationship with Dr. Abril, because she saw Tiffany again wearing the ring that she had returned to Dr. Abril during the break up, and Tiffany started visiting with Kian again.

Mrs. Schriber said on cross-examination that she saw a lot more of her daughter when she was living with Bridgette Breaux than when she was living with Dr. Abril.

Mervin Schriber, defendant's father, testified that he knew Bridgette Breaux and Dr. Abril. He said he saw his daughter much less after she moved in with Dr. Abril. Tiffany seemed like a kept woman. He thought her health was deteriorating, as she lost a tremendous amount of weight. He heard that Dr. Abril had to be escorted out of the Crown Buick dealership

because she was causing a ruckus. He believed that toward the end of the relationship, Tiffany was “scared to death” of Dr. Abril, but he could not recall precisely why. He stated on cross-examination that he saw Dr. Abril approximately seven times, and felt she put on a good front for him and his wife. He did not approve of gay lifestyles.

Tiffany Schriber, who was thirty years old at the time of trial, testified on her own behalf. Despite having a lesbian relationship with Bridgette Breaux before her marriage, Ms. Schriber was married in 1990. The marriage lasted only six months, and she resumed her relationship with Bridgette after her divorce.

Ms. Schriber testified that she purchased the .38 caliber revolver after her purse was snatched. This was the same gun with which she later shot Dr. Abril. She was introduced to Dr. Abril by Betty Collins at a 1995 Christmas party at Dr. Abril’s condo. She believed Dr. Abril was living with a woman named Sylvia at that time. Ms. Schriber next saw Dr. Abril in June 1996 at a surprise birthday party given for Ms. Collins. She, Bridgette and Dr. Abril developed a friendship during the summer of 1996. They would sail on Dr. Abril’s boat, and have drinks and dinner at the Yacht Club. During this time Ms. Schriber fell and injured her lower back. Dr. Abril offered to treat her pain using an electrical stimulation device that the doctor

had at her condo. On one occasion, while Dr. Abril was showing Bridgette message techniques to use on Ms. Schriber, Dr. Abril initiated sexual activity, in which all three women participated. The three continued to see each other, but near the end of summer of 1996, Ms. Schriber ended her seven-year relationship with Bridgette Breaux, and moved in with Dr. Abril in September. Dr. Abril gave her the ring in December 1996, which Ms. Schriber had appraised at \$25,500. Ms. Schriber testified that she reluctantly sold her truck at Dr. Abril's urging. Ms. Schriber said she asked Dr. Abril, who was quite a bit older than she, why she was interested in her, to which Dr. Abril responded that she [Ms. Schriber] was a "raw pearl." Ms. Schriber was very close to Dr. Abril's daughter, Kian, and stated that Kian was told that she had two mothers.

Ms. Schriber first sought counseling from Molly Ferguson in July 1997, because she was troubled by unresolved issues with Dr. Abril. In her quest to better understand Dr. Abril, Ms. Schriber said she visited Dr. Abril's ex-lover Sylvia. It was when she mentioned this visit that Dr. Abril "exploded" on the night of the shooting. In August 1997, she and Dr. Abril broke up after Dr. Abril expressed that she was unsure of her love for Ms. Schriber. Ms. Schriber moved out when Dr. Abril came home that evening. Dr. Abril subsequently showed up at Crown Buick, wanting the ring back.

Ms. Schriber said she considered the ring to be a gift, and told Dr. Abril that she would have to think about returning it. She returned to her office and asked a manager to have Dr. Abril leave. Dr. Abril later returned with Kian, and followed Ms. Schriber until she had no choice but to stop and talk. She again told her she would think about giving back the ring. Dr. Abril told her that she would have her run off the road, which Ms. Schriber understood as a threat. She sought advice from Deborah Faust, the attorney who had drafted her will, but decided against obtaining a peace bond, fearing that it would only make Dr. Abril more angry, irate and vindictive. Ms. Schriber eventually returned the ring.

Ms. Schriber testified that she began drinking in her senior year of high school, and had cut back during her relationship with Bridgette Breaux, but never thought she had a drinking problem. Dr. Abril also drank, and the two drank a lot together. Dr. Abril had three shelves of drugs in an upstairs closet, including antibiotics and vitamins. Ms. Schriber identified a package of Prozac and what she said was Xanax—two different pills in an unlabeled pillbox—and Buspar, that she claimed she got from Dr. Abril. She said Dr. Abril would come home upset from a busy day, and take Xanax. She said that Dr. Abril would give her the pills without a prescription.

She encountered Dr. Abril one day on Canal Boulevard after the

breakup and the incident at Crown Buick, and asked her if she wanted to go out for dinner to celebrate her birthday. After dinner, the two went to Ms. Schriber's apartment and had sex. The couple went to two counseling sessions with Molly Ferguson, but Dr. Abril said she was not satisfied with Ms. Ferguson's credentials. They began counseling sessions with Rev. Ord, whom they both knew previously. Ms. Schriber moved back in with Dr. Abril after her lease expired, but did not tell anyone in her family.

In the summer of 1998, Dr. Abril detected a lump in her breast and believed she was going to die. Her father also died around that time. Ms. Schriber claimed that she felt closer to Dr. Abril than ever during this period. Shortly before the day of the shooting, Dr. Abril discovered that the lump was benign.

On the morning of the shooting, Ms. Schriber took coffee to Dr. Abril in the bedroom, and left for work. Dr. Abril had the day off. Ms. Schriber brought lunch home for them. After returning to work, Rev. Ord telephoned to say he was bringing dinner to their regularly scheduled counseling session. Ms. Schriber paged Dr. Abril, but she did not respond. When Dr. Abril arrived home, she asked what the big "f---ing emergency" was that she had to page her twice. Dr. Abril told her to find a place in the condo away from her. Ms. Schriber did not understand what had caused Dr. Abril to

become irate since lunch. She opened her second beer and went across the street to wait for Rev. Ord. When he arrived, she told him that Dr. Abril was irate, and that she did not want to attend the counseling session. He insisted, and she went upstairs with him. Dr. Abril came downstairs from her bedroom in a seemingly normal mood, but ignored Ms. Schriber. The three went outside on the balcony. Ms. Schriber left to get cigarettes from her car, and picked up her gun at that time, which she had been unable to take inside earlier because she had her hands “full” with groceries. She said she put the gun in her pocket and returned upstairs to talk with Dr. Abril and Rev. Ord. She asked Dr. Abril why she was so angry with her for simply paging her, but Dr. Abril did not respond. During the discussions, Ms. Schriber commented, after she had been drinking wine, that she should have listened to Sylvia. Dr. Abril exploded, calling her a “shit,” and told her that they would not be seeing each other anymore. Rev. Ord then went into the kitchen to prepare dinner, and Ms. Schriber stood at the door to the balcony asking Dr. Abril why the relationship was over. Dr. Abril did not want to talk, and came inside. Ms. Schriber stated that she had been drinking a lot, and did not recall speaking to either Amy or Kelly, her friends who testified that she telephoned them before the shooting. Dr. Abril told her that she had thirty minutes to get the things she owned out of the condo and leave. Ms.

Schriber went upstairs to Kian's room to "symbolically" tell her goodbye, as Kian was in Houston. When she returned downstairs, Rev. Ord was explaining to Dr. Abril that it was 10:00 p.m. and, therefore, not reasonable to make Ms. Schriber pack all of her belongings at that time. She stated that she did not want to go to her parents' house, and did not remember Dr. Abril offering to pay for a hotel. Rev. Ord offered to let her stay at his house across the lake. Ms. Schriber went upstairs to pack some things she needed for work. She returned, and told Rev. Ord that she needed to talk to Dr. Abril. She still felt she had received no explanation as to why Dr. Abril was ending the relationship. She said Dr. Abril agreed with this. Dr. Abril told her she wanted the ring back, and that if Ms. Schriber did not return it, she would have it delivered with her hand. Ms. Schriber testified that the next thing she remembered was a big noise. After seeing Dr. Abril, she sat down on the floor and shot herself in the chest. She remembered that Rev. Ord came to her, and that she told him to help Dr. Abril. She remembered Mrs. Neuenhous telling her to stay awake.

After a three to four week stay in the hospital, Ms. Schriber moved in with her parents, and again saw Molly Ferguson for counseling. She had been in Alcoholics Anonymous for almost a year at the time of trial, and did not drink anymore. She delivered meals for elderly shut-ins, and lived on

money she withdrew from her Loyola retirement account. She worked in a Metairie Road coffee shop after exhausting that money.

On cross-examination, Ms. Schriber testified that her relationship with Bridgette was getting stale when she ended it and began seeing Dr. Abril. She conceded that Dr. Abril's financial stature was a small part of her desire to end her relationship with Bridgette. Another reason was that she wanted children, but Bridgette did not. She had become very attached to Kian, whom she would often watch while Dr. Abril and Bridgette would sail. Ms. Schriber said she was confused and in poor health at that time. She left the home she shared with Bridgette, and moved directly in with Dr. Abril. Ms. Schriber testified that at the time of trial she still had the diamond ring, and denied having pawned it. Ms. Schriber described her day-to-day relationship with Dr. Abril as one in which she cooked and did some housework if Dr. Abril was dissatisfied with the maid's work. Dr. Abril paid the bills. Dr. Abril also gave her a check for \$4,000 that she deposited in her account to be used on incidentals for the house, including things that Dr. Abril's daughter might need. After the couple reconciled, Ms. Schriber began to pay one half of the \$600 monthly condo fee. Ms. Schriber said the main reason that she and Dr. Abril broke up the first time was that they were not compatible.

When asked specifically about the night of the shooting, Ms. Schriber could not remember at what point she took Xanax. She did not recall how long she had been taking Prozac, but said she was not taking it at the time of trial. She started to get upset as her trial date approached, and had begun taking the antidepressant Zoloft to help her deal with anxiety. Ms. Schriber said that after she and Dr. Abril reconciled, she still did not want to give up her apartment and move back in with her, fearing control problems. She did not tell her family she moved back in because she felt they would not understand, given the previous problems. Ms. Schriber admitted that prior to the night of the shooting, the only threat Dr. Abril had ever made to her was the one to have her run off the road if she did not return the ring. She said she believed that threat. Ms. Schriber admitted that she was bothered because Dr. Abril would not tell her why she was being put out; the fact of being put out did not bother her. She did not remember pulling the gun on Dr. Abril, but said that the gunshot woke her from the drugged state caused by the Xanax and the alcohol. She did remember that on the night of the shooting, Dr. Abril threatened that if Ms. Schriber did not return the ring, she would have the ring delivered with her hand. The prosecutor accused Ms. Schriber of telling Dr. Abril that she would get the ring over her dead body, and that she then pulled out the gun and shot her. Ms. Schriber

replied, “I disagree with that totally.” Ms. Schriber did not deny shooting Dr. Abril, but denied that she intended to do so, because she would never intentionally hurt anyone. Ms. Schriber stated that because the ring was a gift, it belonged to her. She still had the ring at the time of trial.

Ms. Schriber stated on redirect examination that she told a psychiatrist in the hospital that on the night of the shooting, she had taken Xanax and drank beer and wine, and she later told the same things to Dr. Mallik. She stated that she loved Dr. Abril, but because of Dr. Abril’s changing moods, she knew that she might eventually have to get her own apartment again. She was planning to leave with Rev. Ord immediately before the shooting.

ERRORS PATENT:

A review of the record reveals two errors patent. First, the trial court failed to adhere to the twenty-four hour delay between the denial of defendant’s motion for new trial and sentencing, required by La. Code Crim. Proc. art. 873, unless expressly waived by the defendant. In the instant case, neither the sentencing transcript nor the minute and docket master entries from the date of sentencing reflect that Ms. Schriber expressly waived the twenty-hour delay. This Court has held that the failure to adhere to the delay is harmless error under several circumstances. *See State v. Clark*, 97-1757, p. 6 (La.App. 4 Cir. 4/7/99), 732 So.2d 138, 141 (where the defendant does

not challenge his sentence on appeal); *State v. Allen*, 94-1895 (La.App. 4 Cir. 9/15/95), 661 So.2d 1078, 1083 (where the sentence is mandatory); *State v. Bentley*, 97-1552, p. 3 (La.App. 4 Cir. 10/21/98), 728 So.2d 405, 408 (where the original sentence is vacated and the defendant is resentenced as a habitual offender). However, in the instant case, Ms. Schriber is challenging her sentence.

In *State v. Augustine*, 555 So.2d 1331 (La. 1990), the Court cited numerous cases requiring remand for resentencing where defendants were sentenced within twenty-four hours after denial of new trial motions without waiver of the delay. The *Augustine* court rejected the view expressed in *State v. White*, 404 So.2d 1202 (La. 1981), that a remand for resentencing was a “useless formality” for reimposition of sentence, stating that for all it knew, reimposition of sentence upon the defendant in *Augustine* might result in a lesser sentence for him. Thus, under *Augustine*, the sentence imposed by the trial court must be vacated and the case remanded for resentencing. Ms. Schriber’s right to file a new appeal on the issue of excessive sentence is preserved.

The second error patent is that in sentencing defendant the trial court did not stipulate that the sentence for attempted second degree murder be without the benefit of parole, probation or suspension of sentence, as

required by La. Rev. Stat. 14:27(D)(1), pertaining to punishment for attempts where the offense attempted is punishable by death or life imprisonment. The offense of second-degree murder is punishable by life imprisonment. Thus, the court imposed an illegally lenient sentence. However, this Court will not correct an illegally lenient sentence on appeal where the State does not raise the issue. *State v. Jones*, 99-0861, p. 6 (La.App. 4 Cir. 6/21/00), 769 So.2d 28, 35; *State v. Mims*, 97-1500, p. 24 (La.App. 4 Cir. 6/21/00), 769 So.2d 44, 61.

ASSIGNMENT OF ERROR NO. 1:

In her first assignment of error, Ms. Schriber claims the evidence is insufficient to sustain her conviction. More specifically, she argues that the State failed to prove that she specifically intended to kill Dr. Abril.

This Court reiterated the well-settled standard for reviewing convictions for sufficiency of the evidence in *State v. Ragas*, 98-0011 (La.App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall*, 523 So.2d 1305 (La.1988). The reviewing court must

consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall; Green; supra*. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319 (La.1992) at 1324.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia, supra*, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So.2d at 106-107, quoting *State v. Egana*, 97-0318, pp. 5-6 (La.App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

Ms. Schriber was convicted of attempted second degree murder, a violation of La. Rev. Stat. 14:27 and 14:30.1. La. Rev. Stat. 14:27 provides that an attempt is committed when a "person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended, and it shall be immaterial whether, under the

circumstances, he would have actually accomplished his purpose.” Second degree murder is defined in pertinent part by La. Rev. Stat. 14:30.1 as the killing of a human being when the offender has a specific intent to kill **or** to inflict great bodily harm. However, to convict a person of attempted second degree murder, the State must prove that the offender had the specific intent to kill. *State v. Sullivan*, 97-1037, p. 20 (La.App. 4 Cir. 2/24/99), 729 So.2d 1101, 1111. Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow her act. La. Rev. Stat. 14:10(1).

Specific intent can be formed in an instant. *State v. Cousan*, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as fact, but may be inferred from the circumstances and actions of the defendant. *State v. Hebert*, 2000-1052, p. 28 (La.App. 4 Cir. 4/11/01), ___ So.2d ___, ___, 2001 WL 540446.

Ms. Schriber presented the defense of intoxication to exempt her from responsibility for the crime. The defense of intoxication is provided for by La. Rev. Stat. 14:15, which states in pertinent part:

The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, except as follows:

* * *

(2) Where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular

crime, this fact constitutes a defense to a prosecution for that crime.

The defendant has the burden of proving the intoxicated condition at the time of the offense. *State v. Smith*, 94-2588, p. 5 (La.App. 4 Cir. 3/27/96), 672 So.2d 1034, 1038. Where circumstances indicate that an intoxicated condition precluded the presence of specific criminal intent, the burden shifts to the State to show beyond a reasonable doubt that specific intent was present. *State v. Holmes*, 95-2249, pp. 6-7 (La.App. 4 Cir. 10/29/97), 701 So.2d 752, 756; *State v. Patterson*, 99-994, p. 8 (La.App. 5 Cir. 1/25/00), 752 So.2d 280, 284, *writ denied*, 2000-0753 (La. 2/9/01), 785 So.2d 26. The jury is the ultimate factfinder as to whether a defendant has proven her intoxicated or drugged condition and as to whether the State negated that defense beyond a reasonable doubt. *State v. Davis*, 92-1623, p. 10 (La. 5/23/94), 637 So.2d 1012, 1020.

The undisputed evidence in the instant case revealed that blood drawn from Ms. Schriber at 11:05 p.m. had a blood alcohol concentration of .137. The legal blood alcohol concentration limit for operating a vehicle while intoxicated is .10. Thus, her blood alcohol concentration within one hour of the shooting, which occurred between 10:00 p.m. and 10:30 p.m., was over one-third higher than the legal limit for operating a motor vehicle. Ms. Schriber also told Dr. Mallik that she was on Prozac and had taken Xanax

that night. She also mentioned this to Molly Ferguson, her counselor. However, there was no conclusive evidence to support these assertions, and, further, a test run on a urine sample taken on the night of the shooting was negative for Xanax. But, Dr. Mallik testified that Xanax might not show up in urine for up to three hours after ingestion, or could show up as soon as fifteen minutes. He also said Prozac could slow the elimination of Xanax. Amy Francioni, a former co-worker of Ms. Schriber's from Loyola, had been to Dr. Abril's condo, and said she had seen samples of Prozac and Xanax in the condo. Dr. Abril admitted that she kept Xanax at her condo, but denied ever giving any of it to Ms. Schriber. She did have knowledge that Ms. Schriber had obtained a prescription for Prozac from her personal physician. Dr. Abril testified that she had given defendant only Buspar, an anti-anxiety medication. Dr. Mallik conceded that Prozac does not affect alcohol. There was also evidence produced by the State that in some instances Prozac diminishes the hypnotic or sedative effects of alcohol, and in some cases protects against the adverse affects of alcohol.

Dr. Mallik testified that it was his opinion that a host of factors contributed to the events that evening, including Ms. Schriber's personality traits or psychological makeup, her underlying intoxicated state, along with Xanax abuse, and the overall emotionally charged situation, that precluded

her from having the capacity to form a specific intent to kill Dr. Abril.

When asked whether, it would change his opinion if Xanax was removed from the equation, he said, “Not really.” He said again that he was basing his opinion on Ms. Schriber’s psychological makeup, the history of that evening, the therapy the couple was receiving, and Xanax **or** Prozac and alcohol. Dr. Mallik admitted that Ms. Schriber formulated something in her mind that night, though he maintained that it was not specific intent to kill.

Molly Ferguson diagnosed Ms. Schriber with an adjustment disorder with depressed mood. She found defendant had dependent personality features—but not enough traits to categorize her as having a dependent personality disorder.

Dale Standifer testified for the defense, and stated that she believed Ms. Schriber knew what she was doing when she shot Dr. Abril, but admitted that she did not know what effect drugs or alcohol may have had on defendant. Ms. Standifer believed that Ms. Schriber shot Dr. Abril because she was a victim of psychological abuse, “battered spouse syndrome,” and felt she had no option left open to her. She believed Ms. Schriber shot herself because she had lost all hope.

Amy Francioni testified that Ms. Schriber telephoned her within perhaps twenty minutes of the shooting, stating that Dr. Abril was

threatening her, and that she had no choice but to defend herself. This testimony comports with Dale Standifer's testimony that defendant knew what she was doing, and felt she had no option left open to her. Ms. Francioni testified that Ms. Schriber sounded disconnected, and told her she was in a counseling session, and would call Ms. Francioni back when she was through. There was also evidence that Ms. Schriber telephoned Kelly Williams prior to telephoning Ms. Francioni, and told him that Dr. Abril kept threatening that if she did not get her stuff out of the condo she would have her "taken care of." However, Mr. Williams testified that there was no urgency in Ms. Schriber's voice, and, in fact, told him she would call him back.

It was revealed in defendant's case-in-chief that Mrs. Schriber routinely used Prozac, Xanax and drank alcohol, the very things she claims precluded her from being able form the specific intent to kill on the night of the shooting. However, Ms. Schriber admitted that she had been a regular drinker, and in fact was in Alcoholics Anonymous at the time of trial. Her ex-lover, Bridgette Breaux, said Ms. Schriber sometimes became argumentative when she drank, but was not violent. In fact, there was no testimony that Ms. Schriber ever did anything out of the ordinary during all of the times she was allegedly intoxicated and/or drugged, except for one

night—the night she shot Dr. Abril.

Ms. Schriber's testimony supports a conclusion that the jury could have found her less than credible. She claimed that she could not remember many events from that night, and was awakened out of a drugged state only by the sound of the gunshot. Yet, within one hour of the shooting, she was talking to one friend who said she sounded only "a little disconnected," and to another friend who did not detect any urgency in her voice. Ms. Schriber said she could not recall making those telephone calls. She remembered coming downstairs, sitting down, and telling Rev. Ord to wait outside so she could say her goodbyes to Dr. Abril. Rev. Ord said that although Ms. Schriber had been drinking that night, she was not stumbling drunk. Also, despite his familiarity with her personality, he did not indicate in any way that Ms. Schriber's thought process was impaired up to the time she asked him to wait outside. According to Dr. Abril, Ms. Schriber had the gun in her hand even as she asked Rev. Ord to wait outside. During Ms. Schriber's testimony, the prosecutor accused defendant of telling Dr. Abril she would get the ring over her dead body, and then pulled out the gun and shot her. Ms. Schriber replied, "I disagree with that totally." Ms. Schriber was then reminded that supposedly she did not remember what happened. In an attempt to explain her comment, Ms. Schriber replied that she was not that

type of person. The jury could have viewed this as a slip, revealing that in fact Ms. Schriber knew what had happened, and was lying about being unable to remember the events surrounding the shooting.

According to Dr. Abril, after Rev. Ord left the condo, Ms. Schriber, while pointing the cocked revolver at her, said if she could not have her no one would. She also allegedly told Dr. Abril that she was not going to ruin her life. Ms. Schriber could not dispute this, having claimed not to remember even pulling out the gun, much less saying anything or shooting Dr. Abril.

Ms. Schriber also argues that Dr. Abril's testimony was inconsistent because Rev. Ord and Mrs. Neuenhous both indicated that they talked on the balcony for up to ten minutes. Yet, she points out, Dr. Abril did not testify to anything that was said during that time other than defendant's two alleged statements, and Dr. Abril's alleged question to defendant about leaving Kian without a mother. However, neither Rev. Ord nor Mrs. Neuenhous testified that they remembered precisely how long they talked, both of them speculating it had been for five, seven or ten minutes. The jury could have believed they both were mistaken as to their estimation of the time period on the balcony. Moreover, there is not necessarily a conflict or internal inconsistency simply because Dr. Abril may not have testified to everything

that was said as she faced defendant's cocked revolver.

Dr. Abril was shot at very close range. A physician testified that her injuries and complications therefrom had been life-threatening. It is true that Ms. Schriber only shot Dr. Abril once, and shot herself in the stomach shortly thereafter. Despite her own injuries, she also told others at the scene to tend to Dr. Abril, not her. Also, there was no evidence that Ms. Schriber was a violent person, or had ever threatened to harm Dr. Abril or any other person before this night. However, the fact that Ms. Schriber shot herself in the stomach after shooting Dr. Abril does not necessarily indicate a lack of specific intent to kill; murder-suicides are very common. Nor does her apparent immediate regret negate specific intent to kill. As for Ms. Schriber not being a violent person, as Dale Standifer testified, she believed defendant had reached the end of her rope, and defendant felt she had no option but to shoot Dr. Abril. This is consistent with defendant's statement to Amy Francioni approximately twenty minutes prior to the shooting, that Dr. Abril was threatening her and she felt she had to defend herself. The jury, the ultimate factfinder, could have rejected the defense of intoxication insofar as it precluded defendant's ability to formulate specific intent to kill.

In *State v. Cepriano*, 2000-213, p. 7 (La.App. 5 Cir. 8/29/00), 767 So.2d 893, 898, the defendant was convicted of attempted second degree

murder. He claimed, however, that his intoxication negated his specific intent to kill. He testified that he smoked four joints of marijuana and consumed twelve beers the evening of the crime. However, he also testified that he was able to drive from Ponchatoula to Lafitte and that he was thinking clearly enough to park the stolen car he was driving away from the scene of the incident. The victim testified that she could not tell that the defendant was intoxicated. The Court explained that the jury apparently did not believe that the defendant's intoxication, if any, negated his specific intent. Also, because the question of credibility is made by the trier-of-fact, an appellate court will not reweigh such a finding on appeal.

In *State v. Barnett*, 96-2050 (La.App. 1 Cir. 9/23/97), 700 So.2d 1005, the defendant was convicted of attempted second degree murder after he beat his wife's head repeatedly against a headboard and door frame. Witnesses at the scene testified that he repeatedly stated that he was going to kill her. Several people testified that defendant had consumed at least two margaritas and a shot of whiskey at a party shortly before the incident. The defendant testified that he had drunk numerous beers and had taken Buspar before going to the party. A neuropsychologist testified that it was quite unlikely that defendant could have formed the requisite specific intent if he had ingested four to six beers, a dose of Buspar, a medium or large

margarita, and a shot of whiskey prior to the incident. In upholding the conviction, the First Circuit stated that the trier-of-fact could have rejected the defense of intoxication. As a reviewing court, it would not impinge on the factfinder's decision to reject the defense.

In the instant case, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have rejected the defense of intoxication, and found that Ms. Schriber shot Dr. Abril at close range, with the specific intent to kill her.

ASSIGNMENTS OF ERROR NOS. 2 & 3:

In these assignments of error, Ms. Schriber claims the trial court erred in denying her motions for mistrial.

In the first instance, Dr. Abril testified at length on the second day of trial, without objection, concerning her gunshot wound and the pain and other complications she endured and continued to endure as a result of being shot. Defense counsel finally objected to the line of questioning, and approached the bench. While counsel were at the bench discussing this and another matter, a juror fainted. The juror was lying prone on the floor, and at some point, Dr. Abril told the paramedics to "lift his legs up." Defense counsel moved for a mistrial on the ground that it was impossible for defendant to receive a fair trial because of the combined effect of the juror

passing out immediately after Dr. Abril's testimony from a gurney, and Dr. Abril's directing the paramedics to raise the juror's legs.

The trial court denied the motion, stating that the matter of Dr. Abril testifying from a gurney had been discussed with both counsel prior to trial. The court said it did not know why defense counsel would have been under the impression that Dr. Abril was going to testify from a wheelchair. The court spoke with the juror, who indicated that he felt like he had a fever, a sore throat, and was coming down with a virus. The paramedics informed the court that the juror fainted because of a sudden drop in blood pressure. The sixty-six year old juror was questioned by the court as to whether he could continue to hear testimony, and he replied that he thought he would have to lie down to do so. The court had paramedics transport the juror to the hospital as a precaution, and he was replaced with an alternate. The court implicitly found no prejudice to defendant's right to a fair trial. The trial court instructed the other jurors that their fellow juror had fainted, that he had been feeling like he was coming down with a virus, but had wanted to fulfill his duty as a juror.

Defense counsel reurged his motion for mistrial on the fourth day of trial, citing a report from the Times-Picayune newspaper that Dr. Abril instructed the medics who revived the juror. Defense counsel suggested that

a mistrial be granted and the case not be tried until Dr. Abril was able to testify from a wheelchair. The trial court interviewed each juror separately to determine whether any of them had read the Times-Picayune article or had been exposed to any radio or television news coverage of the incident. The court also inquired as to whether they would give more or less weight to Dr. Abril's testimony because she was a physician and may have given some advice pertaining to the juror who fainted. All twelve jurors stated that they had not read the newspaper article or seen any coverage about the trial. All stated that they heard Dr. Abril say something about raising the juror's feet or legs, and all said that would not affect the weight they gave to her testimony. One juror stated that he thought the juror who fainted possibly had been overwhelmed by the situation—that the “presence of the victim” may have had some effect on him emotionally. However, that juror said that he believed the juror had diabetes and that this had been the overriding factor in his fainting. The trial court denied the reurged motion for mistrial.

Upon motion of a defendant, a mistrial shall be ordered and the jury dismissed when prejudicial conduct in or outside of the courtroom makes it impossible for the defendant to obtain a fair trial. La. Code Crim. Proc. art. 775. “Mistrial is a drastic remedy, and is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial.”

State v. Wessinger, 98-1234, p. 24 (La. 5/28/99), 736 So.2d 162, 183. “The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion.” Id.

Ms. Schriber argues that one juror suspected that the juror fainted because “he was overwhelmed with the situation of the victim testifying from the gurney about all of her medical problems.” This is incorrect, as that juror mentioned nothing about the fact that Dr. Abril testified from a gurney. That juror simply referred to the “presence” of the doctor as possibly having some effect on the juror. Moreover, that juror concluded that the overriding factor in the fainting spell was more likely the juror’s medical condition. Further, the juror did not faint when Dr. Abril was brought up on a gurney, but only after defense counsel allowed Dr. Abril to testify in great detail about her medical problems before he finally objected to a question about what medication Dr. Abril was taking. That objection was sustained by the trial court as “long overdue.” However, as the court noted, it allowed the testimony to go on because defense counsel did not object. All of the jurors said they could be fair, and several mentioned that Dr. Abril was just doing what she had been trained to do. It cannot be said

that the trial court abused its discretion in determining that the fainting incident did not result in substantial prejudice such that Ms. Schriber could not receive a fair trial.

In the second instance, Ms. Schriber claims the trial court erred in denying her motion for mistrial based on prosecutorial misconduct. She cites the cross examination of Dale Standifer, who testified concerning battered women's syndrome. However, defense counsel only objected to the question: "So, now you see why this isn't necessary [sic] an acceptable defense?" The trial court overruled the objection, implicitly denying the motion for mistrial. The trial court noted that the witness was on cross examination, and she could give whatever answer she deemed appropriate. The colloquy leading up to the question shows that the prosecutor was simply picking apart the defense as it pertained to this defendant, and concluded by asking the objectionable question. It cannot be said that the trial court abused its discretion in implicitly determining that this question by the prosecutor did not result in substantial prejudice such that Ms. Schriber could not receive a fair trial.

ASSIGNMENT OF ERROR NO. 4:

In this last assignment of error, Ms. Schriber claims that her twenty-five year sentence is unconstitutionally excessive. However, because we are

vacating the sentence due to the error patent, we pretermitt discussion of this issue.

CONCLUSION:

For the foregoing reasons, we affirm the conviction, vacate the sentence, and remand to the trial court for resentencing, preserving Ms. Schriber's right to raise the issue of excessive sentence in a new appeal.

**CONVICTION AFFIRMED; SENTENCE VACATED,
AND REMANDED FOR RESENTENCING**