NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0746

PMc

STATE OF LOUISIANA

VERSUS

ASHLEY POSEY

Judgment Rendered: SEP 2 6 2008

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On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Livingston
State of Louisiana
Docket No. 19709

Honorable Elizabeth P. Wolfe, Judge Presiding

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Scott M. Perrilloux District Attorney Patricia Parkerl Assistant District Attorney Amite, Louisiana	Counsel for Appellee State of Louisiana
Bertha M. Hillman Louisiana Appellate Project Thibodaux, Louisiana	Counsel for Defendant/Appellant Ashley Posey

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Welch J. concurs with reasons assigned
Parro, J., concurs.

McCLENDON, J.

The defendant, Ashley Posey, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. She pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals. She asserts six assignments of error as follows:

1. There was insufficient evidence to support the conviction. It was uncontested that the defendant did not fire the fatal shot and there was no evidence that the defendant knew that her co-defendant had a gun.
2. The trial court erred in denying the defendant's motion to suppress her confession.
3. The trial court erred in denying the defendant's motion for mistrial based on improper comments made by the state during rebuttal closing arguments.
4. It was error for the court to rule that the state did not have to answer whether or not the defendant was the shooter in response to the bill of particulars.
5. It was error for the court to exclude evidence of the co-defendant's plea to manslaughter.
6. The trial court erred in admitting evidence of other wrongs or acts of the defendant.

Finding no merit in these assignments of error, we affirm the defendant's conviction and sentence.

FACTS

On May 5, 2005, the defendant Posey, Eric Petsch, Steven Durnin, Jacob Walker, and several other individuals, were gathered at Walker's home in Walker, Louisiana. In response to discussions regarding the group's desire to acquire drugs and money, the defendant and Petsch decided to "hit a lick" or commit a robbery. The defendant suggested Jimmy Morris as the potential target. She told Petsch that Morris, whom she referred to as her uncle, had both drugs and money in his trailer. With Durnin as the driver, the defendant and Petsch traveled to Morris's residence in Big D's Trailer Park in Walker.

Meanwhile, Morris was home alone in his trailer. At approximately 10:00 p.m. there was a knock at the door. Morris asked who was there before opening the door. After the defendant identified herself, Morris opened the door. Immediately thereafter, a single gunshot was fired, hitting Morris in the head. Morris did not survive the shooting. The defendant and Petsch fled the scene, reentered the vehicle with Durnin, and left the area. Nothing was taken from the victim's residence.

Petsch, Durnin, and the defendant were subsequently charged with second degree murder in connection with the victim's death.

ASSIGNMENT OF ERROR 1

In her first assignment of error, the defendant challenges the sufficiency of the state's evidence in support of the second degree murder conviction. Although defendant admitted being present at Morris's trailer with Petsch when the offense was committed, she insists that the evidence presented failed to show that she had the requisite specific intent to support her conviction. She argues that there was absolutely no evidence she was aware that Petsch was armed with a handgun or that she intended to use force or intimidation to steal the pills.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821; **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1 Cir. 1984). The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in Louisiana Code of Criminal Procedure article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, Louisiana Revised Statute 15:438 provides the fact-finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Nevers**, 621

So.2d 1108, 1116 (La. App. 1 Cir.), writ denied, 617 So.2d 906 (La.1993); **State v. McLean**, 525 So.2d 1251, 1255 (La. App. 1 Cir.), writ denied, 532 So.2d 130 (La.1988).

Louisiana Revised Statutes 14:64(A) defines armed robbery as "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon."

Louisiana Revised Statutes 14:30.1(A) defines second degree murder, in pertinent part, as the killing of a human being:

> "(1) When the offender has a specific intent to kill or to inflict great bodily harm; or (2)(a) When the offender is engaged in the perpetration or attempted perpetration of . . . aggravated burglary . . . armed robbery, first degree robbery [or] simple robbery ,. . . even though he has no intent to kill or to inflict great bodily harm."

"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 defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000, p. 3 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876.

Louisiana Revised Statutes 14:24 provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

While all persons "concerned in the commission of a crime" are principals under LSA-R.S. 14:24, this rule has important qualifications. An individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. **State v. Bridgewater**, 2000-1529, p. 10 (La. 1/15/02), 823 So.2d 877, 890, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).

On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact-finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. The credibility of a witness is a matter of weight of the evidence, not sufficiency. **State v. Johnson**, 446 So.2d 1371, 1375 (La.App. 1 Cir.), writ denied, 449 So.2d 1347 (La.1984).

At the trial of this matter, Steven Durnin testified that he and the defendant, and several other individuals, were hanging out at Jake Walker's house on the night of the shooting. Everyone there was out of money and bored. Eric Petsch suggested that they "hit a lick," street terminology for committing a robbery. In response, the defendant advised that she knew someone who had pills. The defendant, with Durnin and Petsch, left Walker's residence and drove over to Big D's Trailer Park. According to Durnin, he dropped the defendant and Petsch off at the trailer park. The defendant and Petsch went to Morris's residence, and Durnin left to get gas. When Durnin returned to the area, the defendant and Petsch reentered the vehicle. According to Durnin, Petsch was hysterical and the defendant appeared to be in shock. When Durnin asked what had happened, Petsch eventually admitted that he had accidentally shot the victim in the head. The three traveled to Woodland Crossing Subdivision where Petsch discarded the pistol into a pond.

The crux of the defendant's argument in this assignment is that the state failed to prove the essential element of specific intent because the evidence did not show that the defendant was aware that Petsch was armed with a gun or had any intent to commit an armed robbery of the victim. She argues that there is a reasonable hypothesis that the defendant only intended to steal pills from the victim without force or violence as she had done the day before.

Our review of the evidence presented proves otherwise. From the evidence presented, it is clear the state did not attempt to prove that the defendant was the shooter. In fact, it was undisputed that Petsch was the shooter. However, under the law of principals, a defendant can be found guilty

of armed robbery if he aids and abets, or directly or indirectly counsels or procures, another to commit a crime. Under this theory, the defendant need not actually take anything, or hold a weapon, to be guilty as a principal of armed robbery. See **State v. Dominick**, 354 So.2d 1316, 1320 (La.1978). All persons involved in the commission of a crime, whether present or absent, are equally culpable. **State v. Hampton**, 98-0331, p. 13 (La. 4/23/99), 750 So.2d 867, 880, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999); **State v. Jones**, 2000-2009, p. 7 (La. App. 1 Cir. 5/11/01), 808 So.2d 609, 614, writ denied, 2001-1698 (La. 5/3/02), 815 So.2d 93. A person who aids and abets another in a crime is liable just as the person who directly commits it, although he may be convicted of a higher or lower degree of the crime, depending upon the mental element proved at trial. See **State v. Watson**, 397 So.2d 1337, 1342 n.10 (La.), cert. denied, 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

Upon reviewing the evidence in the light most favorable to the state, we are convinced that the evidence presented was sufficient to support the defendant's conviction as a principal to the second degree murder committed by Petsch. The trial testimony provides sufficient direct evidence from which a reasonable fact-finder could have concluded beyond a reasonable doubt, and to the exclusion of any reasonable hypothesis of innocence, that the defendant was aware that Petsch had a handgun and defendant was actively involved in the planning and commission of the robbery attempt. The testimony established that the defendant orchestrated the plan to rob the victim and actively assisted in executing it. Durnin testified that the sole purpose of the trip to Morris's residence was to rob him of pills he possessed. The testimony of Wendy Varnado, another one of the individuals who had been present at Walker's residence that day, established that the defendant was aware that Petsch possessed a gun. According to Varnado, she and the defendant had briefly left Walker's residence earlier that day because Petsch was playing Russian roulette with the gun. Therefore, the evidence presented clearly established that, although the defendant did not actually pull the trigger, she was instrumental in

the robbery plans, as she suggested the particular victim and directed the co-defendants to his residence. The defendant also enticed the victim to open the door by identifying herself, the individual with whom the defendant was acquainted.

Under LSA-R.S. 14:30.1(A)(2)(a), the evidence is sufficient to support a second degree murder conviction, even in the absence of the intent to kill or to inflict great bodily harm, "[w]hen the offender is engaged in the perpetration or attempted perpetration of . . . armed robbery, first degree robbery, [or] simple robbery . . . ." Because the evidence clearly established that the victim was killed during the attempted perpetration of a robbery, the evidence was sufficient to support the second degree murder conviction. No further evidence of the defendant's intent was necessary.

Considering the aforementioned evidence, we find that the state carried its burden of proving that the defendant acted as a principal in the commission of the second degree murder. This assignment of error lacks merit.

ASSIGNMENT OF ERROR 2

In her second assignment of error, the defendant contends the trial court erred in denying her motion to suppress her confession. Specifically, the defendant asserts the confession should have been suppressed because she was intoxicated when the statement was given, and thus, the statement was not voluntary.

It is well-settled that for a confession or inculpatory statement to be admissible into evidence, the state must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-R.S. 15:451. The state must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1 Cir. 1984), writ denied, 464 So.2d 1375 (La.1985). Additionally, the state must show that an accused who makes a statement or confession during custodial interrogation was

first advised of his **Miranda** rights. **State v. King**, 563 So.2d 449, 453 (La. App. 1 Cir.), writ denied, 567 So.2d 610 (La.1990).

In the first instance, the admissibility of a confession is a question for the trial court, and its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the statement will not be overturned unless they are not supported by the evidence. **State v. Sanford**, 569 So.2d 147, 150 (La. App. 1 Cir. 1990), writ denied, 623 So.2d 1299 (La.1993); see also **State v. Patterson**, 572 So.2d 1144, 1150 (La. App. 1 Cir. 1990), writ denied, 577 So.2d 11 (La.1991). Whether a showing of voluntariness has been made is analyzed on a case by case basis with regard to the facts and circumstances of each case. **State v. Benoit**, 440 So.2d 129, 131 (La.1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983).

In its reasons for denying the motion to suppress, the trial court determined that Det. Calvin Bowden and Cheryl Smith of the Livingston Parish Sheriff's Office were credible witnesses and accepted their testimony that the defendant seemed coherent and did not appear intoxicated at the time the statement was given. At the suppression hearing, both Det. Bowden and Ms. Smith testified that the defendant answered booking questions coherently and was cognizant of the date, the time, her date of birth, and other relevant information at the time of the statement. Although there was testimony that the defendant appeared lethargic, there was no evidence that the defendant was intoxicated. To the contrary, both Det. Bowden and Ms. Smith specifically indicated that the defendant showed no signs of intoxication. Thus, the trial court found that the defendant was not intoxicated.

When the free and voluntary nature of a confession is challenged on the ground that the defendant was intoxicated at the time of the confession, the confession will be rendered inadmissible only when the intoxication is of such a degree as to negate the defendant's comprehension and to render him unconscious of the consequences of what he is saying. Whether intoxication

exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact, and the trial court's conclusion on this issue will not be disturbed unless unsupported by the evidence. **State v. Latiolais**, 563 So.2d 469, 472 (La. App. 1 Cir. 1990).

We agree with the trial court's finding that there was no evidence that the defendant was intoxicated or impaired to such a state that rendered her confession involuntary. Ms. Smith testified that when the defendant gave her confession, although she initially appeared lethargic, she was cooperative, alert, and understood what was happening. Our review of the taped confession supports Ms. Smith's testimony. During the statement, the defendant was clearly aware of what she was doing. She responded coherently and, as the state notes in its brief, she even attempted to mitigate her role in the commission of the offense. There is no indication that the defendant's lethargic condition had any effect whatsoever upon her confession.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR 3

In her third assignment of error, the defendant contends that the trial court erred in denying her motion for a mistrial. Specifically, the defendant argues a mistrial should have been granted when the prosecutor, during closing argument, referred to the defense's failure to call Petsch, the actual shooter, to testify at the trial. The portion of the closing argument that the defendant specifically challenges is as follows:

> . . . they're clouding your vision trying to get you out of focus on . . . this case. You're not here on the trial of Eric Petsch. Eric Petsch got [sic] his own problems. You're here on Ashley Posey. I'm not here to defend Eric Petsch. What I find ironic is defense has the same subpoena powers that I have.

Immediately following this statement, counsel for the defendant objected and a bench conference was held. Later, the prosecutor again argued to the jury that the defense has the same subpoena powers as the state. The defense objected again and another bench conference was held. During the bench conferences, the defense requested a mistrial.

Initially, we note that the bench conferences held in connection with the objections in question were not transcribed and are not part of the record before this court. However, the trial court did note, on the record, that the defense requested a mistrial in connection with these objections, which was denied. The absence of the transcription of the exchange that took place during the bench conferences appears to be inconsequential. It is clear from the transcript that the reference to the defense's subpoena powers was in direct response to argument made by the defense in its closing. In closing, the defense argued:

> The question you've got to ask yourself is why didn't they put Eric Petsch on the stand? I don't have to put Eric Petsch. Why didn't they put Eric Petsch on the stand? Eric Petsch could have told y'all everything you needed to know.

Considering the foregoing, it is clear that the defense, with its closing argument, opened the door for this line of rebuttal by the state. See LSA-C.Cr.P. art. 774.

Mistrial is warranted when certain remarks are considered so prejudicial and potentially damaging to the defendant's rights that even a jury admonition could not provide a cure. **State v. Edwards**, 97-1797, p. 19 (La. 7/2/99), 750 So.2d 893, 906, cert. denied, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999). However, mistrial is a drastic remedy and warranted only when substantial prejudice to the accused will otherwise result. **State v. Anderson**, 2000-1737, p. 19 (La. App. 1 Cir. 3/28/01), 784 So.2d 666, 682, writ denied, 2001-1558 (La. 4/19/02), 813 So.2d 421. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454.

Therefore, even if we were to find the comments improper, we do not find that they rose to the level of preventing a fair trial and warranting a mistrial. The trial court, in its general jury charge, specifically instructed the jurors that the defendant was not required to prove her innocence. Therefore, we are not convinced that the jury was influenced by the prosecutor's comments or that the comments, in any way, contributed to the verdict.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR 4

In her fourth assignment of error, the defendant contends it was error for the court to rule that the state did not have to respond to the bill of particulars and answer whether Ashley Posey was the shooter.

On July 16, 2007, at a pretrial conference, the defense noted that a bill of particulars had been filed in this matter. In connection with the request for particulars, the defense pointed out that it had asked, "Is it the State's theory that Ashley Posey is the shooter?" In response to the question, the state indicated that it would not be submitting a specific answer to that inquiry. The defense asked that the state be required to answer the inquiry, specifying its theory of the case. In response, the state argued that it was not required to limit its theory of the case as suggested by the defense. Argument was heard on the issue.

At the conclusion of the argument on the applicability of **State v. Bridgewater,** 2000-1529 (La. 1/15/02), 823 So.2d 877, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003), the court held that the state was required to answer the inquiry. The court also stated that, under **Bridgewater**, a response indicating that the state was proceeding under both theories, principal and shooter, was sufficient. The state responded, "Your honor, I will retype that, and I'll give him that I'll go underneath both theories, the principal and the actual participant."

Considering the foregoing, it is clear that, contrary to the defendant's assertions, the trial court did not rule that the state was not required to answer the inquiry in question. In fact, the minutes for this pretrial hearing also reflect that the trial court granted the defendant's motion to have the state answer the inquiry. There was no further objection by the defense to the ruling. Thus, this assignment of error presents nothing for review.

ASSIGNMENT OF ERROR 5

In her fifth assignment of error, the defendant contends that the trial court erred in disallowing evidence of co-defendant Petsch's plea agreement to

be introduced at trial. Specifically, defendant asserts that the fact that Petsch, the actual shooter, was allowed to plead to the lesser offense of manslaughter was relevant and should have been allowed.

Prior to trial of this matter, the state moved to exclude any evidence regarding a plea agreement between the state and Petsch (wherein Petsch pled guilty to the reduced charge of manslaughter and received a sentence of thirty years). The state argued that, because Petsch was not going to be called as a witness, any information regarding Petsch's plea and sentencing was irrelevant in the instant case. The defendant argued that Petsch did not plead guilty; it was the state that reduced the charge against Petsch to manslaughter and Petsch pled no contest. Thus, defense counsel argued, the jury had a right to know of the reduction in the charge against the shooter, the co-defendant. In response, the state noted that Petsch was indicted for second degree murder and was allowed to plead to manslaughter pursuant to a plea agreement. Following argument from both parties, the court took the matter under advisement.

Subsequently, the trial court ruled that while the evidence regarding Petsch's plea agreement may be helpful to the defendant, it was not relevant to the main issue of the defendant's guilt or innocence. The court further noted that the information would also be unfairly prejudicial to the state as it invokes sympathy and passion for the jury towards the defendant. The court held that the evidence was inadmissible and would not be allowed at the trial.

Any evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence is relevant. LSA-C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or waste of time. LSA-C.E. art. 403. A trial court's decision on the relevancy of evidence is given great weight and should not be overturned on appeal absent a finding of a

clear abuse of discretion. See **State v. Mosby**, 595 So.2d 1135, 1139 (La.1992).

The trial court did not abuse its discretion in ruling that the plea agreement in question was irrelevant and inadmissible. The defense did not argue that the evidence was needed to rebut or impeach any testimony. The jury was aware that Petsch was the alleged shooter. As the trial court correctly noted, the fact that Petsch agreed to plead guilty and received a lesser sentence is irrelevant to the central issue of the trial, i.e., the defendant's guilt or innocence. Furthermore, the record reflects that the defendant was also offered a plea to the lesser charge of manslaughter. She declined the offer. Because the details regarding Petsch's guilty plea were irrelevant to the issue of the defendant's guilt or innocence, the trial court did not err in denying the defendant's attempt to introduce this evidence. See **State v. Timon**, 28,747, p. 23 (La. App. 2 Cir. 10/30/96), 683 So.2d 315, 330, writ denied, 96-2880 (La. 4/25/97), 692 So.2d 1081. As the state correctly notes in its brief, although the facts and circumstances in **Timon** are somewhat different from the instant case, the holding on the issue of relevance of the plea agreement, with which we agree, is still applicable herein.

This assignment is without merit.

ASSIGNMENT OF ERROR 6

In her final assignment of error, the defendant contends that the trial court erred in allowing testimony from Tasher Archer indicating that the defendant had stolen pills from the victim on another occasion. Defendant argues that this evidence of other crimes or bad acts should not have been allowed under LSA-C.E. art. 404(B)(1).

In the absence of certain statutory or jurisprudential exceptions, evidence of other crimes or bad acts committed by the defendant is inadmissible at trial. LSA-C.E. art. 404(B)(1); **State v. Jackson**, 625 So.2d 146, 148 (La.1993). The erroneous admission of "other crimes" evidence is subject to a harmless-error analysis. **State v. Morgan**, 99-1895, p. 5 (La. 6/29/01), 791 So.2d 100, 104

(per curiam). The test for determining harmless error is whether the verdict actually rendered in the case was surely attributable to the error. See **Morgan,** 99-1895 at p. 6, 791 So.2d at 104; see also **Sullivan v. Louisiana,** 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

Even if we were to conclude that Archer's testimony regarding the taking of the pills on a prior occasion was an inadmissible reference to other bad acts by the defendant in this case, any error in allowing the evidence was clearly harmless. A review of the record without such testimony would still clearly support the defendant's participation in the victim's murder. The defendant and Petsch planned the robbery and traveled to the victim's residence to carry it out. The evidence presented at the trial established that the defendant was aware that Petsch had been armed with a weapon; the defendant, Petsch, and Durnin agreed to rob the victim; the defendant directed Petsch to the victim's residence; and the defendant enticed the victim to open the door by announcing her presence. Thus, it is clear that the defendant's conviction was unattributable to the introduction of any other crimes evidence. This assignment of error lacks merit.

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

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA	**NUMBER 2008 KA 0746**
VERSUS	**FIRST CIRCUIT**
	COURT OF APPEAL
ASHLEY POSEY	**STATE OF LOUISIANA**

WELCH, J., CONCURRING.

I respectfully concur in affirming the defendant's conviction and sentence. The evidence in the record meets our standard of review for sufficiency of the evidence because, viewing the evidence in the light most favorable to the prosecution, a rational juror could have found the essential elements of the crime of second degree murder beyond a reasonable doubt. Louisiana Revised Statutes 14:30.1(A)(2) provides that second degree murder is the killing of a human being without specific intent to kill or to inflict great bodily harm when the offender is engaged in the perpetration or attempted perpetration of certain enumerated felonies. Essentially, the majority affirms the defendant's sentence and conviction by reasoning that the trial testimony provides sufficient direct evidence from which a rational trier of fact could have concluded, beyond a reasonable doubt and to the exclusion of any reasonable hypothesis of innocence, that the defendant knew that Eric Petsch had a handgun and that the defendant intended to commit an *armed* robbery, one of the felonies listed in La. R.S. 14:30.1(A)(2). However, based on my review of the record, I believe that the trial testimony only provides sufficient evidence from which a rational trier of fact could have concluded, beyond a reasonable doubt and to the exclusion of any reasonable hypothesis of innocence, that the victim was killed when the defendant was engaged in the perpetration or attempted perpetration of *simple* robbery, another felony enumerated in La. R.S. 14:30.1(A)(2). Therefore, I would find the evidence was sufficient to support the defendant's conviction and sentence on those grounds.

The only evidence offered by the State as to the defendant's knowledge that Petsch brought a gun to the robbery (and therefore, was engaged in the perpetration or attempted perpetration of an armed robbery) was the testimony of Wendy Varnado. According to Varnado, the defendant was aware that Petsch was in possession of a handgun because earlier in the day, the defendant and Varnado left Jacob Walker's residence because Petsch was playing Russian roulette with the gun inside the residence. According to the testimony of Steven Durnin, who drove the car to the victim's trailer, Petsch rode in the front seat on the passenger side of the car and the defendant rode in the back seat. Durnin, who was also at Walker's residence during the Russian roulette incident, testified that he did not know that Petsch had brought the gun until Petsch got back in the car after the attempted robbery/murder. And, during the defendant's confession, she stated that she did not know that there was a gun inside the vehicle. Considering this evidence in the light most favorable to the prosecution, no rational juror could have concluded beyond a reasonable doubt that simply because the defendant knew Petsch was in possession of a gun *earlier* in the day, that she knew that Petsch had brought a gun to the attempted robbery *later* that day.

Nevertheless, Durnin testified and the evidence established, beyond a reasonable doubt that the sole purpose of the trip to the victim's trailer was to rob him of drugs and money he possessed. The defendant was instrumental in the robbery plans as she suggested the particular victim, she directed the co-defendants to the victim's residence, she enticed the victim to open the door by identifying herself, and she brought a male companion with her to commit the robbery. Louisiana Revised Statutes 14:65(A) provides that "[s]imple robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon." When viewing the evidence in the light most favorable

to the prosecution, I believe that the evidence is sufficient to establish beyond a reasonable doubt that the defendant was actively involved in the planning of and attempted commission of simple robbery, and therefore, the evidence was sufficient to support the defendant's conviction and sentence for second degree murder.

Thus, I respectfully concur.