

NO. 76802-1

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

CARISSA DANIELS, RESPONDENT

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by

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 00-1-05286-5

SUPPLEMENTAL BRIEF OF PETITIONER

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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Appendix "A"

A. ISSUES PRESENTED.

1. When a jury convicts a defendant of felony murder based on either of two predicate felonies and one predicate felony is invalidated on appeal, may defendant be retried for felony murder on the remaining predicate felony without violating double jeopardy?
2. When a defendant is successful in obtaining a new trial after having a criminal conviction overturned on appeal, may the State retry defendant on a greater offense, on which the jury could not reach agreement, without violating double jeopardy?
3. Did the Court of Appeals err in finding that a blank verdict form on a greater offense was the equivalent of an “implicit acquittal” when under the given jury instructions the blank verdict form was an express statement that the jury was unable to agree on the charge?
4. Should the State be allowed to introduce defendant’s voluntary statements made during non-custodial interrogation in its case-in-chief?

B. STATEMENT OF THE CASE.

The victim in this case “DK” was born on July 18, 2000, a full term healthy infant. RP 342-345. On September 14, 2000 he was

pronounced dead at Madigan emergency room; hospital staff called the medical examiner's office to investigate the death. RP 123-125. The autopsy of DK's body revealed multiple injuries of differing dates indicating that he had been subjected to blunt force trauma on more than one occasion. RP 491-492. DK had a total of ten broken ribs that were approximately 10 days to 2 weeks old. RP 462-467. DK had subdural and subarachnoid hemorrhages on both sides of his head. RP 472-479. There was evidence of newer injury (bleeding) superimposed over older injury; the newer injury was a day or two old and the older injuries were about two weeks old. RP 472-483. These hemorrhages led to a swelling of the brain causing it to be incapable of performing body function. The injuries were consistent with DK having been shaken violently on more than one occasion. RP 168-169, 177-178, 477-486. Descriptions of DK's injuries are more fully set forth in the briefs filed below. Respondent's brief at pp. 6-9.

DK lived with his mother, the defendant, and her boyfriend, Clarence Weatherspoon, who was not DK's biological father. On September 11, 2000, Natasha Bird, defendant's close friend watched DK from approximately 8:30 in the morning until 11:00 at night while defendant and Weatherspoon went to the Puyallup fair. RP 367-368, 382-390. DK did not suffer any injury while he was in her care but he was vomiting after he ate. RP 373, 380-381. On September 12, defendant left DK in the child care center at her school for three hours. RP 393-396. An

experienced child care worker held him for most of that time because he was fussy and could not be soothed. Id. DK would not eat; the worker felt that there was something wrong but “couldn’t put [her] finger” on what was wrong. RP 396, 401. Except for these two occasions, only defendant or Weatherspoon cared for the baby. RP 230-231. Defendant was the primary caregiver to DK. RP 1058-1059. Both defendant and Weatherspoon testified at trial; both denied causing any injury to DK. RP 924-926, 1107-1108. Defendant asserted at trial that Weatherspoon must have inflicted the injuries. Id. The evidence presented to the jury for it to decide whether defendant was criminally responsible for the death of her son is set forth in a sixteen page fact statement in the brief filed below. Respondent’s brief at pp 3-19.

The State charged defendant with homicide by abuse or, in the alternative, with felony murder in the second degree, alleging predicate felonies of assault in the second degree and criminal mistreatment. CP 86-87. The jury was instructed to consider the crimes as follows:

When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, or if after full and careful consideration of the evidence you cannot agree on that

crime, you will consider the alternatively charged crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form B the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Instruction 23, CP 33-57. After hearing the evidence, including the testimony of both Weatherspoon and defendant, the jury returned its verdicts leaving Verdict Form A blank, but finding defendant guilty of felony murder in the second degree on Verdict Form B. CP 107-108.

Defendant appealed her conviction of felony murder in the second degree; the State cross-appealed the trial court’s exclusion of the statements defendant made to detectives on September 20, 2000. The Court of Appeals found that as assault had been invalidated in In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), as a proper predicate felony for felony murder and as the jury had not been asked to specify the underlying predicate felony on felony murder the case must be remanded for new trial on felony murder predicated on criminal mistreatment. State v. Daniels, 124 Wn. App. 830, 103 P.3d 249 (2004). The court also ruled that double jeopardy precluded the State from retrying defendant on the charge of homicide by abuse and left intact the trial court’s ruling regarding defendant’s September 20th statements to the detectives. The State acknowledges the need to retry defendant but seeks reversal of the

Court of Appeals on whether defendant may be retried for homicide by abuse and whether her statements may come in during the State's case in chief.

C. ARGUMENT.

1. DEFENDANT MAY FACE RETRIAL ON BOTH MURDER IN THE SECOND DEGREE AND HOMICIDE BY ABUSE WITHOUT VIOLATING DOUBLE JEOPARDY AS SHE REMAINS IN CONTINUING JEOPARDY FOR BOTH OFFENSES.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following acquittal; (2) a second prosecution following conviction; and 3) multiple punishments for the same offense imposed in the same proceeding. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. In re PRP of Higgins, 152 Wn.2d 155, 95 P.3d 330 (2004); State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Before a prosecution will be barred under this provision three elements must be met: “(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense.” State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). The first two elements determine “former” jeopardy and must be met before there can be

“double” jeopardy. Id. When “former” jeopardy is established, the third element determines “double” jeopardy. Id.

Assuming a court has jurisdiction, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first witness is sworn. Id. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final, but not with a conviction that a defendant successfully appeals. Id. at 646-647. A second trial following a successful appeal is generally not barred because the defendant's appeal is part of the initial jeopardy or “continuing jeopardy.” Id. at 647. Thus, the successful appeal of a judgment of conviction will not prevent further prosecution on the same charge unless the reversal was based upon insufficiency of the evidence. Id. at 647-648. Similarly, a retrial following a “hung jury” does not normally violate the Double Jeopardy Clause because this is another instance of continuing jeopardy. Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

- a. Defendant remains in continuing jeopardy on murder in the second degree following the successful appeal of her conviction.

Defendant was charged with felony murder in the second degree predicated on either the crime of assault or criminal mistreatment. CP 86-87. The jury was instructed that it could find defendant guilty of second degree felony murder on either, or both, of two alternative predicate

crimes. CP 33-57. Neither party requested special interrogatories asking the jury to delineate on which theory or theories it found guilt. It is unknown whether the jury: 1) unanimously found that both means of committing felony murder had been proved beyond a reasonable doubt; 2) unanimously found that only one of the means had been proven; or, 3) unanimously agreed that felony murder had been proved but were not unanimous as to the means. All that is known is that the jury convicted defendant of the crime of felony murder in the second degree. CP 108. The Court of Appeals vacated the conviction for murder in the second degree because the crime of assault could not serve as a predicate felony for felony murder under In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The Court of Appeals held that felony murder may be predicated upon the crime of criminal mistreatment - a holding that is not before this court for review – and remanded for retrial on felony murder based on that predicate offense. Defendant has obtained review of the lower court’s determination that retrial on felony murder did not violate double jeopardy. As will be explained below the Court of Appeals was correct in finding that double jeopardy does not bar retrial on felony murder in the second degree.

Defendant cannot show jeopardy “terminated” for the charge of felony murder in the second degree. The jury did not acquit her of that charge and her conviction has not become “unconditionally final.” See, Corrado, 81 Wn. App. at 646-48. When an appellate court sets a

conviction aside, that conviction is, by definition, not unconditionally final. To the contrary, double jeopardy “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[.]” North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Defendant’s retrial on murder in the second degree is not barred by double jeopardy because defendant’s jeopardy has never terminated on this offense.

There is considerable case authority supporting the conclusion that remand for new trial is the appropriate remedy when conviction on one of the alternative means is unsupportable. Usually the issue arises in an alternative means case when there is insufficient evidence to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987). But where there is insufficient evidence supporting one of the means, the conviction cannot be upheld, and remand for new trial is appropriate. State v. Ortega-Martinez, 124 Wn.2d at 708; State v. Kinchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998); State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997). While here the court invalidated the assault means of committing felony murder as a matter of law, rather than due to a failure of proof, the

case is in the same posture as if there had been a failure of proof as to one of the means. Remand for new trial is the appropriate remedy.

Defendant has successfully challenged her conviction for felony murder in the second degree on appeal, but she remains in continuing jeopardy for that crime; the double jeopardy clause does not bar retrial on that offense.

- b. Defendant remains in continuing jeopardy on homicide by abuse because the jury was unable to agree on that offense in the first trial and her successful appeal has returned the matter to the trial court for retrial.

As mentioned earlier, before double jeopardy can act as a bar to further prosecution of a crime, three essential elements must be satisfied: 1) jeopardy must have previously attached; 2) jeopardy must have previously terminated; and 3) the defendant must be in jeopardy a second time for the same offense in fact and in law. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). In examining whether double jeopardy precludes retrial on the charge of homicide by abuse, the first and third elements are not in dispute.¹ It is the second element – whether jeopardy has previously terminated – that is at issue. Defendant’s

¹ There can be no dispute that jeopardy attached in this case when Daniel's jury was sworn in 2002. See, Corrado, 81 Wn. App. at 646. Moreover, the third element – whether Daniel’s faces the same offense in fact and in law - is also not at issue. The State seeks to retry defendant on the same charge of homicide by abuse she faced in the earlier trial.

jeopardy has not terminated with respect to the charge of homicide by abuse. Daniel's jeopardy is continuing for two reasons: 1) because the jury could not agree on a verdict for homicide by abuse, and 2) because Daniel's second-degree felony murder conviction was vacated at her request.

Jeopardy terminates for purposes of the second element of former jeopardy only if one of two alternative requirements has been satisfied: 1) the defendant has been acquitted of the charge in question; or 2) the defendant has been convicted, and that conviction has become unconditionally final. Corrado, 81 Wn. App. at 646-48. For purposes of either of these requirements, the law contemplates “a final adjudication as to each offense charged.” State v. Ahluwalia, 143 Wn.2d 527, 538, 22 P.3d 1254 (2001). Therefore, “if the jury does not reach a verdict as to each offense charged, the defendant has not been acquitted or convicted upon the indictment or information[.]” Id.

A retrial following a “hung jury” is another instance of continuing jeopardy. Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). “[N]either this court nor the United States Supreme Court has ever held that a hung jury bars retrial under the double jeopardy clauses of either the Fifth Amendment or Const. art. 1, § 9.” State v. Russell, 101 Wn.2d 349, 351, 678 P.2d 332 (1984).

Two fundamental principles emerge from these cases: first, a hung jury is neither a conviction nor an acquittal, and second, double jeopardy

does not bar retrial following reversal of a conviction on appeal.

Accordingly, the United States Supreme Court has held that a defendant may be tried a second time for a greater crime when the original jury deadlocked on that greater crime, convicted the defendant only of a lesser crime, and the lesser conviction is subsequently reversed on appeal.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

In Sattazahn, the defendant was tried for capital murder. The jury found the defendant guilty of first-degree murder during the guilt phase of the proceedings, but deadlocked in the penalty phase as to whether the aggravating circumstances justified imposition of the death penalty. The trial court discharged the jury, and imposed a life sentence in accord with Pennsylvania law. The defendant then succeeded in challenging his conviction on appeal, the state tried the defendant for capital murder a second time on remand. After the second trial, the defendant was convicted and sentenced to death because the second jury reached a unanimous verdict in favor of the aggravating circumstances. Sattazahn, 537 U.S. at 103-06.

On appeal to the Supreme Court, the defendant argued that the imposition of a life sentence following his first trial was the functional equivalent of an acquittal as to the aggravating circumstances, and that double jeopardy should have barred any retrial for the greater crime of capital murder. The Court disagreed, and characterized the first jury's

failure to reach agreement on capital murder a “non-result” because the jury had made no findings on the merits with respect to the aggravating circumstances. Sattazahn, 537 U.S. at 109. Moreover, the Court expressly rejected the notion that the state's initial acquiescence to the lesser conviction precluded prosecution for the greater offense on remand. To the contrary, the Court observed,

Instead we see here a State which, for any number of perfectly understandable reasons, has quite reasonably agreed to accept the default penalty of life imprisonment when the conviction is affirmed and the case is, except for that issue, at an end – but to pursue its not-yet-vindicated interest in one complete opportunity to convict those who have violated its laws where the case must be retried anyway[.]

Id. at 114 (internal page references, quotations, and citations omitted).

In reaching its conclusion, the Court analyzed the case as one involving a jury that deadlocked on a greater crime, but returned a conviction on a lesser crime. Because Sattazahn had not been acquitted of the greater crime, his jeopardy for that crime had never terminated. Furthermore, because Sattazahn's conviction on the lesser crime had been set aside on appeal, that conviction was not unconditionally final for double jeopardy purposes. Accordingly, the essential elements of former jeopardy were not satisfied, and Sattazahn could be retried for the greater crime. Id. at 112-13.

Daniels's case is in the same posture as Sattazahn's was. In Daniel's case, the jury was unable to reach agreement on the homicide by abuse charge.

In this case, the jury was instructed :

When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or "guilty" according to the decision you reach. ***If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.***

Instruction No. 23, CP 33-57 (emphasis added). The jury left "Verdict Form A" blank. RP 1380. Under the court's instructions, the fact that Verdict Form A was left blank indicates that the jury was unable to agree as to that charge. If it had found unanimously that defendant was "not guilty" of that offense, it would have entered those words into the blank space on Verdict Form A. "Verdict Form B" was completed and signed by the foreperson and stated:

We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in count I, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the alternatively charged crime of murder in the second degree.

RP 1380-1381; CP 107-108. As the jury did not enter the words "not guilty" on Verdict Form A, the relevant language in verdict Form B is "or being unable to agree as to that charge." The jury was not silent as to its

decision on the charge of homicide by abuse; it was following the instructions of the court and expressly indicating its *inability to agree* on that charge by leaving Verdict Form A blank.

When the verdict was returned, the court read both verdict forms in open court thereby informing defendant of the jury's inability to agree on the homicide by abuse charge and of its unanimous decision that she was guilty verdict of the alternative charge of felony murder. RP 1380-81. Defendant asked the jury be polled on its verdicts. RP 1381. After each juror confirmed the verdicts read in court, the court discharged the jury without objection from either party. RP 1381-1385.

Daniels later succeeded in challenging her felony murder conviction on appeal. Therefore, as in Sattazahn, the State should be allowed to proceed on the charges that remained unresolved on the merits at the conclusion of the first trial, and to have "one complete opportunity" to prosecute Daniels now that the original conviction has been set aside and the case must be retried. Sattazahn, 537 U.S. at 114.

Jeopardy has not terminated as to any charges in defendant's case due to the jury's failure to reach an agreement on homicide by abuse, its conviction on felony murder and due to defendant's successful appellate challenge to her conviction for felony murder. Because defendant's jeopardy has not terminated, the essential elements of former jeopardy have not been satisfied, and thus double jeopardy does not bar further

prosecution. The Court of Appeals erred in ruling otherwise, and this Court should reverse.

- c. As the jury expressed its inability to agree on the charge of homicide by abuse, defendant was not implicitly acquitted of this crime.

Although the essential elements of former jeopardy were not satisfied in this case, the Court of Appeals ruled that double jeopardy applied due to the doctrine of “implied acquittal.” The implied acquittal doctrine should not apply to this case for two reasons: 1) the record demonstrates that the jury could not agree as to the charge of homicide by abuse; and 2) defendant did not object to the discharge of the jury or raise any claim on appeal that the jury had been precipitously discharged. For these reasons, the requirements for application of the implied acquittal doctrine have not been satisfied, and the trial court should be reversed.

As stated above, if a jury “does not reach a verdict as to each offense charged, the defendant has not been acquitted or convicted upon the indictment or information” for double jeopardy purposes. Ahluwalia, 143 Wn.2d at 538. The implied acquittal doctrine is an exception to this general rule that applies in some cases where the factfinder considers a greater crime and a lesser crime and, without explanation, fails to render a verdict on the greater crime.

The seminal case on the implied acquittal doctrine is Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In

Green, the defendant was tried for arson and first-degree murder. The jury was also instructed on second-degree murder as a lesser-included offense. The jury found the defendant guilty of arson and second-degree murder, but was silent as to first-degree murder, and the jury was discharged. The second-degree murder conviction was then reversed on appeal. On remand, the defendant was tried a second time for first-degree murder. He was convicted and sentenced to death. Green, 355 U.S. at 185-86.

The Supreme Court held that the defendant's second trial for first-degree murder violated double jeopardy because the first jury's silence should be treated "as an implicit acquittal on the charge of first degree murder." Green, 355 U.S. at 191. The Court reached this conclusion based on two critical factors: 1) the defendant's first jury was dismissed without reaching a verdict without the defendant's consent; and 2) the record offered no explanation as to why the jury had failed to reach a verdict. As the Court explained,

[T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.

Id.

In so holding, the Court reaffirmed the axiomatic principle that "the failure of a jury to agree on a verdict" *is not* an acquittal for double

jeopardy purposes, and that a hung jury is an extraordinary circumstance that allows a defendant to be retried. Id. at 188. Thus, the basis for the Court's holding in Green is not merely the first jury's failure to reach a verdict for first-degree murder. Rather, it is the jury's discharge without the consent of the defendant in combination with the failure of the record to provide any reason – such as a hung jury – for the jury's discharge, that gives rise to the implied acquittal doctrine. Accordingly, if the record demonstrates that the jury could not reach a verdict due to its inability to agree before the jury is discharged, the implied acquittal doctrine does not apply. Sattazahn, 537 U.S. at 109.

In a recent opinion this court discussed the doctrine of implied acquittal. State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006). In Linton, the Court held unanimously that the State could not retry the defendant for first-degree assault where the jury was deadlocked 11 to 1 to convict as to first-degree assault as charged, but returned a guilty verdict for the lesser-included crime of second-degree assault. Linton, 132 P.3d at 129-34 (lead opinion); 132 P.3d at 134-35 (Sanders, J., concurring); 132 P.3d at 135-36 (Chambers, J., concurring). However, the Court reached this unanimous conclusion in three distinct ways, and none of the three rationales commanded a majority – or even a plurality – of the Court.

Normally, when this type of split occurs, the rule of law dictates that “the holding of the court is the position taken by those concurring on the narrowest grounds.” Davidson v. Hansen, 135 Wn.2d 112, 128, 954

P.2d 1327 (1998). However, the three opinions in Linton each uses a distinct rationale, and thus it is difficult to discern which rationale could be characterized as the narrowest. The State asks this court to adopt the rationale set forth in Justice Sanders's concurring opinion.

As discussed earlier, it is well settled that double jeopardy "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[.]" North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Accordingly, a defendant who chooses not to challenge a conviction in the appellate courts is protected from prosecution for the same offense under the double jeopardy clause so long as that conviction remains intact. See, Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (noting that the failure to appeal a conviction leaves that conviction in place for purposes of double jeopardy).

This is the basis for Justice Sanders's concurring opinion in Linton. As Justice Sanders observed, it is Linton's conviction for second-degree assault, not an implied acquittal for first-degree assault, that bars retrial for first-degree assault under the double jeopardy clause. Because Linton did not appeal his second-degree assault conviction, that conviction remains in place and the double jeopardy inquiry is at an end. Linton, 132 P.3d at 134-35 (Sanders, J., concurring). Conversely, if a jury were unable to agree on a greater charge, but were to return a verdict on a lesser charge, double jeopardy poses no bar to retrial on the greater charge if the lesser

conviction were later set aside by an appellate court. See, Linton, 132 P.3d at 135 (Sanders, J., concurring); Sattazahn v. Pennsylvania, 537 U.S. 101, 109-14, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In such a case, jeopardy has not terminated with a conviction that has become unconditionally final. Rather, jeopardy continues, and the State should be given the opportunity “to pursue its not-yet-vindicated interest in one complete opportunity to convict those who have violated its laws where the case must be retried[.]” Sattazahn, 537 U.S. at 114.

The State asks the Court to reexamine Linton in light of the circumstances of this case, and to adopt the rationale in Justice Sanders’s opinion. This rationale finds clear support in well-established double jeopardy jurisprudence, and results in a simple rule for future courts, both trial and appellate, to follow. It will also serve to remove much of the confusion that has plagued Washington law with respect to the applicability (or, more importantly, the inapplicability) of the implied acquittal doctrine in many cases involving the “unable to agree” instruction.

2. THE COURT OF APPEALS AND TRIAL COURT SHOULD BE REVERSED AND DEFENDANT'S STATEMENTS MADE DURING NON-CUSTODIAL INTERROGATION SHOULD BE ADMISSIBLE IN THE STATE'S CASE-IN-CHIEF.

The Miranda decision established a prophylactic rule designed to protect an individual's privilege against self incrimination when taken into custody. Miranda v. Arizona, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 726 (1966). Miranda warnings are not required unless the individual is in custody. Miranda, 384 U.S. at 479. This court has repeatedly emphasized that the United States Supreme Court's decision in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) is the standard to be used in Washington as to when Miranda warnings are necessary. State v. Heritage, 152 Wn.2d 210, 217-218, 95 P.3d 345 (2004); State v. Short, 113 Wn.2d 35, 40, 775 P.2d 458 (1998); State v. Harris, 106 Wn.2d 784, 790, 725 P.2d 975(1986). In Berkemer, the United States Supreme Court refined the definition of "custody." The court developed an objective test--whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Berkemer, at 441-42; State v. Short, 113 Wn.2d at 41.

Once the Supreme Court adopted the Berkemer standard, many tests that had been employed previously to determine the necessity of Miranda warnings became obsolete. It became irrelevant: 1) whether the

police had probable cause to arrest the defendant; 2) whether the defendant was a “focus” of the police investigation; 3) whether the officer subjectively believed the suspect was or was not in custody; or even, 4) whether the defendant was or was not psychologically intimidated. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997); see also, State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

Thus, persons voluntarily accompanying police to the police station as material witnesses are not under custodial interrogation if their freedom of action is not curtailed to a degree associated with a formal arrest. State v. Harris, 106 Wn.2d at 790; see also, State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979), reconsidered at, 94 Wn.2d 216, 616 P.2d P.2d 628 (1980) (pre-Berkemer case holding that just because interview of material witness occurs at a police station does not mean that warnings are required). Under Berkemer it is the “freedom of movement, not the atmosphere or the psychological state of the defendant, [that is] the determining factor in deciding whether an interview is ‘custodial.’” State v. Sargent, 111 Wn.2d at 649-650.

As can be seen from the written findings of fact and conclusions of law, the trial court completely ignored the Berkemer standard and focused on whether the defendant had become the focus of the investigation in ruling on whether the defendant’s statements made on September 20 were admissible. CP 91-96, Appendix A. The trial court considered the timing of when defendant became the focus of the investigation to be a critical

fact to the determination of whether the statements were admissible. In its “conclusions as to admissibility” the trial court addressed facts relevant to this “focus” issue and does not address any facts relevant to the Berkemer standard. The cases the trial court relied upon in its findings were pre-Berkemer cases. Id.

The trial court was clearly applying the incorrect standard and its decision should not have been upheld. The Court of Appeals recognized that Berkemer was the appropriate standard, and held that the trial court could be affirmed in meeting that standard. The Court of Appeals held that because defendant “spent more than one and one half hours in the precinct station where detectives asked her questions knowing that their questioning could provoke an incriminating response” and the fact that the detectives would not allow defendant’s father to be present in the interview meets the Berkemer standard. State v. Daniels, 124 Wn. App. 830, 645-846, 103 P.3d 249 (2004). Firstly, the fact that questions may provoke an incriminating response goes to the issue of whether there was interrogation not whether a person is in “custody.” Sargent, 111 Wn.2d at 649-652. Detectives did question defendant for a lengthy period of time but the State can find no authority that the mere length of an interview will determine whether Miranda warnings are required. The detectives were gathering information regarding the dead infant’s medical history as well as information about his caregivers. CP 91-96. This type of information is not likely to be covered in a ten-minute discussion. The Court of

Appeals also considered the fact that defendant's father wanted to be present in the interview as a sign the interview was custodial. The State submits that this is not relevant. There is nothing to indicate that the defendant wanted her father to be present; she did not follow his advice regarding asking for an attorney. That defendant's father wanted to be present bears no information as to whether defendant's freedom of movement was restrained. And while defendant was 17 years old at the time, she was living as an adult with her boyfriend at his apartment as opposed to under parental control. Again this factor does not address the issue of whether she was in "custody."

None of the reasons given by the Court of Appeals go to the issue of whether defendant was under restraint. Moreover, the Court of Appeals is not a fact finding court, and it should not be making findings that the trial court did not make. The trial court cannot be upheld on the findings entered in this case as they clearly focus on the wrong standard and do not address facts critical to the Berkemer standard. Under the proper standard, defendant was clearly not under "restraint associated with formal arrest" at the time she made her statements to the detectives. As such, defendant's statements to detectives on September 20th should be admissible in the State's case-in-chief on retrial. This court should reverse both the trial court and the Court of Appeals on this issue.

D. CONCLUSION.

The State asks this court to remand this case for retrial on both the offense of homicide by abuse and felony murder in the second degree.

The State asks this court to hold that defendant's statements to detectives on September 20th are admissible in the State's case-in-chief as Miranda warning were not necessary prior to a non-custodial interrogation.

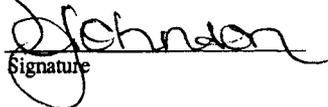
DATED: November 9, 2006,

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

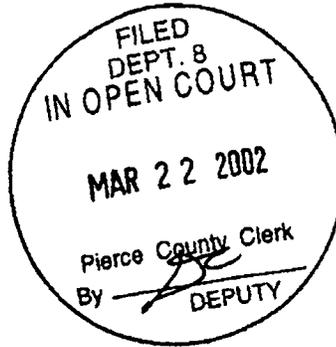
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/9/06
Date

Signature

APPENDIX “A”

*Findings of Fact and Conclusions of Law
RE: Admissibility of Statement, CrR 3.5*



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

CARISSA DANIELS,

Defendant.

CAUSE NO. 00-1-05286-5

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ADMISSIBILITY OF STATEMENT, CrR
3.5

THIS MATTER having come on for hearing before the honorable BRIAN TOLLEFSON on the 14th and 17th day of September, 2001, and the court having ruled orally that the statements of the defendant made on September 20, 2000 are inadmissible and the statements defendant made on September 19 and October 31, 2000, are admissible now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

/

FINDINGS OF FACT AND
CONCLUSIONS, CrR 3.5 - 1

00-1-05286-5

UNDISPUTED FACTS

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2
3
4 1. On September 14, 2000, Lakewood Sheriff's deputies were dispatched to a call regarding
5 an unresponsive infant. This infant was the defendant's two month old son. The infant was
6 pronounced dead at Madigan hospital that day.

7
8 2. On September 19, Detective Berg and Detective/Sergeant Estes went to defendant's
9 apartment to try to speak with her and her live-in boyfriend, Clarence Weatherspoon, regarding
10 the death of her son. Defendant and her boyfriend agreed to come to the precinct the next day to
11 be interviewed.

12 3. On September 20, defendant came to the Lakewood precinct for her interview. She was
13 placed in a 8' X 10' interview room with a table and chairs; Det. Berg and Det/Sgt. Estes were
14 also present. Defendant came to the station with her boyfriend and her father who were in the
15 waiting area of the precinct while defendant was being interviewed.
16

17 4. Defendant was seventeen at this time. Her father wanted to be present during the
18 interview, but was told he could not in the room by the detectives. Defendant's father told
19 defendant that she should have a lawyer, but the defendant did not ask for a lawyer.
20

21 5. By September 20, 2000, the detectives knew from the medical examiner that the infant
22 had died of suspected homicidal violence.

23 6. The interview lasted from approximately 9:40 a.m. to 11:19 a.m.. Defendant was not
24 given her Miranda rights at the beginning of the interview. Toward the end of the interview, the
25 detectives advised defendant of her Miranda rights and, after defendant indicated she understood
26

27
28 FINDINGS OF FACT AND
CONCLUSIONS, CrR 3.5 - 2

00-1-05286-5

1
2 her rights and was willing to speak, they continued to question her. Defendant signed a written
3 waiver of her rights. There was nothing about defendant's demeanor or appearance which gave
4 any indication that defendant was under the influence of drugs or alcohol or other mental
5 disability. All of her answers tracked the questions asked. She did not ask any questions
6 regarding her rights.
7

8
9 7. Not long after this advisement, defendant became upset with the detectives and told the
10 detectives she wanted her mother and an attorney. The detectives ceased questioning her.
11 Defendant was very angry and upset. The detectives told defendant that she would be placed into
12 a holding cell until she calmed down as the detectives were concerned she was going to be
13 violent. Defendant did not make any statements after she invoked her right to an attorney.
14

15 8. The defendant remained in the holding cell while the detectives spoke to the boyfriend.
16 After both interviews were done, the defendant and the boyfriend left the precinct.

17 9. At the point that defendant was put into the holding cell, she was detained.

18 10. Defendant and her boyfriend were not arrested until October 31, 2000. Defendant was taken
19 to the precinct and advised of her Miranda rights, which she waived. Defendant spoke with the
20 Detective Berg and Detective Farrar and then gave a taped statement. Defendant signed a written
21 waiver of her rights. There was nothing about defendant's demeanor or appearance which gave
22 any indication that defendant was under the influence of drugs or alcohol or other mental
23 disability. All of her answers tracked the questions asked. She did not ask any questions
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27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 3

00-1-05286-5

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3 regarding her rights. When the detectives began the taped statement, they re-advised defendant
4 of her rights on the tape, which she again waived.

5 11. At the suppression hearing defendant had no argument to support suppression regarding
6 the statements made on September 19 and October 31.

7
8 **DISPUTED FACTS**

9 1. It is disputed when defendant became the focus of the investigation.
10

11 **CONCLUSIONS AS TO DISPUTED FACTS**

12 1. While Detective Berg and Det/Sgt. Estes testified that the purpose of the interview on
13 September 20 was to gather information on the deceased infant's life - including who had taken
14 care of it - the court finds that defendant was a suspect by that date because from September 14
15 to September 20th, the detectives had not been able to identify suspects other than the defendant
16 and her boyfriend who could have inflicted the infant's injuries.
17

18 **CONCLUSIONS AS TO ADMISSIBILITY**

19 1. Based upon the evidence adduced at the hearing and defendant's acknowledgment, the
20 court finds that the statements made on September 19 are admissible. Defendant was not in
21 custody and the conversation concerned arranging an interview which was not designed to elicit
22 incriminating statements. The court also finds that the statements made on October 31, 2000,
23 were made after a proper advisement of defendant's constitutional rights and after the defendant
24
25
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27 **FINDINGS OF FACT AND**
28 **CONCLUSIONS, CrR 3.5 - 4**

00-1-05286-5

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3 knowing, voluntarily and intelligently waived those rights. These statements are admissible in
4 the state's case-in-chief.

5 2. The court finds that the detectives should have advised defendant of her Miranda rights at
6 the outset of the interview on September 20, 2000. By that time, defendant was the focus of the
7 investigation as the most likely suspect and the questions were designed to elicit incriminating
8 statements or evidence.

9
10 3. The court relies upon State v Green, 91 Wn.2d 431, 588 P.2d 1370 (1979) and State v.
11 Van Antwerp, 22 Wn. App. 674, 591 P.2d 844 (1979), for the proposition that once an officer
12 has probable cause to believe the person confronted has committed a crime that it is a custodial
13 interrogation and Miranda warnings are required. The court further relies upon State v.
14 Wethered, 110 Wn.2d 466, 755 P.2d 797 (1988), and State v. Moreno, 21 Wn. App. 430, 585
15 P.2d 481 (1978), for the proposition that actions by officers aimed to adduce incriminating
16 statements or actions from a suspect in custody must be preceded by Miranda warnings.

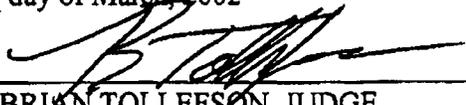
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18 4. As the defendant was not properly advised of her Miranda rights at the beginning of the
19 September 20, 2000, interview, those statement are not admissible in the State's case-in-chief.
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28 FINDINGS OF FACT AND
CONCLUSIONS, CrR 3.5 - 5

00-1-05286-5

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2 However, as the statements were not coerced, such statements are admissible for impeachment
3 purposes or in rebuttal.
4

5 DONE IN OPEN COURT this 22ND day of March, 2002

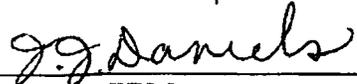
6 
7 BRIAN TOLLEFSON, JUDGE

8 Presented by:

9 
10 SUNNI KO/KATHLEEN PROCTOR
11 Deputy Prosecuting Attorney
12 WSB # 14811



13 Approved as to Form:

14 
15 JOANNA DANIELS,
16 Attorney for Defendant

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28 FINDINGS OF FACT AND CONCLUSIONS, CrR 3.5 - 6