

original

NO. 35408-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICHEAL RHOADES,

Appellant.

Chen

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-02021-9

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. *R. Hauge*
DATED October 15, 2007, Port Orchard, WA
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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 RECKLESSLY DISREGARDED THE DANGER TO HER
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 HER WHERE RHOADES FAILED TO GIVE HER
 DAUGHTER NOTHING BUT MILK FOR A MONTH,
 FAILED TO GET HER MEDICAL ATTENTION WHEN
 SHE SUBSEQUENTLY BECAME SICK, AND LEFT HER
 ALONE NAKED ON THE FLOOR OF HER ROOM FOR
 MORE THAN 40 HOURS, AND WHERE SHE KNEW AT
 THE TIME THAT ALL OF THESE ACTIONS COULD
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I. COUNTERSTATEMENT OF THE ISSUES

Whether the evidence showed that Rhoades withheld the basic necessities of life, thereby recklessly causing her 18-month-old daughter's death, where Rhoades failed to give her daughter nothing but milk for a month, failed to get her medical attention when she subsequently became sick, and left her alone and naked on the floor of her room for more than 40 hours, and where she knew at the time that all of these actions could lead to her daughter's death?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

After her 17-month-old daughter BAR starved to death, Richeal Rhoades was charged by second amended information in Kitsap County Superior Court with first-degree murder (Count I), and two counts of second-degree felony murder. The second-degree murder charges were based on the underlying felonies of first- or second-degree criminal mistreatment (Count II), and third-degree assault of a child (Count III). CP 78.

Rhoades waived her right to a jury, RP (8/21) 7-8, 13.¹ At the conclusion of trial, the court granted Rhoades's motion to dismiss Count III.

¹ The consecutively-paginated reports of the trial will be referred to by their volume numbers; the separately reported trial testimony of Gwen Headen will be referred to as "RP (GH)." Other reports will be referred to by date.

5RP 530. The Court entered a verdict of guilty on Count II under either underlying felony, and a verdict of not guilty on Count I. CP 176.

B. FACTS

Appellant Richeal Rhoades's husband was in the Navy. 2RP 178. His unit relocated from Georgia to Bremerton. 2RP 179. The sailing took three months. 2RP 182. The ship left Georgia in the end of August and arrived in Bremerton in December. 2RP 182.

They did not see each other, however, between June and December. 2RP 182. Between June and August the husband was in Georgia doing training. 2RP 182. Rhoades stayed in Nevada at her in-laws' house until moving to Bremerton at the end of the summer. 2RP 180.

Rhoades set up the house in Bremerton by herself. 2RP 181. Her husband helped her set up the computer over the phone. 2RP 182. Rhoades took care of paying the household bills, such as the utilities. 2RP 182. She handled all the bills when he was at sea. 2RP 183.

Cassie Hall was Rhoades's next-door neighbor. 3RP 273. They were good friends and spent a lot of time together. 3RP 270. They both usually slept until around noon. 3RP 273. Rhoades was frequently up until 3:00 a.m. and sometimes until dawn. 3RP 273. She kept her children on a similar schedule. 3RP 273. The kids were usually clean. 3RP 273-74.

Rhoades played Final Fantasy II a lot on the computer. 3RP 271. It was an online role-playing game. 3RP 271. She played Final Fantasy for hours at a time, sometimes 10 hours a day. 3RP 272.

Rhoades always shopped “en masse”, buying large quantities of food. 3RP 271. She kept MJR’s food on the lower shelves of the refrigerator in case he woke up before her, so he could get to it himself. 3RP 274. It was also so BAR and MJR could get to food during the day if Rhoades was too busy with her game. 3RP 274.

Kevin was a friend of Hall’s who acted as nanny and lover, although Hall stopped sleeping with him when he took up with Rhoades. 3RP 277. Kevin was Hall’s husband’s foster brother. 3RP 277. He left his Chihuahua, Scarlet, with Rhoades when he left town. 3RP 281.

Hall recalled that BAR got sick in mid-September, and Rhoades kept BAR downstairs and she and MJR stayed upstairs so they would not catch it. 3RP 275. Hall saw her take a cup of milk and some medicine downstairs to BAR once. 3RP 275. Otherwise they stayed upstairs. 3RP 275.

Gwen Headen and her husband met Rhoades in an online dating site in November 2005. RP (GH) 6. Shortly afterwards, Rhoades and her children came over for dinner. RP (GH) 8. After putting the children to bed, the three of them had sex. RP (GH) 10. Rhoades was nervous, but enjoyed

herself. RP (GH) 10. They went to sleep afterwards. RP (GH) 11. Rhoades left around 3:00 a.m., after BAR woke up crying. RP (GH) 11.

Rhoades and MJR went to Hall's house for Thanksgiving dinner. 3RP 276. BAR did not attend. 3RP 276. Rhoades told her that BAR was in the hospital. 3RP 276. Rhoades said she did not want to talk about BAR being in the hospital. 3RP 278. She and MJR were both quieter than usual. 3RP 278. Rhoades brought au gratin potatoes and a pie to the dinner. 3RP 279. The pie was store-bought, but the potatoes were homemade. 3RP 279. Kevin left around November 12. 3RP 280.

Headen had to work on Thanksgiving, so her family celebrated the holiday on Saturday. RP (GH) 12. Headen invited Rhoades to join them, which she did, although she only brought MJR with her. RP (GH) 12. Rhoades told then that BAR was with family because she was ill. RP (GH) 12. She seemed nonchalant when she said that. RP (GH) 13. Rhoades stayed that night and the next night as well. RP (GH) 13. They had sex again one of the nights. RP (GH) 13. Rhoades was more relaxed and definitely enjoyed herself during the sex. RP (GH) 14. During this second visit MJR was ravenous, and seemed to have lost his toilet training. RP (GH) 15.

The day before she was arrested, Rhoades gave Hall a package of diapers. 3RP 282.

Rhoades's husband's ship pulled in on December 10, 2005. 2RP 179. He had duty that night, so he did not get home until December 11. 2RP 183.

When he walked in, Rhoades had a horrified look on her face like something was terribly wrong. 2RP 183. She said something was wrong. 2RP 183. His initial reaction, having been away so long, was that maybe there was another man in the house. 2RP 183. He did not have any particular reason to believe that, but it was a common concern among sailors. 2RP 183. This was his third patrol. 2RP 184. Although he subsequently learned that Rhoades had had an affair during his second patrol, he did not know it when he got home in December 2005. 2RP 185.

After Rhoades said something was wrong, she apologized for the house being messy, although it was not particularly messy. 2RP 185. He brought in his bags, and put them down. 2RP 185. After a little while, Rhoades mentioned that BAR was gone. 2RP 185. MJR was standing next to her at the time, and she volunteered the fact. 2RP 186.

He asked her, "Gone where?" 2RP 186. He asked her where several times, and she just kept repeating "gone." 2RP 186. She began to cry. 2RP 186. He briefly thought she meant passed away, but put that thought out of his head. 2RP 186. He kept asking her where, and finally Rhoades told him that BAR had died. 2RP 186.

He just stood there in shock. 2RP 187. He asked Rhoades where BAR was, not sure where she had been taken, whether to a hospital or elsewhere. 2RP 187. He asked her if she was still downstairs, and started walking toward her bedroom. 2RP 187. Rhoades said he would not find her there. 2RP 187. He continued to question her, wanting to know why he had not been contacted. 2RP 187. Rhoades told him that no one knew yet. 2RP 187.

Eventually she told him that she was out on the balcony. 2RP 187. He looked on the balcony, but all he saw were boxes. 2RP 187. Then she told him BAR was in a box. 2RP 187. He asked which one, and started opening boxes, and then Rhoades told him she was not out there. 2RP 188.

After much discussion, Rhoades admitted that she was in a box on the balcony. 2RP 188. He was not thinking straight, and picked up the box and took it downstairs and put it in BAR's room. 2RP 188. He asked her what had happened, and she said that BAR had gotten sick, and she, Rhoades had been sick as well. 2RP 188.

He never opened the box. 2RP 190. After about an hour, his friend who had driven him to the house knocked on the door and told him they needed to get back to the ship. 2RP 190. He noticed the window was open a crack in BAR's room, and he shut it. 2RP 191. Then the friend knocked and

they went upstairs. 2RP 191. He noticed that the trash was full, and told Rhoades he would clean it up when he got back, but that they would have to talk about it. 2RP 191. Then he left with his friend. 2RP 191.

Rhoades's husband got the rest of his stuff from the ship and returned about an hour later. 2RP 192. He got back around 6:00 or 7:00 p.m. 2RP 192. They spent the evening talking. 2RP 192. Rhoades cried a lot. 2RP 192. He asked her why she did not take BAR to the hospital, and she said she was scared of CPS. 2RP 193. Rhoades said that BAR got sick, partially due to her leaving the window open. 2RP 193. She said she was sick too, and both of them were throwing up, and then she, Rhoades, fell asleep for a long time, ten or fifteen hours. 2RP 193. Rhoades said she did not tell anyone because she did not know who to tell or how to tell them. 2RP 193. He did not know either. 2RP 194. He told her they would have to tell someone because people did not just disappear. 2RP 194.

She was very scared. 2RP 194. She was afraid the family would think she was a bad mother. 2RP 194. He still believed it was an accident at that time, and told her that accidents happened, and children died sometimes. 2RP 194. He told her it was not normal, and there would be an investigation. 2RP 194. He told her they would have to answer any questions so they could carry on with their lives. 2RP 194. She slowly became more accepting. 2RP 195. He was just trying to comfort her and predict what was going to happen.

2RP 195. He did not know what would happen with the body, which was why he was going to contact the authorities. 2RP 195.

He did not know why he moved the box, it just seemed like the thing to do at the time. 2RP 196. It might have been a fatherly instinct to bring the child in from the cold. 2RP 197. They spent the rest of the evening talking and crying. 2RP 197. He also spent time with MJR, who did not understand why his parents were crying. 2RP 197.

Eventually, Rhoades went out and brought back some burgers and fries. 2RP 198. Then he put MJR to bed. 2RP 198. MJR did not want to go to bed. 2RP 198. He just assumed MJR was being a kid and wanting to keep playing, or maybe was afraid of the dark. 2RP 199. He left the hall light on for the boy and went back upstairs. 2RP 199.

Back upstairs, Rhoades showed him a new computer that she wanted on the internet. 2RP 199. Then they went to bed and had sex. 2RP 199. He did not recall the bad smell in the house, but the entire night was a blur to him. 2RP 200.

He recalled that he had emailed Rhoades when he was at sea, expressing concern that she not neglect the children while playing her computer game. 2RP 225. But he felt she knew how to be a parent. 2RP 227. She knew that she needed to feed them for them to live. 2RP 227. She

was able to recognize when they were sick. 2RP 228

The next day, December 12, Bremerton police officer Mike Davis and Officer Roessel, a new officer who Davis was training, were called to the Rhoades home by a paramedic, Jeff Prichard, after Prichard was refused entry to check on the welfare of a child. 1RP 24, 26. Rhoades answered the door with her son, and Davis asked her if she had another child that was in need of medical attention. 1RP 26. Rhoades responded with a blank stare. 1RP 26. He asked her again. 1RP 26. Rhoades exhibited very little emotion. 1RP 37. The blank stare continued the entire time Davis was there. 1RP 37. Rhoades appeared to understand Davis. 1RP 37. She did not appear confused, just very unemotional. 1RP 37-38.

Rhoades eventually turned and began walking to the stairs, and then said, "Follow me." 1RP 26. They went down the stairs to the basement. 1RP 28. At the bottom of the stairs, Davis asked Rhoades where the child was. 1RP 29. Rhoades went into a dark closet. 1RP 29. She rifled through the closet and returned with an Atlas Van Lines moving box, which she handed to Davis. 1RP 29, 120. When Rhoades handed him the box, she said "It's in here." 2RP 177. Davis was speechless for a minute, and then asked Rhoades to go upstairs and remain with Officer Roessel. 1RP 29.

Davis set the box down on top of some other boxes that were in the

hallway, and asked Prichard to come down and join him. 1RP 30. There was plastic tape sealing the box, which they cut away. 1RP 31. Inside was a black plastic garbage bag. 1RP 31. They opened that and found another black garbage bag inside it. 1RP 31. Inside the second bag were dirty diapers and the body of a small child, later identified as Rhoades's 17-month daughter, BAR. 1RP 31-32. Her skin was a pale yellow and there blue marbling around her ribs. 1RP 32. BAR's ribs were protruding when they found her body. 1RP 120. Prichard determined that the child was dead. 1RP 33. She obviously had been deceased for a long time. 1RP 43.

The smell quickly became overwhelming and they opened the door at the end of the hall to let in some fresh air. 1RP 33-34. Prichard went back upstairs, and Davis radioed for crime-scene detectives and closed and locked the door. 1RP 34.

Davis left the box in the hall and went back upstairs himself. 1RP 34. Because the house was now a crime scene, Davis had Roessel escort Rhoades and her son to the back of a patrol car so they could keep warm. 1RP 35. Rhoades sat in the back of the car with her dog in her lap and calmly petted it. 2RP 152. After Rhoades was arrested, NCIS gave the Chihuahua, Scarlet, to neighbor Hall. 3RP 282. Scarlet was well-fed and healthy. 3RP 282.

Davis spoke to the detectives when they arrived and then escorted

Rhoades to the office of the Naval Criminal Investigative Service (NCIS).
1RP 35. NCIS was involved because the death occurred in the Jackson Park
naval housing complex. 1RP 66.

NCIS Special Agents Michele Starostka and Dave Bell interviewed
Rhoades that day at the NCIS Special Assault Unit office at Puget Sound
Naval Shipyard in Bremerton. 1RP 48.

They spoke with Rhoades for six and a half to seven hours. 1RP 48.
Rhoades was very calm when Starostka first met with her. 1RP 67. During
the interview she was calm, cooperative, and matter-of-fact, and occasionally
appeared sad. 1RP 67.

During the oral portion of the interview, Rhoades stated that that BAR
became very ill, but she didn't take her to the hospital for fear of being
reported to the authorities. 2RP 148. Rhoades tried to take care of her
herself by giving her some Tylenol. 2RP 148.

Shortly after BAR's temperature returned to normal, Rhoades left
BAR in her room, and locked MJR into his bedroom by taking an extension
cord and wrapping it around the outside doorknob of the bedroom door and
tying the other end to another door. 2RP 148. Rhoades did not bother tying
BAR's door because she knew she was unable to open it. 2RP 148. Rhoades
left them alone like that for 40 to 48 hours. 2RP 149. Rhoades knew her care

of BAR was substandard. 2RP 165.

After the agents interviewed Rhoades they prepared a statement, which Rhoades reviewed as they typed each paragraph, making any appropriate corrections. 1RP 49. When it was done, they printed it out, and Rhoades reviewed it again. 1RP 50. Rhoades again reviewed each paragraph, hand-wrote any needed corrections, and then initialed each paragraph. 1RP 50. Rhoades then signed the statement. 1RP 50.

In her written statement, Rhoades stated that in October, she began to get depressed and feel distant from her children, although she was not yet neglecting them. Exh. 1, at 1. She stated that they normally arose around 9 or 10 o'clock in the morning, and she made them cereal for breakfast, and give BAR a bottle of milk, and MJR juice or water. Exh. 1, at 1. After breakfast they would watch television, play games or entertain themselves, while she played Final Fantasy online. Exh. 1, at 1.

Later she would prepare them sandwiches, salads, or macaroni and cheese for lunch. Exh. 1, at 1. They would spend the afternoon involved in the same types of activities as in the morning, while she again got online. Exh. 1, at 1. They would have appropriate dinner food for the evening meal. BAR ate the same food as her mother and brother. Exh. 1, at 1. The children usually went to bed around 9 or 10 o'clock, although MJR sometimes went

later. Exh. 1, at 1.

Rhoades always shopped in bulk. Exh. 1, at 1. There was therefore always a lot of food in the house. Exh. 1, at 1.

Rhoades stated that in November she began to become more depressed. Exh. 1, at 1. She was tired and did not want to be around or take care of the children. Exh. 1, at 1. She began to have suicidal thoughts, but never acted on them. Exh. 1, at 1.

During this time Rhoades began to “do the bare minimum” for BAR. Exh. 1, at 2. MJR was old enough to fend for himself. Exh. 1, at 3. She put a stool in front of the kitchen sink so he could get himself water. Exh. 1, at 2. She kept BAR in a playpen in the upstairs master bedroom so she keep an eye on her without having to put in the effort of going downstairs. Exh. 1, at 2. She fed BAR a bottle of milk whenever BAR woke up, about six to seven eight-ounce bottles a day. Exh. 1, at 2. She did not, however, give BAR any solid food. Exh. 1, at 2.

As time went on, Rhoades stated that she became more depressed and lazy. Exh. 1, at 2. She stopped getting up to care for her children when she heard them crying. Exh. 1, at 2. She also stopped feeding BAR as much, giving her only three bottles of milk a day, and no solid food. Exh. 1, at 2. She sporadically fed MJR when she made herself something to eat, which

was about once a day. Exh. 1, at 2. Otherwise, he had to fend for himself. Exh. 1, at 2. She also started changing BAR's diaper only once a day, "when she was getting really full." Exh. 1, at 2. Rhoades also asserted that she stopped caring for herself, and could not be bothered to get up to use the bathroom, and would just soil herself. Exh. 1, at 2.

About a week before Thanksgiving, things continued to get worse. Exh. 1, at 2. The dirty diapers in the bin in BAR's room started to smell bad, so she opened the window to air it out. Exh. 1, at 2. That night she put BAR to bed, but forgot to close the window. Exh. 1, at 2. Sometime during the night, MJR had gone into BAR's room to play. Exh. 1, at 2. The following morning Rhoades, found that MJR had piled a bunch of toys on top of BAR. Exh. 1, at 2.

BAR was very weak from the toys and was sick from the window being left open. Exh. 1, at 2. BAR refused a bottle, so Rhoades took her temperature. Exh. 1, at 2. It was 102°. Exh. 1, at 2. She took BAR upstairs and gave her two Children's Tylenol crushed in her milk. Exh. 1, at 2. After a few hours, her temperature came down to 101°. Exh. 1, at 2. Rhoades gave BAR some liquid Children's Tylenol. Exh. 1, at 2. When she next checked her temperature, it had gone back up a little. Exh. 1, at 2. Rhoades gave her another half tablet of Children's Tylenol, again crushed in her milk. Exh. 1, at 2. The next time she checked BAR's temperature, it was down 98.7° or

98.9°. Exh. 1, at 2. She made BAR a peanut butter and jelly sandwich, but she did not want it, so MJR ate it. Exh. 1, at 2. Rhoades later made her another one, which she ate part of along with some Cheerios. Exh. 1, at 2.

Rhoades did not call the doctor or take BAR to the hospital, because she knew it was her fault that she was sick, from Rhoades leaving the window open. Exh. 1, at 3. She was afraid they would report her. She knew she had not been taking care of the children. Exh. 1, at 3. She knew that BAR was malnourished and had a bad diaper rash. Exh. 1, at 3. She was afraid that they would take both kids away from her. Exh. 1, at 3.

After her temperature went down, Rhoades tried to put BAR to bed, but she would not go to sleep in her bed. Exh. 1, at 3. Rhoades put her on the floor and laid down next to her. Exh. 1, at 3. BAR finally fell asleep, and Rhoades dozed as well. Exh. 1, at 3. Rhoades woke up and went upstairs and did a few things. Exh. 1, at 3.

Rhoades then told MJR it was time for bed. Exh. 1, at 3. BAR had been in her room for about six to seven hours at that point. Exh. 1, at 3. MJR was fighting going to bed, so she put him in his room and shut the door. Exh. 1, at 3. To keep him from getting out, she tied an extension cord from his door to the back door. Exh. 1, at 3.

Rhoades also shut BAR's door. Exh. 1, at 3. She did not bother tying

it, because she knew BAR was unable to open the door by herself. Exh. 1, at 3. She was tired of taking care of them and left BAR with a bottle of milk and MJR with sippy-cup of milk. Exh. 1, at 3. BAR had been alone for six to seven hours at that point. Exh. 1, at 3.

Rhoades then went to bed herself and slept for a “really long time.” Exh. 1, at 3. She woke up around four o’clock in the afternoon the next day. Exh. 1, at 3. She did a few things around the house upstairs, and then went to back to bed around 6:00 or 7:00 p.m. Exh. 1, at 3. She did not check on the kids or give them anything to eat or drink while she was up. Exh. 1, at 3. She did not even go downstairs. Exh. 1, at 3.

She awoke the next morning around nine o’clock. Exh. 1, at 3. She knew things had to change. Exh. 1, at 3. She decided that it would be a good day, and that she needed to get the kids ready and go shopping. Exh. 1, at 3. She drew a bath for BAR. Exh. 1, at 3. At this point, BAR had been in her room for about 40 to 44 hours, and MJR had been alone for 28 to 32 hours. Exh. 1, at 3.

She knew, even before going into the room, that BAR was “really bad and not healthy” and that she needed to remedy it. Exh. 1, at 3. She planned to be a better mother to her. Exh. 1, at 3. When she tried to open the door, Rhoades had to push BAR out of the way, because her body was up against

the door. Exh. 1, at 3. Rhoades knew right away that she was dead. Exh. 1, at 3. She touched her chest and it was cold. Exh. 1, at 3.

She shut the door immediately. Exh. 1, at 3. She knew that BAR was dead and that she had killed her by not feeding her or taking proper care of her. Exh. 1, at 3.

She panicked and did not know what to do, or who to call. Exh. 1, at 3. She knew BAR's death was her fault and was afraid what would happen to her. Exh. 1, at 4.

She went and untied the cord on MJR's door and carried him upstairs. Exh. 1, at 3. She made him a bowl of cereal, and left him in front of the TV in the living room and told him to stay there. Exh. 1, at 3.

She got a black garbage bag from the kitchen and went back downstairs. Exh. 1, at 3. She picked BAR up by her left hand and put her in the bag. Exh. 1, at 3. BAR had taken her diaper off before she died. Exh. 1, at 3. Rhoades "grabbed the poopy diaper" and put it in the bag as well. Exh. 1, at 3. She also put the other dirty diapers that were in the room in the bag, because she did not want the room to smell. Exh. 1, at 3-4. She pulled the yellow strings to tighten the bag, and then tied the drawstrings into several tight knots. Exh. 1, at 4. She put the bag next to the playpen and then left the room and closed the door. Exh. 1, at 4.

Then she went back upstairs. Exh. 1, at 4. After checking on MJR, who was still watching TV, she got online and played Final Fantasy. Exh. 1, at 4. She did not go back downstairs for the rest of the day. Exh. 1, at 4.

After the day BAR died, Rhoades played the computer game almost every waking moment. Exh. 1, at 4. She did not tell anyone what had happened, and avoided going downstairs. Exh. 1, at 4. MJR began sleeping upstairs with her, and she went downstairs only a couple of times to do laundry. Exh. 1, at 4.

The neighbors invited her to Thanksgiving dinner, and she accepted the invitation. Exh. 1, at 4. She told them that BAR could not come because she was staying with some other people because she was sick. Exh. 1, at 4.

After BAR's death, Rhoades started feeding MJR regular meals and snacks. Exh. 1, at 4. She changed his diapers regularly, although she still avoided going downstairs. Exh. 1, at 4. About four days after Thanksgiving, she ran out of diapers and had to go into BAR's room to get more. Exh. 1, at 4. Up to December 5, she would periodically open BAR's door to "check on her." Exh. 1, at 4. She never went in the room except for the one time to get the diapers. Exh. 1, at 4.

On December 5, because she did not want her husband to come home and see BAR in the bag, she got another black garbage bag and put the first

bag inside it and tied it off. Exh. 1, at 5. Then she put it in a box. Exh. 1, at 5. She carried the box upstairs and sealed it with packing tape. Exh. 1, at 5. She put the sealed box out on the porch. Exh. 1, at 5.

On December 10, she called to find out when her husband's ship would be in. Exh. 1, at 5. When he arrived home on December 11, he asked her how things were going. Exh. 1, at 5. She stated she told him, "not good, we only have one kid." Exh. 1, at 5. She told him that BAR was not there and she was dead. Exh. 1, at 5. After he questioned her, she showed him where the box was. Exh. 1, at 5. He took the box and put it in BAR's room and closed the door. Exh. 1, at 5. She told him that BAR got sick and she tried to prevent her from dying, but it was too late. Exh. 1, at 5. Then he had to leave for work. Exh. 1, at 5.

When he got home at 6:00 p.m., she finished telling him what had happened. Exh. 1, at 5. She told him that she had neglected to feed the children, and left BAR's window open. Exh. 1, at 5. He was in shock and did not really say anything. Exh. 1, at 5. Around 7:00, she went to McDonald's and got them some dinner. Exh. 1, at 5. They ate dinner and did not talk about BAR for the rest of the evening. Exh. 1, at 5. After putting MJR to bed, they looked at some computers on the internet. Exh. 1, at 5. They went to bed around 3:00 a.m. and had sex. Exh. 1, at 5.

The next day, her husband woke up late for work. Exh. 1, at 5. Before he left, he told her that he would tell someone about what happened. Exh. 1, at 5. She said “okay,” and went back to bed. Exh. 1, at 5. She was awakened by the firefighters. Exh. 1, at 5.

After going over the written statement, Starostka asked Rhoades if she had anything to add or change, and Rhoades hand-wrote an additional comment about meeting some people online and staying with them in early December. 1RP 50; Exh. 1, at 6. Rhoades then asserted that she had nothing else to add. 1RP 50.

Part of the interview was videotaped and presented to the trial court. 1RP 56. In it, Rhoades stated that the reason BAR died was due to possible malnourishment from Rhoades’s failure to provide her with food and water. Exh. 2, at 273.² She described an account of the events that was consistent with her written statement. Exh. 2, at 273-75. She conceded that although she was depressed, she realized at the time that she was not meeting the needs of her children. Exh. 2, at 275.

At the end of the interview process, Rhoades told Starostka that she needed some paper because she wanted to add something to her statement.

² Exhibit 2, the transcript of the video interview, was not paginated by the transcriptionist. References are to the Bates stamp numbers presumably placed on the exhibit during discovery.

1RP 58. This assertion was not in response to any questioning. 1RP 58.

In this additional hand-written statement, Rhoades disclosed, that she had told people in her online game community, presumably after BAR's death, that she was sad because something had happened to someone who was close to her. Exh. 3. She told two others that someone had died. Exh. 3. She told one of them it was her daughter. Exh. 3. She did not tell him what had actually happened. Exh. 3. She "lied" to him, however, and said it was being taken care of by paramedics. Exh. 3. Then she told him she did not want to talk about it anymore, and they did not discuss it again. Exh. 3.

After giving these statements, Rhoades gave written consent to search her home and computer. 1RP 59. Officer Davis then came in and arrested her. 1RP 59.

Bremerton Police Detectives Jason Vertefeuille and Detective Kenny Davis responded to the scene after Mike Davis discovered the BAR's body. 1RP 79. NCIS was in charge of the investigation, the Bremerton Police were there to assist. 1RP 80. They obtained a search warrant to retrieve the body and search the house on December 12. 1RP 81

When they entered they were confronted with the distinct odor of a decomposing body. 1RP 96. There was a box of carpet freshener on the banister at the top of the stairs. 1RP 87. There was a bunch of soda in the

hallway. 1RP 101.

In the living room, the big-screen TV was on, tuned to Cartoon Network. 1RP 108. There were diapers and wipes, and a bag of clothes next to the TV. 1RP 107. There was cereal on the coffee table. 1RP 108.

There were burnt candles on the dining room table. 1RP 88.

They observed a significant amount of food in the kitchen. On the counters were tortillas, numerous boxes of cereal, banana chips, numerous bottle tops, a candy bar, more bottles and tops, more cereal, graham crackers, more chips, Cup-O-Noodle soups, and bananas. 1RP 88, 102-03. In the cabinets were boxes of Hamburger Helper and other box dinners, rice, cooking oil, bread, peanut butter, spaghetti sauce, canned vegetables and fruit and sloppy joe mix. 1RP 104-105. In the refrigerator were several containers of cheese, chocolate pudding, some vegetables, Capri Sun juice drinks in the door, sour cream, milk, soda and butter. 1RP 88. The food in the refrigerator was not spoiled. 1RP 131. The freezer was full of foil-wrapped food items, meat, pizza, pizza snacks and ice cream. 1RP 104. There was dog food and a dog dish. 1RP 105. The dog dish was full. 2RP 157. 1RP 105. There were also more Glade Carpet Fresh and candles in the kitchen. RP 103.

In the family room, at the computer desk were a Pepperidge Farms

snack container, a Reese's Peanut Butter Cups wrapper, and video games. 1RP 90, 106. There were a fast food bag and Mountain Dew on top of the printer. 1RP 107. There were more candles on the television and the window sill. 1RP 90.

In the master bedroom there were Mountain Dew cans on the nightstand. 1RP 111. There were several blankets on the bed. 1RP 112.

Downstairs, there was an air freshener next to the downstairs outside door. 1RP 96. There was also a power cord in the hall with a loop knotted into it outside MJR's room. 1RP 97. Agent Bell confirmed that the extension cord could be used to tie MJR's door shut as Rhoades had described. 2RP 156. Another NCIS agent was unable to open the door from the inside when it was tied. 2RP

The only food in MJR's room appeared to be a sippy-cup with curdled milk in it. 1RP 133, 2RP 143. MJR's room had a strong smell of urine in it. 2RP 142. The smell was present throughout the basement floor. 2RP 142

In BAR's room was "port-a-crib" with some toys and bubble wrap in it. 1RP 92. The sheet was soaked with urine. 1RP 94, 115. The pad from the changing table appeared to have blood stains and possibly urine stains on it. 2RP 171. The mattresses from the crib were still in their boxes. 1RP 114. There was a whitish stain on the floor by the closet. 1RP 114. There was

another air freshener on the dresser. 1RP 114. A white stain on the floor appeared to be vomit. 1RP 115 The vomit was dry. 1RP 129. There was no food in BAR's room, 1RP 132, just a bottle with a dried crusty substance in it. 2RP 175. A fluoroscopic examination revealed numerous urine stains on the carpet in BAR's room. 2RP 154. There were stains throughout the room, but the largest one was in front of the door. 2RP 155. MJR's room also had urine stains throughout the carpeting. 2RP 155. 157.

In the laundry room were towels with urine, feces and blood. 2RP 176. Other than the bedding and laundry the house did not appear dirty. 1RP 133. There was no physical evidence that Rhoades had urinated or defecated on herself. 2RP 166. There was no dog poop in the house. 2RP 157.

On December 13, Agent Starostka went to the Kitsap County jail and interviewed Rhoades again with Special Agent Gus Wohler. 1RP 60. Starostka asked Rhoades if she would give them additional information regarding the child's death. 1RP 60. Rhoades prepared another hand-written statement.

In the statement, Rhoades stated that she knew as a mother that kids needed food and drinks to survive. Exh. 4, at 1. She knew that it was harmful to be malnourished, and that it could lead to serious illness or death. Exh. 4, at 1. She knew that she was not providing MJR or BAR enough food

or liquid. Exh. 4, at 1. Because she was depressed she did not want to do anything, including “doing right by them.” Exh. 4, at 1. Because BAR was solely dependent on Rhoades she was hurt the most. Exh. 4, at 1. Rhoades knew that it could “bring her to death.” Exh. 4, at 1. Rhoades woke up on the day she found BAR’s body worried that it might “be too late for her.” Exh. 4, at 1.

Rhoades knew BAR was in pain from the lack of food and liquid. Exh. 4, at 1. On the day she came down with the fever, Rhoades knew that BAR was susceptible to illness due to malnutrition. Exh. 4, at 1.

Toward the end of this statement, Rhoades suddenly became emotional and began crying. 1RP 61. They asked if she would prefer to finish the statement on videotape, to which Rhoades agreed. 1RP 61. The video was played for the trial court. 1RP 62.

In this statement, she recounted in greater detail the steps she took to try to bring BAR’s fever down. Exh. 5, at 407-08.³ Rhoades was asked why she thought BAR was refusing the milk after her fever came down. Exh. 5, at 408. After a long pause Rhoades suggested that maybe BAR was not hungry. Exh. 5, at 408. Then she added that maybe it was due to the lack of Rhoades “giving her stuff.” Exh. 5, at 408.

³ As with the Exhibit 2, the page references are to the Bates stamp numbers.

Rhoades had noticed, before she found BAR dead, that her ribs were “protruding” through her stomach. Exh. 5, at 409. She did not notice any changes in her face, just that she was getting skinny. Exh. 5, at 409.

When Rhoades put her to sleep on the floor, BAR was not wearing anything but a diaper. Exh. 5, at 409.

Rhoades knew that BAR was starving. Exh. 5, at 410. When Rhoades woke up the morning she found BAR’s body, she had the feeling it was “too late for [her] to try to fix anything,” because Rhoades thought that “maybe [BAR] had already passed on.” Exh. 5, at 412. She knew her lack of caring and giving BAR what she needed could lead to her dying. Exh. 5, at 412.

Although she was sad, Rhoades was “happy in a little way” that BAR was gone, because she knew she would not be in pain any more. Exh. 5, at 414. Rhoades had caused that pain. Exh. 5, at 414.

When she found her, BAR was not wearing her diaper. Exh. 5, at 414. BAR “had played with it” and it was across the room from her body. Exh. 5, at 414. It was “poopie.” Exh. 5, at 414. She put that diaper and some other dirty diapers in the plastic garbage bag. Exh. 5, at 414. Then she picked BAR up by her arm and put her in the bag as well. Exh. 5, at 415. Then she picked up the bag by the drawstrings and put it by the playpen.

Exh. 5, at 415.

Rhoades did not call 911 or a neighbor because she was scared of what they would do or say. Exh. 5, at 415. She knew that she was the cause of it, and she was afraid of CPS taking MJR away, and getting arrested. Exh. 5, at 415. That fear kept her both from getting medical care for BAR when she was still alive, and from calling anyone after she died. Exh. 5, at 416. She also wanted to wait until her husband got home, so someone would be there to take care of MJR, because she knew that she would not be able to, and did not want him to have to go to CPS. Exh. 5, at 418. She expected that she would be put in jail. Exh. 5, at 418.

Rhoades told her husband that BAR had had a fever, but that was not the primary cause of her death. Exh. 5, at 419. The main reason was that she had not had enough to eat or drink. Exh. 5, at 420. They briefly discussed reporting BAR missing, but her husband was not going to do that. Exh. 5, at 421. Rhoades had thought of “disposing her” herself, but could not bring herself to do that. Exh. 5, at 421.

Rhoades knew when she was depressed that BAR was very dependent on her. Exh. 5, at 423. She knew that when a child did not have food or drink she could die. Exh. 5, at 423. Rhoades knew that by not checking on her for two days, by her not getting any liquid or food before that, she was

putting BAR in danger, and that it could kill her. Exh. 5, at 423. Rhoades knew that calling a doctor or the hospital could have helped, but did not because she was afraid because she knew she was causing BAR harm. Exh. 5, at 423.

NCIS subsequently confirmed that BAR had no medical records at the Bremerton Naval Hospital. 2RP 169.

Forensic pathologist Emmanuel Lacsina performed the autopsy on BAR. 2RP 246. Due to decomposition, it was impossible to identify the date or time of death. 2RP 255.

BAR died from malnutrition, dehydration and probable electrolyte imbalance due to neglect and deprivation of food and water. 2RP 247. BAR showed no signs of trauma or disease. 2RP 254.

She was underweight for an 18-month-old. 2RP 248. She weighed 6.8 kg, while the normal weight for her age was 12.2 kg. 2RP 248. She did not have any food particles in her stomach. 2RP 250. Her small intestines were likewise devoid of any food particles. 2RP 250. It would take days of no food for a child to be found with no food in their stomach or intestines. 2RP 254.

Many of the symptoms of dehydration would cause significant pain. 2RP 252. A child could die from dehydration in three days. 2RP 253.

Dehydration would occur quicker if the child were running a fever. 2RP 260. In such a case, the child could die in two days. 2RP 261. It could be shorter with vomiting. 2RP 261. At most a child could live five to six days. 2RP 253.

Psychologist Barry Ward examined Rhoades at Western State Hospital. 4RP 396. His primary diagnosis was borderline personality disorder, and dysomnia not otherwise specified (i.e. a sleep disorder that did not follow typical patterns). 4RP 405. Rhoades might also have suffered from major depression and post-traumatic stress, although she did not meet the diagnostic criteria for either, *i.e.*, she was not currently symptomatic for them. 4RP 405-06.

Borderline personality disorder is a pervasive disturbance in the person's affect, self-image and relationships. 4RP 406. The core characteristic is that the person has difficulty regulating affect. 4RP 406. The person responds very rapidly and intensely. 4RP 406. Typically the reaction is anger, particularly over interpersonal situations. 4RP 406. The person's thinking tends to be very black-and-white, all-or-nothing. 4RP 407. The person will often engage in impulsive, dangerous or attention-seeking behaviors. 4RP 407. The person's mood is subject to sudden change; affective instability is one of the defining characteristics of the disorder. 4RP 408. Rhoades had many of the features associated with borderline personality

disorder. 4RP 412. Additionally her developmental history was consistent with the disorder. 4RP 413.

In addressing diminished capacity, Dr. Ward did not believe that her borderline personality disorder caused any significant impairment in Rhoades's ability to perceive the risk in which she was placing BAR. 4RP 416. A person with borderline personality disorder is more vulnerable to becoming enraged, but any resulting impairment is one of judgment because of the rage not impairment in any psychiatric sense. 4RP 417.

Although not having been present at the time of the crime, Ward was unable to form any opinion as to whether Rhoades could subjectively appreciate the risk she was placing BAR in, he did not believe her capacity to appreciate the risk was impaired. 4RP 418. He felt there was a great deal of evidence suggesting that Rhoades had extended periods of intact perception. 4RP 418.

Psychology as a discipline does not measure intent and knowledge, which are legal concepts. 4RP 419. Therefore the forensic psychologist has to look at the capacities that psychologists do measure and determine which are required to form the requisite legal mental state. 4RP 419. Ward felt perception and cognition were very important in determining legal mental state. These include the ability to pay attention, to remember, to process

information, and to exercise judgment. 4RP 419.

Rhoades had no gross impairments of any of these functions, and none that would rise to the level of a mental disorder. 4RP 420. That her perception was intact was demonstrated by her ability to do things.

She was able to recognize, in the days before BAR's death, that BAR had a rash. 4RP 420. She was accurately perceiving the environment. 4RP 420. She was able to recognize that BAR's ribs were protruding. 4RP 421. She was also able to perceive more mundane facts, such as how to use her email, and that there was food in the refrigerator. 4RP 421.

Further, she was going beyond perception and performing executive functions, which are the highest functions humans perform. 4RP 422. She was able to analyze data, such as the diaper rash, and the temperature on the thermometer, and compare them with what was normal. 4RP 422. She was able to make inferences and plans based on the information, such as that the fever indicated that BAR was sick, and that BAR's underweight condition meant she was not being fed enough. 4RP 422. She was able to take the next step, which was to plan a rational strategy based on the data. 4RP 422. BAR was warm, so Rhoades used a thermometer to check her temperature. 4RP 422. Because she had a fever, Rhoades gave her Tylenol, again planning. 4RP 422.

Rhoades's concern for being reported to CPS was an even more abstract form of judgment. 4RP 423. It showed an awareness of societal norms. 4RP 423. It showed she could project into the future and predict how others would react to her conduct. 4RP 423. It also showed an awareness that there were consequences for deviating from social norms. 4RP 423. Going from the baby's symptoms to concern for CPS action "demonstrated a wide range of intact cognitive function." 4RP 424.

Ward did not see any evidence that Rhoades suffered from any significant periods of debilitating disassociation. 4RP 426. There was some evidence that she occasionally experienced dissociative states, but at worst they came and went. 4RP 427. Moreover, a person can retain fairly intact functioning during a dissociative state; such a state does not obliterate cognitive function. 4RP 427.

Moreover, much of Rhoades's actions during the relevant time did not appear to be automatic. 4RP 427. For example, during the 40-hour period before BAR's death, Rhoades awoke and checked her email and did household chores. 4RP 428. This did not suggest a dissociative state. 4RP 428. Nor did her activities when she took BAR's temperature or tied MJR's door shut. 4RP 428. If she was disassociating at that time, the disassociation was so mild that it would not have impaired her ability to perceive and know and make inferences. 4RP 428. Thus the issue of disassociation was, to

Ward, irrelevant to the issue of whether her capacity was impaired. 4RP 428.

Ward saw no evidence that Rhoades's "bad sleep hygiene" would have impaired her capacity in any clinical sense. 4RP 430. Ward also felt that although Rhoades's history of depression probably played a role in the crime, it would not have prevented her from having the capacity to form the relevant mental states. 4RP 431. He felt the same way about any vegetative depression or PTSD. 4RP 432.

Ward disagreed with Dr. O'Leary's diagnosis of bipolar disorder. 4RP 434. Even if Rhoades were bipolar, however, there was no evidence that she was actively suffering from mania during the relevant period. 4RP 436.

The discovery all was strongly suggested that Rhoades had the capacity to form the requisite mental state. The facts included Rhoades's statements about recognizing certain risks, taking steps to ameliorate those risks, and her statements that upon awakening, she knew that it may already be too late. 4RP 454.

III. ARGUMENT

THE TRIAL COURT WAS WITHIN ITS RIGHTS AS FINDER OF FACT TO DETERMINE THAT RHOADES RECKLESSLY DISREGARDED THE DANGER TO HER DAUGHTER FROM FAILING TO FEED OR CARE FOR HER WHERE RHOADES FAILED TO GIVE HER DAUGHTER NOTHING BUT MILK FOR A MONTH, FAILED TO GET HER MEDICAL ATTENTION WHEN SHE SUBSEQUENTLY BECAME SICK, AND LEFT HER ALONE NAKED ON THE FLOOR OF HER ROOM FOR MORE THAN 40 HOURS, AND WHERE SHE KNEW AT THE TIME THAT ALL OF THESE ACTIONS COULD LEAD TO HER DAUGHTER'S DEATH, AND WHERE A REASONABLE PERSON WOULD HAVE BEEN AWARE OF THE RISK POSED, AND WHERE THE PSYCHOLOGIST OPINED THAT RHOADES HAD THE CAPACITY TO PERCEIVE THE RISK AT THE TIME OF THE CRIME, AND.

Rhoades argues that the expert testimony was inadequate to prove that Rhoades acted recklessly. This claim is without merit because the trial court could infer, without any expert testimony at all, that Rhoades perceived the risk to her child, and even were that not true, Dr. Ward did testify that Rhoades had the capacity to perceive the risk involved.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even

if the appellate court might have resolved the issues of fact differently.
Basford, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

A person is guilty of second-degree felony murder if:

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants ...

RCW 9A.32.050(1)(b). To meet its burden, the State must prove all essential

elements of both felony murder and the underlying offense. *State v. Gamble*, 154 Wn.2d 457, ¶ 12, 114 P.3d 646 (2005). Felony murder, however, has no mental-state element other than that of the underlying offense. *Gamble*, 154 Wn.2d at ¶ 17.

Here, Rhodes was convicted of second-degree felony murder based on the underlying felonies of criminal mistreatment in the first and second degrees. First-degree criminal mistreatment is defined at RCW 9A.42.020(1):

A parent of a child ... is guilty of 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.

Second-degree criminal mistreatment is defined at RCW 9A.42.030(1):

A parent of a child ... is guilty of 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.

It cannot seriously be argued that Rhodes did not withhold any of the basic necessities of life from her child:

“Basic necessities of life” means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.

RCW 9A.42.010(1). Rhodes nevertheless raises such a contention, asserting that while she “decreased the frequency,” she did not withhold the necessities

of life. Brief of Appellant at 24. Rhodes “decreased the frequency” of feeding her 18-month-old daughter to the point that she starved to death. In at least the final 44 hours of the child’s life she did not feed her at all. The medical examiner thought it likely that the child had been without food or water longer than that.

In the final 44 hours, the child was left naked on the floor of a basement room in November. Rhodes also denied her daughter shelter by leaving her window open on a late-November night. When the exposure resulted in a high fever, Rhodes did not seek medical assistance, for fear of getting into trouble. Likewise, after essentially placing the child on a liquid diet, she failed to change her diapers with anything approaching a reasonable frequency, resulting in an extreme diaper rash, which was also a withholding of basic hygiene. Both malnutrition and illness factors, resulting from withholding both reasonable care and medical attention, no doubt contributed to the child’s weakened state and her eventual death. Rhodes’s claim that this element was not met is insulting to the Court and should be rejected.

To the extent that Rhodes is arguing that her failure to provide these necessities was due to her alleged diminished capacity, the argument would be misplaced. Diminished capacity is a concept that applies to a defendant’s mental state, not to her acts. *See, e.g., State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Nor can it be seriously argued that Rhodes's actions did not cause "great bodily harm," "an imminent and substantial risk of death or great bodily harm," or "substantial bodily harm." The child died as a result of the mistreatment, which clearly falls within the definitions of these terms. *See* RCW 9A.42.010(2).

The primary question, and the main focus of Rhodes's argument, then, is whether the State proved beyond a reasonable doubt that Rhodes acted recklessly.⁴ RCW 9A.08.010(1)(c) defines recklessness:

A person is reckless or acts recklessly when he 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.

Contrary to Rhodes's argument, the evidence fully supports the trial court's conclusion that the State met its burden of showing she acted recklessly.

Under the statutory definition, reckless conduct includes a subjective and objective component. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.

⁴ Toward the end of her brief Rhodes argues that the "facts of the case do not suggest that Ms. Rhodes acted 'with the objective or purpose to accomplish a result which constitutes a crime.'" Brief of Appellant at 28; *also* Brief of Appellant at 22. The quoted language is the statutory definition of "intent," *see* RCW 9A.08.010(1)(a), however, which has no relevance to the charged crimes which only have a required mental state of recklessness.

R.H.S., 94 Wn. App. at 847. The trier of fact is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists. *R.H.S.*, 94 Wn. App. at 847. Without question, a reasonable person would know that leaving a malnourished, recently feverish, 18-month-old child on a floor in a cold room for more than 40 hours without food, water, or attention could result in great bodily harm or death. As such the trial court as finder of fact was within its rights in finding actual subjective knowledge. *R.H.S.*, 94 Wn. App. at 847.

Rhodes nevertheless argues that the trial court erred because Dr. Ward's testimony did not show Rhodes was capable of understanding the subjective component of the recklessness standard. This argument both ignores the permissible inference noted in *R.H.S.*, and fails to interpret Dr. Ward's testimony in light of the standard of review.

First of all, under *R.H.S.*, the trial court could have concluded that Rhoades had actual subjective knowledge even if Dr. Ward had not testified at all.⁵ Indeed, the only issue raised by diminished capacity is whether the defendant was capable of forming the requisite intent, which is a factual issue to be determined by the jury when deciding whether the State has proved the requisite mental state of the defendant beyond a reasonable doubt. *State v.*

⁵ Rhoades does not challenge the trial court's rejection of Dr. O'Leary's testimony as not credible. Nor could she, as such findings are generally unassailable on appeal.

James, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). Diminished capacity does not add an element that the State must refute. *James*, 47 Wn. App. at 608.

Secondly, Dr. Ward's testimony affirmatively rejected the notion that Rhoades's capacity to perceive and act on her perceptions was in anyway significantly impaired. As such her claims are without merit, and the judgment should be affirmed.

It must finally be pointed out that in her brief, Rhoades takes many of Dr. Ward's comments at trial out of their context. When examined in context they in no way support her argument.

She claims that he testified that Rhoades had periods of disassociation and that her mental illness was a likely contributor to the offense. Brief at 19. However, Ward specifically noted that there was no evidence that she suffered from any debilitating periods of disassociation, 4RP 426-28, that any disassociation would have been extremely mild, and that it was irrelevant to determining whether her capacity was impaired. 4RP 428. Ward also felt that although her prior history of depression or post-traumatic stress disorder may have contributed to the crime, it would not have prevented her from having the capacity to form the relevant mental states. 4RP 431-32.

Rhoades also faults Ward because he did not offer an opinion as to

whether Rhoades “in fact” formed the requisite mental state at the time of crime, but instead observed, at length, that she had the capacity to do so. Brief at 20-21. Rhoades utterly fails to explain what such an opinion might be based upon. Dr. Ward himself explained that intent and knowledge are not things that the psychological profession is equipped to directly assess:

[W]hat we measure and what we observe and what we label in psychology often is not -- you know, we don't have -- in our DSM, we don't have intent and knowledge. We don't have it broken out the way. The courts have it broken out. So as a forensic psychologist, what you have to do is, you have to look at the types of capacities, the types of things that we do measure and that we do observe and that we do label and that we do have some expertise in and try to find out which of those capacities best match or what -- which of those capacities are required to form particular mental states.

And the things that we are quite good at looking at would include things like perception, things like cognition, which would include the ability to pay attention, the ability to remember, the ability to process information, the ability to exercise judgment. These would be cognitive function; that is, we as psychologists can observe and measure and label and we have some expertise in, and they're the types of capacities that would be required to have knowledge or to know what societal standards were, things like that.

4RP 419. Rhoades concedes that Ward found that she was able to perceive, process information and exercise judgment.

Despite this, Rhodes argues that Ward failed to address the issue of whether she formed the requisite mental state. Brief at 22. His testimony, as more fully developed in the “FACTS” section, *supra*, belies this argument. Indeed, Dr. Ward's own words refute this claim.. Toward the end of his trial

presentation, he summed up his conclusions:

Q. Doctor, regardless of whether we're talking about Borderline Personality Disorder or Bipolar Disorder, what is your opinion regarding her capacity to appreciate the risk that her daughter was in?

A. I think that there is considerable data to suggest that she had preserved capacity at, not just prior. She was engaging in purposeful, goal-directed, higher executive functions up to the point of leaving Brenda on the floor. She described reality-based -- not psychotic -- reality-based worries in the ruminations as she went to bed. She described awakening with a concern that it might already be too late.

At some point during the interim -- and we don't know whether Brenda was alive or not at the time -- at some point in the interim, she was able to go and answer e-mails and do chores, and she was engaging in conduct that would suggest grossly intact cognition, that she was able to do that. We're not seeing gross clinical deficits, when she's able to go and check e-mail and do the chores and decide to go back to bed.

4RP 494-05. He further explained his conclusions:

I'm asked a very narrow question: Can she form the capacity to have -- can she form the mental state? Does she have the capacity? I look at that as primarily a cognitive test: Is her cognition sufficiently intact that she could be aware of a risk, that she could be aware that the circumstances were creating a risk, that she could disregard a risk? I'm not asked what she wanted to happen. I'm asked if she had those capacities. The data is very strong to suggest that she had perception, that she had the ability to make inferences, that she had the ability to process information, that she had the ability to plan. That data is all very strong.

4RP 497. Dr. Ward explicitly and unequivocally opined that Rhoades had the requisite mental state at the time of the crime. The trial court accepted his

testimony as credible. Both the doctor's opinion and the trial court's conclusion are supported by the evidence. Rhoades fails to show any basis for overturning the court's verdict. Her conviction should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Rhoades's conviction and sentence should be affirmed.

DATED October 15, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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