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Nº. 35408-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Appellant,

v.

RICHEAL MARIE RHOADES,
Respondent.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 05-1-02021-9
The Honorable Jay B. Roof, Presiding Judge

Eric Fong
WSBA No. 26030
Attorney for Respondent
569 Division, Ste. A
Port Orchard, WA 98366
(360) 876-8205

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A. ASSIGNMENT OF ERROR

There was insufficient evidence to convict Ms. Rhoades of second degree felony murder.

B. ISSUES PRESENTED

1. Was the testimony of Dr. Ward sufficient to establish beyond a reasonable doubt that Ms. Rhoades had capacity to form the requisite intent to commit second degree felony murder where Dr. Ward based his conclusions on an analysis of irrelevant factors?(Assignment of Error No. 1)
2. Were the facts introduced at trial sufficient to support the inference that Ms. Rhoades committed criminal mistreatment where Ms. Rhoades continued to provide food, medicine, and care to B.R.?(Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual Background and Procedural Background

Gwen Headen met Ms. Rhoades while living in Port Orchard. RP 5, 9-18-06.¹ Ms. Headen and her husband are “polyamorous,” and have had a mutual girlfriend in the past. RP 7, 9-18-06. Ms. Headen’s husband met Ms. Rhoades on a dating website. RP 5, 9-18-06.

Ms. Headen’s husband invited Ms. Rhoades to the Headen home on the first weekend in November, 2005. RP 6-7. Ms. Rhoades’ children accompanied her to the Headen home. RP 8, 9-18-06. Ms. Rhoades’ daughter, B.R., appeared to be healthy. RP 17, 9-18-06. After dinner, Ms.

Rhoades' children went downstairs to watch a movie and Ms. Rhoades and the Headens had sex. RP 10, 9-18-06. Ms. Rhoades left around 3 A.M. with her children. RP 11, 9-18-06.

Around the beginning of November, 2005, Ms. Rhoades began to get depressed and began not wanting to take care of M.R. and B.R. CP 1-10. Ms. Rhoades was tired and began having suicidal thoughts, but never attempted suicide. CP 1-10. During this time, Ms. Rhoades would do the bare minimum for B.R. and M.R., but was not taking B.R. out of her playpen every day or feeding her solid foods. CP 1-10.

Ms. Rhoades began to do the bare minimum to care for B.R. and felt that M.R. was old enough to fend for himself. Ms. Rhoades kept B.R. in a playpen upstairs in Ms. Rhoades' bedroom so Ms. Rhoades could keep an eye on Brenda but not have to do much work going up and down stairs. CP 1-10. At this time, Ms. Rhoades was feeding B.R. 6 to 7 eight ounce bottles of milk a day. CP 6-10.

Ms. Rhoades' depression worsened and Ms. Rhoades began feeding B.R. less and less until B.R. was receiving 3 eight ounce bottles of milk a day. CP 1-10. At this point, M.R. was feeding himself and Ms. Rhoades did not cook any meals. CP 1-10. B.R. was not getting and solid

¹ The volumes of transcript of the proceedings below are not numbered continuously. Reference will be made by giving the page number of the volume followed by the date the hearing was held.

food and Ms. Rhoades would change B.R.'s diaper about once a day when it got really full. CP 1-10.

About one week prior to Thanksgiving, 2005, Mr. Rhoades' depression became very bad. CP 1-10. Ms. Rhoades would change B.R.'s diapers in B.R.'s room because it was the only place with a changing table. CP 1-10. The dirty diapers were discarded in the diaper bin which was also kept in B.R.'s room. CP 1-10. The room began to smell bad, so Ms. Rhoades opened a window. CP 1-10. Ms. Rhoades put B.R. to bed that night and forgot to close the window. CP 1-10.

The next morning Ms. Rhoades noticed B.R. was sick and had a temperature of 102 degrees. CP 1-10. Ms. Rhoades knew B.R. was sick, but did not take B.R. to a hospital because she was afraid she would be reported. CP 1-10. Ms. Rhoades gave B.R. some children's aspirin to try and make B.R. better. CP 1-10.

After B.R.'s temperature decreased, Ms. Rhoades took B.R. downstairs and fell asleep with B.R. on the floor of B.R.'s bedroom. CP 1-10. When Ms. Rhoades woke up, she went upstairs, did a few things, then put M.R. to bed. CP 1-10. M.R. was fighting bedtime so Ms. Rhoades locked him in his room. CP 1-10. Ms. Rhoades was exhausted from taking care of the children and she went upstairs and slept until 4 P.M. the next day. CP 1-10. Ms. Rhoades remembered that it was night-

time when she put the children to bed. CP 1-10.

When Ms. Rhoades woke up, she did not hear the children and did not go downstairs to check on them or give them food. CP 1-10. Ms. Rhodes fell back asleep around 6 or 7 P.M. CP 1-10. Ms. Rhoades woke up at 9 A.M. the next day. CP 1-10.

When Ms. Rhoades woke up, she knew that things needed to change and wanted to change her life for the better and take better care of her children. CP 1-10, Exhibit 4, p. 1. Ms. Rhoades drew B.R. a bath and got a bottle of milk ready for B.R. prior to going downstairs. Exhibit 4, p. 2. Ms. Rhoades estimated that B.R. had been in her room for about 40-44 hours without Ms. Rhoades checking on her. CP 1-10. Ms. Rhoades could not remember the exact date, but knew it was a few days before Thanksgiving. CP 1-10.

When Ms. Rhoades returned to B.R.'s room, she found B.R.'s body against the door and found that B.R. had removed the diaper Ms. Rhoades had put on B.R. two days earlier. Exhibit 2, p. 1. Ms. Rhoades touched B.R. and discovered that B.R. had died. Exhibit 2, p. 1.

Ms. Rhoades took M.R. upstairs and told him to watch T.V., then got a black plastic garbage bag from the kitchen. CP 1-10. Ms. Rhoades placed B.R.'s body into the garbage bag and also put the used diaper B.R. had removed in the garbage bag. CP 1-10. Ms. Rhoades then closed the

bag with B.R. and the dirty diapers in it, placed the bag next to B.R.'s playpen, and left the room and shut the door. CP 1-10. Ms. Rhoades was panicked and knew that B.R.'s death was her fault and was afraid of what would happen to her. CP 1-10.

Several days prior to Thanksgiving in 2005, Ms. Cassie Hall, a neighbor of Ms. Rhoades, went to Ms. Rhoades' home to invite Ms. Rhoades to dinner. RP 269, 292. Ms. Rhoades answered the door wrapped in a blanket with messy hair and no makeup and looked like she "had just rolled out of bed." RP 291-292, 9-13-06. On Thanksgiving, Ms. Rhoades and M.R. had Thanksgiving dinner with Ms. Hall. RP 269, 275-276, 9-13-06. Ms. Rhoades told Ms. Hall that B.R. was sick and was in the hospital. RP 276, 9-13-06. Ms. Rhoades seemed upset and was quieter than usual. RP 278, 9-13-06. When Ms. Hall first met Ms. Rhoades in the summer, Ms. Rhoades was happy and chipper. RP 283, 9-13-06. As time went on, Ms. Rhoades became more and more depressed and unhappy. RP 285, 9-13-06. Ms. Rhoades told Ms. Hall that her marriage was not happy. RP 285, 9-13-06. Ms. Rhoades was listless around Thanksgiving. RP 289, 9-13-06.

On November 26, 2005, the weekend following Thanksgiving, the Headens invited Ms. Rhoades to Thanksgiving dinner since Ms. Rhoades was new in the area and didn't have any family here. RP 12, 9-18-06.

Ms. Rhoades was accompanied only by her son, M.R., and told Ms. Headen that B.R. was ill and was with family. RP 12, 9-18-06. Ms. Headen was nonchalant when discussing B.R. and appeared to be tired. RP 12-13, 9-18-06. Ms. Rhoades stayed the weekend with the Headens and had sex with them. RP 13-14. Ms. Rhoades appeared to be enjoying herself while having sex with the Headens, but she appeared to be tired. RP 13-14, 9-18-06.

On December 9, knowing her husband was returning home and not wanting her husband to see B.R. in the bag, Ms. Rhoades put the garbage bag containing B.R. into another garbage bag and then put the bags into a box. CP 1-10. Ms. Rhoades taped the box up and placed it on the porch. CP 1-10.

On December 11, 2005, Michael Rhoades returned home after being deployed from June until December. RP 179-183, 9-12-06. Mr. Rhoades is a sailor on the submarine the Maine. RP 210-211, 9-12-06. When he walked in the door, Ms. Rhoades had a "horrified" look on her face and told Mr. Rhoades that something was wrong. RP 183, 9-12-06. Ms. Rhoades told Mr. Rhoades that B.R. "was gone." RP 185, 9-12-06. Mr. Rhoades asked where B.R. had gone, and Ms. Rhoades began to cry and repeated that B.R. was "gone." RP 186, 9-12-06. Mr. Rhoades kept questioning Ms. Rhoades and Ms. Rhoades eventually told Mr. Rhoades

that B.R. had died. RP 186, 9-12-06.

Mr. Rhoades asked where B.R. was and Ms. Rhoades told him that B.R. was outside on the back balcony. RP 197, 9-12-06. Mr. Rhoades went to the back porch and Ms. Rhoades told him B.R. was in a box. RP 187-188, 9-12-06. There were several boxes on the porch and after being asked several times by Mr. Rhoades which box B.R. was in, Ms. Rhoades told him which box contained B.R. RP 187-188, 9-12-06. Mr. Rhoades picked p the box containing B.R. and took it inside and down to B.R.'s room. RP 188, 9-12-06. Mr. Rhoades never opened the box. RP 9-12-06.

A friend of Mr. Rhoades knocked on the door and asked Mr. Rhoades for a ride back to the boat. RP 190, 9-12-06. Mr. Rhoades took his friend back to the boat. RP 190-191, 9-12-06.

When Mr. Rhoades returned home, he continued to question Ms. Rhoades about what had happened to B.R. RP 192, 9-12-06. Ms. Rhoades told Mr. Rhoades that B.R. got sick due to the window in B.R.'s room being left open. RP 193, 9-12-06. Ms. Rhoades told Mr. Rhoades that she also had been sick and that she and B.R. had been so ill that they were throwing up. RP 193, 9-12-06. Ms. Rhoades told Mr. Rhoades that she had fallen asleep for a long period of time, possibly ten or fifteen hours. RP 193, 9-12-06. Ms. Rhoades told Mr. Rhoades that she had not told any family members that B.R. had died and that she didn't who to tell

that B.R. had died. RP 193, 9-12-06. Ms. Rhoades told Mr. Rhoades that she didn't take B.R. to the hospital when B.R. got sick because she was afraid CPS would take B.R. away. RP 192-193, 9-12-06.

Ms. Rhoades told Mr. Rhoades that after B.R. had died she contemplated committing suicide, but didn't want M.R. to be alone. RP 221-222, 9-12-06.

That evening, Mr. and Ms. Rhoades sat and talked in the living room. RP 197, 9-12-06. Mr. Rhoades was trying to find out what was going on. RP 197, 9-12-06. Both Mr. and Ms. Rhoades were crying because they were really sad that B.R. had died. RP 197, 9-12-06.

After talking, Ms. Rhoades went out and bought burgers and fries while Mr. Rhoades played with M.R. RP 198, 9-12-06. After eating, the Rhoades put M.R. to bed and went upstairs. RP 198-199, 9-12-06. Ms. Rhoades wanted to show Mr. Rhoades something on the computer and then the couple had sex. RP 198-199, 9-12-06.

On December 12, 2005, Bremerton Police officers and Bremerton Fire Department Medics responded to 80 D Haven Road in the Jackson Park Navy Housing complex in response to a possible deceased child. CP 1-10. Petty Officer Michael Rhoades had reported that he had returned from a deployment and found that his infant daughter was dead and that her body was still in the home. RP 144, 9-11-06. Bremerton Police Officer

Mike Davis contacted Ms. Rhoades and asked her if there was a child in the residence that needed medical attention. RP 26, 9-11-06. Ms. Rhoades responded by turning and walking down a stairway then turning back around and saying "follow me." RP 27, 9-11-06.

At the base of the stairs, Ms. Rhoades and looked at Officer Davis. RP 28, 9-11-06. Officer Davis asked where the child was that may need medical attention and Ms. Rhoades responded by giving Officer Davis a box from the closet. RP 29, 9-11-06. When Ms. Rhoades handed Officer Davis the box, she said, "It's in here." RP 177, 9-12-06. Officer Davis asked Ms. Rhoades to go back upstairs and remain with Officer Roessel. RP 29, 9-11-06. Officer Davis had Bremerton Fire Medic Prichard come downstairs. RP 30, 9-11-06. Officer Davis and Mr. Prichard opened the box and found the body of a small child and some diapers inside of two plastic garbage bags. RP 31, 9-11-06. The diapers were dirty. RP 32, 9-11-06. Mr. Prichard determined the child was deceased.

Officer Roessel escorted Ms. Rhoades and her son to a patrol car where they were placed in the back seat. RP 35, 9-11-06.

Naval Criminal Investigative Service Officer Michele Starostka interviewed Ms. Rhoades on December 12, 2005. RP 47-48, 9-11-06. Ms. Rhoades was Mirandized and agreed to speak with Officer Starostka and Officer Bell. RP 48, 9-11-06.

Ms. Rhoades told Officer Starostka that at the time BAR died, Ms. Rhoades felt depressed and lazy and did not want to take care of her kids anymore. RP 71, 9-11-06. Ms. Rhoades told Ms. Starostka that BAR needed milk and food, but that Ms. Rhoades wasn't giving food or milk to BAR because Ms. Rhoades didn't feel like going to the playpen. RP 71, 9-11-06. Ms. Rhoades acknowledged that BAR was getting skinnier and Ms. Rhoades could see BAR's rib cage coming through BAR's stomach area and that BAR cried a lot. RP 71, 9-11-06.

Ms. Rhoades told Officer Starostka that she believed the reason why B.R. died was due to possible malnutrition from Ms. Rhoades' failure to give B.R. food and water. Exhibit 2, p. 1. Ms. Rhoades told Officer Starostka that after B.R. became sick due to her window being left open, Ms. Rhoades left B.R. in her room for a period of two days without food or water. Exhibit 2, p. 1.

On December 15, 2005, Ms. Rhoades was charged with one count of felony murder in the second degree with criminal mistreatment in the first and/or second degree as the underlying felony. CP 1-10. The State also alleged that the crime was a crime of domestic violence, that the crime manifested deliberate cruelty, that the victim was particularly vulnerable, and that Ms. Rhoades used her position of trust to facilitate the commission of the crime. CP 1-10.

Dr. Michael O'Leary was asked to consult on this case. RP 294-295, 9-13-06. Dr. O'Leary met with Ms. Rhoades, tested her, and evaluated her. RP 299-300, 9-13-06. In evaluating Ms. Rhoades, Dr. O'Leary reviewed e-mails between Ms. Rhoades and Mr. Rhoades, Bremerton Police Department investigation reports, NCIS reports, two videotaped statements given by Ms. Rhoades, the child abuse consultation done at Mary Bridge on M.R., photographs of the crime scene, autopsy photos of B.R., statements from individuals in Ms. Rhoades community including Cassie Hall, Gwen Headen, and Mr. Rhoades, and statements from Linda Jean Rhodes and Megan Rhoades. RP 289-299, 9-13-06. Dr. O'Leary also interviewed Mr. Rhoades and also Ms. Rhoades' mother. RP 299-300, 9-13-06.

Dr. O'Leary first met with Ms. Rhoades on February 10, 2006. RP 300, 9-13-06. Dr. O'Leary met with Ms. Rhoades a total of four times. RP 300, 9-13-06. Dr. O'Leary interviewed Ms. Rhoades and administered numerous psychological tests on Ms. Rhoades. RP 300-302, 307, 9-13-06. Dr. O'Leary also took a psychiatric history from Ms. Rhoades. RP 302-303, 9-13-06.

When Ms. Rhoades was a child, she witnessed her father severely beat her mother. RP 304, 9-13-06. When Ms. Rhoades was 14 years old, she was raped at knifepoint. RP 304, 9-13-06. Ms. Rhoades was raped

again when she was 17 years old. RP 305, 9-13-06. Ms. Rhoades felt very betrayed by the rape when she was 17 years old because the boyfriend of a good friend had not intervened. RP 305, 9-13-06.

Dr. O'Leary believed that leading up to the death of B.R. Ms. Rhoades was experiencing very severe depression with physiological or vegetative signs. RP 313, 9-13-06. A person in such a state will sleep for extended periods of time, neglect their self-care, and be somewhat confused. RP 313, 9-13-06.

Dr. O'Leary diagnosed Ms. Rhoades as suffering from Post-Traumatic Stress Disorder, Borderline Personality Disorder, and Bipolar II Disorder. RP 307-308, 9-13-06. Dr. O'Leary believed that, given Ms. Rhoades' mental illness, Ms. Rhoades lacked awareness of the risks of her behavior and did not act in a negligent or reckless manner. RP 329-332, 9-13-06. Dr. O'Leary did not believe that Ms. Rhoades was criminally liable in the death of B.R., but did believe that Ms. Rhoades was mentally ill and neglected B.R. during a period where Ms. Rhoades was unaware of B.R.'s vulnerability. RP 335, 9-13-06. Dr. O'Leary concluded that, "Ms. Rhoades lacked the ability, due to her mental illness, to form the specific intent to engage in criminal mistreatment of [B.R.]" CP 201-231, p. 20.

Dr. Barry Ward also performed an evaluation of Ms. Rhoades. RP 398, 9-18-06. Dr. Ward agreed with Dr. O'Leary's diagnosis that Ms.

Rhoades suffered from Major Depressive Disorder and Post-Traumatic Stress Disorder, but did disagree with the conclusion that Ms. Rhoades suffered from Bipolar disorder. RP 432, 9-18-06. However, Dr. Ward believed that a diagnosis of Bipolar Disorder was not an outrageous conclusion in Ms. Rhoades' case given that the symptoms of Bipolar Disorder and Borderline Personality Disorder overlap. RP 432-433, 9-18-06. Dr. Ward disagreed with the diagnosis of Bipolar Disorder only because he did not see any evidence of grandiosity or inflated self worth. RP 433-434, 9-18-06. Dr. Ward concluded that there was no data to suggest that Ms. Rhoades had diminished capacity to appreciate the risk B.R. was in. RP 417-418, 9-18-06.

On August 21, 2006, Ms. Rhoades waived her right to trial by jury. CP 41. Also on August 21, 2006, the charges against Ms. Rhoades were amended to include two charges: one count of murder in the first degree by engaging in conduct which created a grave risk of death to any person and thereby causing the death of another person under circumstances manifesting an extreme indifference to human life, with special allegations of domestic violence, deliberate cruelty, particularly vulnerable victim, and use of a position of trust to facilitate the crime; and one count of second degree felony murder with the underlying felony being criminal mistreatment in the first or second degree, with special allegations of

domestic violence, deliberate cruelty, and a particularly vulnerable victim.
CP 36-40.

A bench trial began on September 11, 2006. RP 23, 9-11-06. Also on September 11, 2006, the charges were again amended, this time to include the same first and second degree murder charges described above, but adding the charge of second degree felony murder with assault of a child in the third degree as the underlying felony with special allegations of domestic violence, deliberate cruelty, particularly vulnerable victim, and use of a position of trust to facilitate the commission of the offense. CP 78-83.

The trial court found Ms. Rhoades guilty of murder in the second degree felony murder with the underlying felony being criminal mistreatment in the first or second degree. RP 24, 9-22-06. The trial court also found that Dr. O'Leary was not a credible witness. CP 169-177.

Notice of Appeal was timely filed on September 29, 2006. CP 168.

D. ARGUMENT

The State presented insufficient evidence to establish beyond a reasonable doubt that Ms. Rhoades had capacity to form the requisite intent to commit second degree felony murder.

The Court of Appeals reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), *citing State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

a. The State had the burden of proving beyond a reasonable doubt that Ms. Rhoades had the capacity to form the specific intent to commit second degree felony murder.

A criminal defendant must have a requisite mental state to commit a crime in Washington. *State v. Utter*, 4 Wn.App 137, 139, 479 P.2d 946 (1971). RCW 9A.08.010(1) lists four culpable mental states: intent, knowledge, recklessness, or criminal negligence.

A diminished capacity defense requires evidence of a mental condition that prevents the defendant from forming the requisite intent necessary to commit the crime charged. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). In a diminished capacity case, the State has the

burden to prove that a defendant formulated the appropriate mental state beyond a reasonable doubt. *State v. James*, 47 Wn.App, 605, 608-609, 736 P.2d 700, (1987).

b. *The State had the burden of demonstrating that Ms. Rhoades acted recklessly towards B.R.*

RCW 9A.08.010 defines the intent which must be present for an act to be considered a crime as follows: “A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.”

The State charged Ms. Rhoades with felony murder with criminal mistreatment in the first or second degree as the underlying felony. CP 78-83. Under RCW 9A.42.020, a parent commits criminal mistreatment in the first degree “if he or she **recklessly**, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.” (Emphasis added.) Similarly, under 9A.42.030, a parent commits criminal mistreatment in the second degree “if he or she **recklessly**, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.” (Emphasis added.) Thus, in order to prove that Ms. Rhoades actions towards B.R. constituted the crime of criminal mistreatment in the

first or second degree, the State had the burden of establishing **beyond a reasonable doubt** that Ms. Rhoades acted recklessly towards B.R.

c. To prove that Ms. Rhoades acted recklessly, the State had the burden of proving that Ms. Rhoades subjectively knew that she was criminally mistreating her children.

RCW 9A.08.010 provides that “[a] person is reckless or acts recklessly when he [or she] knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” “Reckless conduct, therefore, includes a subjective and objective component. Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.” *State v. R.H.S.*, 94 Wn.App. 844, 847, 974 P.2d 1253 (1999).

In order to find Ms. Rhoades guilty, the trial court would have had to conclude that Ms. Rhoades knew that her conduct towards her children placed them in substantial risk and acted in a manner which was a gross deviation from the conduct a reasonable person would exercise in the same situation.

d. The State presented insufficient evidence to establish that Ms. Rhoades subjectively knew that her actions created a substantial risk of harm to her children.

Under RCW 9A.08.010, a person acts with “knowledge” sufficient to found culpable of criminal action when the person acts and “is aware of

a fact, facts, or circumstances or result described by a statute defining an offense; or...has information which would lead a reasonable [person] in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

In *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980), the Washington Supreme Court ruled that “[RCW 9A.08.010] must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that [the defendant] was less attentive or intelligent than the ordinary person.” *Shipp*, 93 Wn.2d at 513-516, 610 P.2d 1322. The *Shipp* court specifically rejected interpreting the definition of knowledge under RCW 9A.08.010 to mean that “[i]f the defendant is ignorant in a situation where the ordinary man would have knowledge, then the defendant would be deemed to have ‘knowledge’ under the law.” *Shipp*, 93 Wn.2d at 515, 610 P.2d 1322.

In the instant case, this would mean that, in order to find Ms. Rhoades guilty of second degree felony murder with criminal mistreatment, the trial court would have had to find that Ms. Rhoades subjectively knew that her care of her children created a substantial risk of harm to her children and that Ms. Rhoades disregarded this harm in a

situation where a reasonable person would not. Under *Shipp*, Ms. Rhoades' knowledge of the danger to her children is evaluated subjectively and must be determined with consideration of the fact that Ms. Rhoades was suffering from severe mental illness.

To meet this burden, the State presented the testimony of Dr. Ward (RP 395-500, 9-18-06) and Ms. Rhoades' numerous confessions. Exhibits 1-5, CP ____.

- i. The testimony and report of Dr. Ward did not address the issue of whether or not Ms. Rhoades had diminished capacity.

Dr. Ward concluded that Ms. Rhoades had a significant personality disorder and that as a result of this disorder it was "reasonably certain" that Ms. Rhoades experienced periods of dissociation and that mental illness was likely a contributor to the offense. CP 256, p. 10. Dr. Ward agreed with Dr. O'Leary's diagnosis of Ms. Rhoades as suffering from Borderline Personality Disorder, Major Depressive Disorder, and Post-Traumatic Stress Disorder. RP 432, 466, 9-18-06. Dr. Ward testified that at the time of B.R.'s death, Ms. Rhoades was suffering from Borderline Personality Disorder and met the diagnostic criteria for clinical depression. RP 477-478, 9-18-06.

In response to questioning by the State as to whether or not Ms. Rhoades could appreciate the risk that B.H. was in, Dr. Ward testified, "I

came to an opinion about whether [Ms. Rhoades] had the capacity to form those mental states. I did not reach an opinion – and I don't see it as my place to form an opinion as to whether she, in fact, subjectively formed those mental states.” RP 418, 9-18-06. Dr. Ward concluded that “there was not data that would suggest diminished capacity to form those mental states.” RP 418, 9-18-06.

As discussed above, the critical inquiry here is whether or not Ms. Rhoades mental illness deprived her of the ability to know that her care of her children created a substantial risk of harm to the children and if she disregarded the risk where an ordinary person would not. However, a review of Dr. Ward's testimony and report reveals that he based his conclusion that there was not data to suggest that Ms. Rhoades had diminished capacity to form the requisite intent on an analysis of the wrong criteria.

In his report, Dr. Ward never actually reaches a coherent conclusion or hypothesis regarding Ms. Rhoades' mental state at the time B.R. died. CP 256-267. The bulk of Dr. Ward's report consists of various repetitions of the history of Ms. Rhoades' life and the events leading up to Ms. Rhoades evaluation and the difficulty of diagnosing patients with Borderline Personality Disorder. CP 256-267. The section of Dr. Ward's report titled “Capacity to Form the Requisite Mental State” consists a

summary of the law relating to the defense of diminished capacity, a recitation of the history of events and Ms. Rhoades' emotional and mental feelings at the time of B.R.'s death, and ends with the conclusion, "While one can speculate about [Ms. Rhoades'] actual subjective purpose, the data unequivocally suggests that Ms. Rhoades was capable of perceiving her environment, capable of anticipating consequences, and capable of acting in a purposeful and goal-directed manner." CP 256-267, p. 9.

Similarly, Dr. Ward's testimony at trial was that there was not data to suggest that Ms. Rhoades suffered from diminished capacity at the time of B.R.'s death. RP 418, 9-18-06. However, Dr. Ward's opinion was based on Dr. Ward's belief that there were no impairments to Ms. Rhoades' cognition, perception, judgment, or memory at the time of B.R.'s death. RP 418-423, 9-18-06. Throughout his testimony, Dr. Ward made assertions that Ms. Rhoades did not have diminished capacity because she could perceive her surroundings (RP 421, 9-18-06), she could perform evaluative and executive functions (RP 422, 9-18-06), she could perform abstract judgments, was aware of societal norms, could project into the future based on her past experience, infer how other people could respond to stimuli (RP 423, 9-18-06), and was able to perform purposeful and goal-directed actions. RP 428, 9-18-06.

Ms. Rhoades' ability to perform such actions have no bearing on

the determination of whether or not Ms. Rhoades had diminished capacity. As stated above, RCW 9A.08.010 defines the intent which must be present for an act to be considered a crime as follows: “A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” The statute requires more than the ability to form “goal oriented” intent. The statute requires that the “goal” towards which the intent is “oriented” be a criminal act.

The issue in determining diminished capacity is not whether an individual could perform goal-oriented behavior or could perform abstract judgments; the issue is whether or not the individual’s mental illness deprived them of the ability to form the requisite intent to be legally culpable of committing the crime the individual is charged with committing. Here, the issue is whether or not Ms. Rhoades’ Post Traumatic Stress Disorder, Major Depressive Disorder, and Borderline Personality Disorder rendered her unable to understand that her actions placed B.R. in substantial risk of harm, *not* whether or not she could accurately perceive her surroundings or perform goal-oriented acts.

By his own admission, Dr. Ward’s testimony and report did not address the issue of whether or not Ms. Rhoades formed the mental state necessary to be found guilty. RP 418, 9-18-06. Further, Dr. Ward’s testimony and his report did not address whether Ms. Rhoades’ mental

illnesses rendered her unable to understand that her actions put B.R. in risk of harm. Dr. Ward's testimony and report simply were not probative of the issue of whether or not Ms. Rhoades had sufficient capacity to be found guilty. Therefore, Dr. Ward's testimony and report do not provide a sufficient basis for the trial court to find that Ms. Rhoades had sufficient capacity to form the requisite legal intent to be found guilty.

- ii. The facts of the case do not suggest that Ms. Rhoades knew and disregarded that her actions created a substantial risk of causing harm to B.R.

It is undisputed that, had Ms. Rhoades not been suffering from several serious mental illnesses, Ms. Rhoades' confessions combined with the facts of the case would be sufficient to find Ms. Rhoades guilty. However, Ms. Rhoades does suffer from mental illnesses, and this fact must be considered in determining whether or not she was able to understand from the facts known to her that she was acting recklessly. *Shipp*, 93 Wn.2d at 513-516, 610 P.2d 1322

Under RCW 9A.42.020, a parent commits criminal mistreatment in the first degree "if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life." Similarly, under 9A.42.030, a parent commits criminal mistreatment in the second degree "if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent

and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.”

Here, Ms. Rhoades did not withhold basic necessities of life from B.R. Due to her mental illness, Ms. Rhoades decreased the frequency with which she provided the “necessities of life” to B.R., but did continue to provide them. Ms. Rhoades’ actions did create an imminent and substantial risk of death to B.R., but, to be found guilty, Ms. Rhoades had to have created the risk “recklessly” which requires that she created the risks “knowingly.” The facts do not support the inference that the risk was created knowingly.

Ms. Rhoades told police that her depression began to get worse around the beginning of November. Exhibit 1. This coincided with her beginning to not want to take care of her children. Exhibit 1. Ms. Rhoades explained how she would do the bare minimum for her children (Exhibit 1), but she did indicate that she continued to care for her children. Exhibit 1. Ms. Rhoades continued to feed both her children, albeit in lesser amounts, and continued to change B.R.’s diapers. Exhibit 1.

Ms. Rhoades testified that during this time she was so depressed that she just wanted to lie on her couch and not be alive. Exhibit 1. Ms. Rhoades testified that she got so depressed that she would lie on the couch and not take care of herself and would soil herself and sit in her soiled

clothes rather than get up and go to the bathroom. Exhibit 1.

Ms. Rhoades testified that her depression got worse about one week prior to Thanksgiving and that this worsening unfortunately coincided with her accidentally leaving the window to B.R.'s room open, causing B.R. to become ill. Exhibit 1. However, despite her worsening depression, Ms. Rhoades continued to care for B.R.: when Ms. Rhoades discovered B.R. the next morning, she removed the toys M.R. had placed on B.R. during the night, told M.R. that he couldn't put toys on B.R., took B.R.'s temperature, gave B.R. medicine to try and bring B.R.'s temperature down, and fed B.R. Cheerios and a peanut butter and jelly sandwich. Exhibit 1.

After she got B.R.'s temperature to drop and got B.R. to go to sleep, Ms. Rhoades went upstairs and fell asleep until 4 P.M. the next day. CP 1-10. Ms. Rhoades arose, listened for the children and did not hear them, did some things in the kitchen, then fell asleep again at six or seven P.M. and did not wake up until 9 A.M. the next day. Exhibit 1. Upon awakening, Ms. Rhoades knew that B.R. was ill and knew that Ms. Rhoades needed to take better care of B.R. Exhibit 1. Ms. Rhoades drew B.R. a bath and got a bottle of milk ready for B.R. prior to going downstairs and discovering that B.R. had died. Exhibit 4, p. 2.

While it is true that the average parent probably would have known that not feeding B.R. regularly, not changing B.R.'s diaper more than once a day, and not taking B.R. to the hospital when B.R. was sick was not providing adequate care, Ms. Rhoades cannot be judged by the standard of an ordinary person. Ms. Rhoades must be judged with her mental illnesses taken into consideration.

Dr. Ward acknowledged that, during the weeks prior to B.R.'s death, Ms. Rhodes met the criteria of a major depressive episode and that Ms. Rhoades' mental illnesses played a part in B.R.'s death. RP 483-487, 489, 9-18-06, CP 256, p. 10. Dr. Ward testified that Ms. Rhoades was "clearly depressed" with "some vegetative signs" but that "the data is pretty mixed about how severe those vegetative signs were." RP 492, 9-18-06. Dr. Ward also acknowledged that just because an individual can take in information does not mean that the individual is thinking through the information clearly and is able to appreciate cause and effect. RP 479, 9-18-06.

Even taken in a light most favorable to the State, the facts of this case clearly indicate that Ms. Rhoades was a mentally ill mother caring for her children to the best of her impaired abilities. Ms. Rhoades did not withhold basic necessities of life from B.R.; rather, Ms. Rhoades mental illness impaired her ability to understand that the care she was giving B.R.

was not enough either in quantity or in quality. In fact, Dr. Lacsina, the doctor who autopsied B.R., testified that normally, a child deprived of liquids could die in three days, but if the child had had a fever or had been ill and been vomiting or had diarrhea that the child would become dehydrated sooner and could die within a day or a day-and-a-half. RP 245-261, 9-12-06. It is clear that, had B.R. not become ill from the window being accidentally left open, B.R. would likely have survived during the period of time where Ms. Rhoades slept for almost two days. When Ms. Rhoades awoke the first time, she listened but did not hear B.R. making any noise. CP 1-10. Ms. Rhoades fell asleep again and her first thoughts on waking were that she needed to care for B.R. so she drew a bath and prepared a bottle for B.R. Exhibit 1 and Exhibit 4. Ms. Rhoades provided care for B.R. to the best of her abilities. The fact that B.R. was in a weakened state due to her illness contributed to B.R.'s rapid death, but the illness was accidental and not caused by any conscious act by Ms. Rhoades.

The State's own expert testified that Ms. Rhoades' mental illness played a role in the death of B.R. The State failed to present sufficient evidence that Ms. Rhoades was able to form the specific intent necessary to find her legally culpable for felony murder during an act of criminal

mistreatment. Ms. Rhoades' mental illnesses prevented her from knowing that her behavior placed B.R. in serious risk of harm.

The facts of the case do not suggest that Ms. Rhoades acted "with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010. Rather, the facts suggest that Ms. Rhoades suffers from several mental illness and that she continued to care for her children to the best of her ability, but her mental illnesses rendered her unable to realize that the level of her care placed her children at risk.

Neither Dr. Ward's testimony nor the facts of the case provided a sufficient factual basis to allow the trial court to find that Ms. Rhoades had the capacity to form the necessary "reckless" intent in her actions towards her children. Ms. Rhoades' mental illnesses made her unable to know of and therefore disregard the risk that her care of B.R. placed B.R. in.

E. CONCLUSION

This is a tragic case. It is tragic not only because B.R. died, but also because Ms. Rhoades was convicted for a crime she was incapable of committing. The State had the burden of proving beyond a reasonable doubt that Ms. Rhoades had full capacity to understand the consequences of her actions despite the uncontroverted fact that she suffered from numerous mental illnesses. The State's witnesses and the facts of the case do not support the conclusion that Ms. Rhoades intentionally mistreated

B.R. or that Ms. Rhoades had the capacity to form the legal intent necessary to be found guilty of criminal mistreatment.

This court should vacate Ms. Rhoades' conviction and remand for dismissal of all charges against Ms. Rhoades.

DATED this 17 day of July, 2007.

Respectfully submitted,



Eric Fong, WSBA No. 26030
Attorney for Appellant

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 RICHEAL MARIE RHOADES,)
)
 Appellant.)
 _____)

Appeal No. 35408-0-II
Superior Court No. 05-1-02021-9

DECLARATION OF MAILING

BY: *AMM*
SUPERIOR COURT
CLERK
JUL 27 10 51 AM '07

On this day I deposited in the United States Mail at Port Orchard, Washington a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

containing the original and one copy of the Brief of Appellant.

Ms. Richeal Marie Rhoades
DOC #898974
WA Correction Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

Mr. Randall Sutton
Deputy Prosecuting Attorney
Kitsap Co. Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

containing a true copy of the Brief of Appellant

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 26th day of July 2007, at Port Orchard, Washington.

Ann Blankenship
ANN BLANKENSHIP

ROVANG FONG & ASSOCIATES
569 DIVISION, SUITE A
PORT ORCHARD, WA 98366
TEL (360) 876-8205
FAX (360) 876-4745