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COURT OF APPEALS  
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STATE OF WASHINGTON  
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NO. 28610-6 II  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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State of Washington - **Respondent,**

vs.

Carissa Marie Daniels- **Appellant.**

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**BRIEF OF APPELLANT**

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Clayton R. Dickinson  
WSBA #13723  
Attorney for Appellant.

6314 19th St. West, Suite 20  
Fircrest, Washington 98466-6223  
Phone: (206) 564-6253

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	)	
Carissa Marie Daniels	)	
	)	
<b>Appellant.</b>	)	
_____	)	

**ASSIGNMENT OF ERROR**

IT IS RESPECTFULLY SUBMITTED that the Honorable Brian Tollefson, Judge of the Pierce County Superior Court, Department No. 8, erred in the following particular:

1. The court committed err, because the law changed after the case was tried, as the case of *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002) held that assault in the second degree could not be used as the underlying offense in support of a felony murder conviction of murder in the 2<sup>nd</sup> degree, and because the alternative under which Carissa Daniels was convicted included both felony murder based upon assault in the second degree and based upon criminal mistreatment in the first degree, without any special interrogatories to determine which underlying basis was

utilized by the jury, it must therefore be assumed that the basis was the assault which was throw out by the state Supreme Court in the above mentioned case.

2. The court committed err, by denying the defense motion to dismiss the alternate count of Murder in the Second Degree based upon Criminal Mistreatment in the First Degree due to insufficient evidence.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. When a defendant is convicted of murder in the second degree based upon felony murder with two alternate means of accomplishing it, i.e., based upon an underlying offense of assault in the second degree and criminal mistreatment in the first degree, without any special interrogatories or means by which it can be determine the basis for the jury's verdict of guilty, should the verdict be reversed because assault has been determined to not be a predicate felony for murder second degree?

2. Due to the "in furtherance of" language of RCW 9A.32.050(1)(b) and the undue harshness of bringing a charge of murder in the second degree based upon felony murder with criminal mistreatment as the underlying offense for the reasons specified in the case of *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002), is this felony inappropriate to be the

predicate felony for felony murder or murder in the second degree?

3. When the state fails to produce evidence that the defendant acted recklessly when she did not seek immediate medical attention for her baby after she or another shook her baby in light of the fact that the injury can occur with only 10 seconds of shaking and that there were no external signs of injury, should the case be dismissed for insufficient evidence?

#### **STATEMENT OF THE CASE**

On July 9, 2000, 17 year old Carissa Daniels gave birth to a baby boy, Damon Daniels.(RP 211, 277, 295, 341, 816, 1048) At the time she was living with her boyfriend, Clarence Weatherspoon, age 22, who was recently discharged from the army and not the father of the child.(RP 815-819) After the baby was born, Mr. Weatherspoon watched the child alone on occasion. (RP 831-832, 1078) He recalled at least 10 times during the month of August. (RP 832) He also watched the baby several days in September. RP 834-836)

On July 18, 2000, Carissa took the baby to the St. Clare ER for blood in his mouth.(RP 272) Mr. Weatherspoon did not go.(RP 272) The baby was examined by Dr. Cowan.(RP 273) He found no bleeding. (RP 273) He further found no problem, it appeared to be a healthy baby. (RP 274 & 279-280) He saw no bleeding and based on the mother's report that it had been

bleeding he noted there had been a minor nosebleed.(RP 280-281) He recommended that the baby be taken to his pediatrician, Dr. Schoenike the next day.(RP 276)

Carissa mentioned this to Deanna Henderson, an RN from Maternity Support Services, who visited her in her home the next day. (RP 216-217) Ms. Henderson also saw Carissa and the baby in her office for a scheduled visit on August 17<sup>th</sup>.(RP 217-218) She noted that Carissa appeared to be a nurturing mother. (RP 241-242)

Dr. Sumner Schoenike was the pediatrician who preformed the discharge examination on the baby on July 11, 2000. (RP 341) He again saw the baby the next day in his office. (RP 344) He saw the baby on July 19, 2000, but he apparently did not know of the ER visit the day before.(RP 346) He examined the baby and found that he had a cold and a right ear infection. (RP 346) Dr. Schoenike next saw him on the 24<sup>th</sup> of July for a two week well child exam. (RP 347) There was nothing found to be wrong with the baby on that date. (RP 347) He next saw the baby on August 10, 2000 at which time he found a persistent ear infection and cold. (RP 348) He saw the baby on the 22<sup>nd</sup> of August for a follow up and found the ear infection had “good clearing” and some minimal nasal congestion . (RP 349) The mother had scheduled visits for September 7<sup>th</sup> and 8<sup>th</sup>, but they had to be cancelled

because the state insurance the mother was on ended and she was switched by the state to Group Health.(RP 349-351)

Dr. Christopher John Schmitt was the doctor Carissa took the baby to at Group Health. He first saw the baby on August 28, 2002 at which time the baby appeared to have a fever, possibly due to a virus and he noted anemia. (RP 552-553) He further noted that there were no bruises nor any apparent injury to the baby. (RP 555) He did have Carissa take the baby to Mary Bridge Children's Hospital for tests, which included a spinal tap. (RP 556) In addition, Mary Bridge did some blood cultures , lab work, and a chest X-ray. (RP 556) He only received the spinal tap results, which were negative for meningitis or infection. (RP 556) He again saw the baby for a follow up visit on the 31<sup>st</sup> of August and noted that the baby was doing about the same or slightly better. (RP 556) He also commented that the baby was eating better and was improved. (RP 556-557)

On September 5, 2001, Dr. Stephen Friedrich, emergency room doctor at St. Clare Hospital saw the baby. (RP 284, 285-286) The baby was brought in by Carissa due to bleeding in the mouth.(RP 289-290) From his notes of the history given by Carissa, the bleeding had been occurring for a week, but he could not find any current bleed.(RP 291) Dr. Friedrich no problems with the baby, he appeared age appropriate in development, no signs of internal

bleeding.(RP 294-295, 298-299) The one thing he found was a torn frenulum, which was not noted to be actively bleeding.(RP 299-300) There was also nothing from his exam that showed that there were any broken ribs and his examination would have triggered a response if there were broken ribs.(RP 301) At trial he acknowledged that one of the causes of a torn frenulum is abuse, such as putting a pacifier or bottle in the baby's mouth too hard, but he did not note anything to raise his suspicion so he did not call CPS.(RP 302-304) He stated that the autopsy picture of the torn frenulum was not what he saw during his examination on the fifth.(RP 304-306)

The first time Carissa noticed blood in the baby's mouth, she came into the room where Weatherspoon was watching the baby and found him "wiggling out" with blood on his shirt. (RP 1062) Weatherspoon had been feeding him a bottle when he saw the blood. (RP 828)

The second time the baby's mouth was bleeding, Carissa had just come home and Weatherspoon was watching the baby.(RP 1068) He apparently had put the pacifier in the baby's mouth prior to noticing the blood. (RP 849, 869) On cross examination, at trial, Weatherspoon changed his story from direct examination and claimed that Carissa had the baby on the 5<sup>th</sup> and caused an unreported mouth bleed on the 7<sup>th</sup> and he was the one who was out and came home. (RP 907-908) But on redirect, he confirmed

that he told the detectives in the first interview that it happened when the baby head butted him twice with his pacifier in his mouth.(RP 935)

Weatherspoon was watching the baby when the baby poked himself in the eye.(RP 852-853, 1078,1190) He then got some ice in a little bag and put it on the eye.(RP 854) Carissa was not home at the time.(RP 854, 1078, 1190) It still got swollen, even with the ice.(RP 854) At trial, Weatherspoon demonstrated how the baby injured himself.(RP 853) He did not recall the date of the injury, but Carissa recalled it was the same week he died.(RP 852-853, 1078) On cross examination it was presented that he told the detectives that Carissa was home and he was the one who came home and found the baby.(RP 911-912) However, on redirect it was presented that he told the detectives on the first interview the first version of the baby poking himself in the eye. (RP 929) One witness testified that there was a bruise on the baby's eye the week he died.(RP 670)

The testimony regarding the relationship between Carissa and Weatherspoon was like a mother to her child.(RP 637, 1015) He did not work and only went on few job interviews at her insistence and worked a few days at a temp service.(RP 822) He usually watched TV or played video games.(RP 822-823) He agreed that he was a stay at home kind of guy.(RP 930) At the time of trial he was still unemployed and homeless. (RP 815)

Carissa, on the other hand was the one who was often out taking the baby to doctor appointments, going to school, working for her father, baby sitting.(RP 1113)

On Monday, September 11, 2000, Carissa took the baby to Natasha Bird while she went to school and so that Weatherspoon could go to the fair. (RP 367) She watched the baby from 8:30 in the morning until 11:00 at night. (RP 374, 380) She noted that he had a scratch on his nose, but she saw no other injury to him.(RP 373, 375-376) She also commented that the baby vomited after eating. (RP 371-372, 380-381, 1263) She did not notice any blood hemorrhaging in the corner of the baby's eye on the 11<sup>th</sup>.(RP 375-376)

On Tuesday, September 12, 2000, Carissa took the baby to the school child care, while she was in class.(RP 394) This was the first time she had used the child care at school.(RP 394) The baby was very fussy, but the child care worker, Mary Waage, could not say if it was more than normal considering it was his first day as children are often fussy their first day.(RP 395-396) She did not recall seeing any injury to the baby's face or to his eye.(RP 397)

On Wednesday, September 13<sup>th</sup>, Carissa and Weatherspoon went to the fair together with the baby.(RP 736, 914-915, 1143) Sarah Schliemann saw them there with the baby around 6:00 p.m. or towards evening that

day.(RP 737)

On September 14, Carrisa got up at 7:30 and fed the baby.(RP 1080-1081) She had an appointment at Maternal Support Service, at St. Clare Hospital. (RP 1081, 1083) She had discussed this with Weatherspoon the night before that she would be leaving the baby with him.(RP 937,1081-1082) She left sometime between 10:00 and 11:00 a.m. or earlier.(RP 894-895) When she left the baby, he was sleeping with Weatherspoon.(RP 894,1081) Weatherspoon was half awake at the time.(RP 1188)

She had an appointment that morning with Maternity Support Services.(RP 1081,1098) She left the house before 11:00. (RP 894) This appointment had been set originally to bring in the baby, but she forgot it was for the baby because she usually had these appointments without the baby.(RP 251-254, 1098) After the appointment, the worker there, Ms. Utt, took her to DSHS to apply for assistance.(RP 256-257, 1083) This was after 12:00 and they got to DSHS around 1:00-1:30.(RP 257) After that Carissa then went to the mall to find the father of the baby to get information needed for the DSHS papers for child support.(RP 1083-1084)

While she was at the mall, Weatherspoon paged her.(RP 860-862, 1084) This was sometime after 3:00 p.m..(RP 861-862) She immediately returned his call from a courtesy phone.(RP 860, 896, 1084-1085) He told her

that the baby was not moving and that everything he did to wake him was not working.(RP 860, 896, 1151)<sup>1</sup> She asked if the baby was blue and when he told her know, then told him to take his temperature and call her back.(RP 1151) He then paged her and she called him right back.(RP 861, 897) He then told her that the temperature was normal, that the baby was breathing, and that he had a pulse.(RP 861) After this conversation, Carissa came home.(RP 862) It took her about 45 minutes by bus to get home.(RP 1085-1086) When she got home, she tried 911, but could not get through.(RP 711, 1086) She then called Joanna Ruzanka-Stuen, at Maternity Support Services at St. Clare Hospital.(RP 711) She told her to call 911 again.(RP 711) This call occurred at approximately 4:30 p.m..(RP 712) Carissa finally got through to 911 at approximately 4:40 p.m..(RP 85) By the time the paramedics came, at 4:47 p.m., the baby had no pulse and was dead.(RP 102,105)

Carissa and Mr. Weatherspoon were charged by information filed on November 1, 2000, with Homicide by Abuse.(CP 1-4) By Second Amended Information that was changed to add an alternative count of murder in the second degree based upon felony murder with the underlying offense being

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<sup>1</sup>During cross, Carissa was asked if Weatherspoon said that the baby was not breathing.(RP 1151) However, Weatherspoon on direct denied that and said that he felt the baby's chest and it sank and rose so he knew the baby was breathing.(RP 861)

either assault in the second degree or criminal mistreatment in the first degree.(CP 5-6)(RP 59)

Before trial, the state dismissed the charges against Mr. Weatherspoon without prejudice in return for his agreement to testify against Carissa.(RP 883-885)<sup>2</sup> He was also released from jail as a result of his agreement.(RP 885)

At trial, Dr. Yolanda Duralde, an expert on child abuse at Mary Bridge Children's Hospital, testified about shaken baby syndrome.(RP 157, 162-164) She testify as to the mechanics of the injury and that there were generally no external signs.(RP 162-164, 167) In regard to what might be noticed she stated:

What you see is neurologic changes and particularly in babies that is often nonspecific. So the neurologic changes you see is the baby is fussy, irritable, vomits. Won't eat. Cries more frequently, Or is real quiet. So all these are sort of nonspecific changes that the baby might go through but babies kind of do that anyways.

So sometimes it's really hard to tell, you know, is this because of an event that happened to the child or does the kid have the flu. And it is often difficult to distinguish.(RP 180-181)

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<sup>2</sup>He apparently passed a polygraph.(RP 808) The record is silent as to whether Carissa was ever offered the opportunity to take a polygraph or not.

In elaborating on whether the signs of shaken baby syndrome would be apparent to a lay person in cross examination she stated:

Well, like I said, it can be quite confusing. Because there's often no external injuries and the baby can basically be more fussy, irritable, not eat as well, but those are things that babies might do anyways. So it can be a confusing picture.(RP 191)

She testified that only 25% of the babies that are shaken die.(RP 179)

A shaken baby can linger for days before it finally dies.(RP 189) Also, it does not take much shaking to cause the injuries of shaken baby syndrome, it can be all of 10 seconds of shaking.(RP 200)

Dr. Roberto Ramoso, an associate Pierce County Medical Examiner, testified that the baby died of blunt trauma to the head. (RP 425-426, 472, 483-484) He testified that this injury could have been from shaken baby syndrome.(RP 476-481) He testified that the autopsy revealed signs of two traumas.(RP 475) One was about two weeks old and the other was several days old.(RP 474-475, 482-483) He also testified about a torn frenulum, that it can be caused by putting a bottle in a baby's mouth too hard.(RP 459) The frenulum injury he observed appeared to have happened only once.(RP 499-500) He also noted a bruise to the eye lid, but other than that no external bruising.(RP 448-449)

Weatherspoon testified that Carissa never shook the baby, she only rattled him.(RP 920-922) Carissa testified that Weatherspoon did shake the baby a little, but not hard.(RP 1180)

At the close of the state's case, the defense brought a motion to dismiss all the charges for insufficient evidence.(RP 539) The court denied the motion.(RP 547)

The jury acquitted on the charge of homicide by abuse but convicted of the charge of murder in the second degree.(RP 1380-1381) There was no differentiation between the two alternate means of committing the offense and no special interrogatories for the jury to distinguish whether this was based upon assault in the second degree or criminal mistreatment in the first degree.(CP 5-6, 57) She was given a mid-range sentence of 195 months.(RP 1402)(CP 68-82)

### **ARGUMENT**

#### I.

WHEN A DEFENDANT IS CONVICTED OF MURDER IN THE SECOND DEGREE BASED UPON FELONY MURDER WITH TWO ALTERNATE MEANS OF ACCOMPLISHING IT, I.E., BASED UPON AN UNDERLYING OFFENSE OF ASSAULT IN THE SECOND DEGREE AND CRIMINAL MISTREATMENT IN THE FIRST DEGREE, WITHOUT ANY SPECIAL INTERROGATORIES OR MEANS BY WHICH IT CAN BE DETERMINE THE BASIS FOR THE JURY'S VERDICT

OF GUILTY, THE VERDICT SHOULD BE REVERSED BECAUSE ASSAULT HAS BEEN DETERMINED TO NOT BE A PREDICATE FELONY FOR MURDER SECOND DEGREE

In the case of *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002) the state Supreme Court held that assault in the second-degree was not a predicate felony for second-degree murder based upon felony murder. In so doing the court reversed prior case law to the contrary ruling that the language of the new statute changed the prior caselaw.

Since Carissa was convicted of murder in the second-degree based upon the alternate crimes of assault in the second-degree and criminal mistreatment in the first degree, without any means of determining which basis the jury used for conviction, her conviction must be reversed and remanded for a new trial based upon the alternative of criminal mistreatment in the first degree only.

## II.

DUE TO THE "IN FURTHERANCE OF" LANGUAGE OF RCW 9A.32.050(1)(B) AND THE UNDUE HARSHNESS OF BRINGING A CHARGE OF MURDER IN THE SECOND DEGREE BASED UPON FELONY MURDER WITH CRIMINAL MISTREATMENT AS THE UNDERLYING OFFENSE FOR THE REASONS SPECIFIED IN THE CASE OF *IN RE PERSONAL RESTRAINT OF ANDRESS*, 147 WASH.2D 602, 56 P.3D 981 (2002), THIS FELONY IS INAPPROPRIATE TO BE

THE PREDICATE FELONY FOR FELONY MURDER OR  
MURDER IN THE SECOND DEGREE

The felony murder statute for murder in the second-degree, RCW 9A.32.050(1)(b), reads as follows:

(1) A person is guilty of murder in the second degree when:

(b) He commits or attempts to commit any felony 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 another participant, causes the death of a person other than one of the participants; (emphasis added)

As mentioned above, in the case of *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002) the state Supreme Court held that assault in the second-degree was not a predicate felony for second-degree murder based upon felony murder. In doing so the court analyzed the “in furtherance of” language of RCW 9A.32.050(1)(b) and determined that this language, having not been in the prior statute analyzed by the courts, constituted a change in the legislative intent. This then allowed for further analysis by the court to determine whether this would support a change in the prior law which allowed assault to be the predicate felony for felony murder.

In so doing the court turned to it’s interpretation of this phrase in the context of the murder in the first degree statute in the case of *State v. Leech*, 114 Wash.2d 700, 790 P.2d 160 (1990). In that case, the defendant was

convicted of felony murder in the 1<sup>st</sup> degree based upon the predicate offense of arson. He argued that since the death of the firefighter occurred in the process of putting the fire out, rather than in any way assisting or furthering the action of his actually committing the arson, it did not occur in furtherance of the arson. Therefore, he could not, under the new statute, be found guilty of having killed him in furtherance of the arson. The court rejected that argument stating:

A homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the "res gestae" of the felony, *i.e.*, if there was a close proximity in terms of time and distance between the felony and the homicide.(at 706)

In the *Andress* case, which dealt with a second-degree assault as the predicate offense for the felony murder in the second-degree, the court in commenting on the *Leech* case stated:

Although *Andress* contends that we should accept a different interpretation of the "in furtherance of" language in this case, we decline to do so. The reasons for the construction of that language in *Leech* are still as compelling today as when *Leech* was decided. However, applying the construction from *Leech* leads to the conclusion that an assault on the person killed is not encompassed within the newer version of the second degree felony murder statute. If it were, the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to the assault to be part of the res gestae of assault. It is nonsensical to speak

of a criminal act--an assault--that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. Therefore, if assault were encompassed within the unenumerated felonies in RCW 9A.32.050(1)(b), the "in furtherance of" language would be meaningless as to that predicate felony. In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.(at 610)

This analysis is equally compelling in the case of criminal mistreatment in the first degree. The statute, RCW 9A.42.020(1), Criminal mistreatment in the first degree reads as follows:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life 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.

RCW 9A.42.010(2)(c) defines the term great bodily harm as follows:

"Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.

RCW 9A.42.010 (1) defines basic necessities of life as follows:

"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.

Basically, in the case of Carrisa, the crime of criminal mistreatment in the first degree was allegedly committed by her failure to obtain immediate medical care for the baby and that failure recklessly created a high probability that the baby would die. As evidenced by the fact that the baby did die. Thus in this case, the death of the baby was not a part of the *res gestae* of the crime, but rather the criminal mistreatment and the homicide are the same. Therefore, criminal mistreatment in the first degree, like assault, cannot form the predicate offense for felony murder in the second-degree.

The court's further analysis makes it even more clear that criminal mistreatment in the first degree is not a predicate offense for felony murder in the second-degree. In the court's further discussion in support of its decision, the court stated:

In addition to the change of language in the second degree felony murder statute, decisions relating to felony murder and the statutory scheme as a whole disclose that assault as a predicate felony for felony murder results in much harsher treatment of criminal defendants than was apparent when this court decided *Harris*. This has become more obvious as various issues have come before the appellate courts of this state, and, in light of the statutory scheme as a whole, we believe the Legislature did not intend this result.

First, as this court recently held, neither degree of manslaughter is a lesser degree of second degree felony murder. *State v. Tamalini*, 134 Wash.2d 725, 953 P.2d 450 (1998). Thus, the jury is not given the option of considering, in cases involving second degree felony murder with assault as the predicate felony, whether the defendant should be convicted of the lesser crime of first or second degree manslaughter. The Court of Appeals in this case upheld the trial court's refusal to instruct the jury on manslaughter in light of *Tamalini*. *State v. Andress*, No. 37250-5-I, at 11, 1999 WL 18092 (Wash.App. Jan.19, 1999). In contrast, manslaughter may be a lesser included offense of intentional second degree murder. *See State v. Berlin*, 133 Wash.2d 541, 551, 947 P.2d 700 (1997).

Additionally, a lesser included offense instruction on assault is normally inappropriate in a felony murder case. Evidence in a case must support an inference that only the lesser crime was committed before a lesser included offense instruction is required as a matter of right. *See Berlin*, 133 Wash.2d at 548, 947 P.2d 700; *State v. Workman*, 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Lyon*, 96 Wash.App. 447, 450, 979 P.2d 926 (1999). Stated somewhat differently, "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." *Berlin*, 133 Wash.2d at 551, 947 P.2d 700. Ordinarily, this factual prong of the test for when a lesser included offense instruction is a matter of right cannot be met in a felony murder case to permit a lesser included instruction on assault because the assault has resulted in the death. *See Lyon*, 96 Wash.App. at 450, 979 P.2d 926.

Thus, in a case where second degree felony murder is charged a jury will rarely have any choice but to convict or acquit on that charge, with no other alternative.

Further, where assault is the predicate felony, the State can elect to charge second degree felony murder rather than second degree intentional murder and thus not have to establish intent to kill, regardless of whether there is evidence of intent to kill.(at 613-614)

First of all, felony murder in the second degree also results in a much harsher treatment when the case involves criminal mistreatment in the first degree as the predicate offense. Likewise, there is no lesser included manslaughter charge available. It is interesting to note that what the court to the prosecutor would have to prove for manslaughter in the first degree is recklessness and that is the same burden of proof for criminal mistreatment in the first degree. So in the case of criminal mistreatment in the first degree being used as the predicate offense for murder in the second-degree, the prosecutor in essence would have to prove essentially the same thing that they would have to prove for manslaughter in the first degree and yet the difference in penalty is extreme.

Carrisa was given a mid-range sentence of 195 months the standard range being 123 to 220 months. If manslaughter had been allowed her range on manslaughter in the first degree then her range would have been 78 to 102 months. If the court gave her a mid-range sentence on that it would have

been 90 months, 105 months less than the time she got. Clearly, she was treated more harshly than she would have been.

It should also be considered that only 25% of the shaken babies die.(RP 179) Therefore, it is possible for two persons to commit the exact same act and the difference in penalty go from 6 to 12 months for criminal mistreatment in the first degree, to not the manslaughter range, but to the 123 to 220 murder in the second degree range depending on whether the baby dies and based upon how the matter is charged.

In regard to the second point mentioned by the court above, that is that the state is free of the burden of proving an intent to kill that they would normally have to prove in a second-degree murder case, the prosecutor in this case made that abundantly clear to the jury.(RP 1287) In this case, there is no proof that Carrisa had any intent to kill her baby and yet the prosecutor was able to get a conviction for murder in the second-degree under facts that at best should have been manslaughter. Clearly, felony murder in the second-degree should not be based upon the predicate offense of criminal mistreatment in the first degree.

As a result of the above, this matter should not only be reversed and remanded because the assault in the second-degree was used as a predicate

offense for felony murder in the second-degree; but it should also be reversed and remanded because criminal mistreatment in the first degree should not have been used as a predicate offense for felony murder in the second-degree.

III.

WHEN THE STATE FAILS TO PRODUCE EVIDENCE THAT THE DEFENDANT ACTED RECKLESSLY WHEN SHE DID NOT SEEK IMMEDIATE MEDICAL ATTENTION FOR HER BABY AFTER SHE OR ANOTHER SHOOK HER BABY IN LIGHT OF THE FACT THAT THE INJURY CAN OCCUR WITH ONLY 10 SECONDS OF SHAKING AND THAT THERE WERE NO EXTERNAL SIGNS OF INJURY, THE CASE SHOULD BE DISMISSED FOR INSUFFICIENT EVIDENCE

The statute, RCW 9A.42.020(1), Criminal mistreatment in the first degree reads as follows:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life 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.

RCW 9A.42.010(2)(c) defines the term great bodily harm as follows:

"Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.

RCW 9A.42.010 (1) defines basic necessities of life as follows:

"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.08.010(c) defines recklessness as follows:

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.

Therefore, in order for Carrisa to be guilty and of the crime of criminal mistreatment of first-degree, she must be found to have recklessly, i.e. to know of and disregard a substantial risk that a wrongful act may occur and that this was a gross deviation from conduct that a reasonable man would exercise in the same situation; caused a bodily injury which had a high probability of causing death or caused serious permanent disfigurement, or caused a permanent or protracted loss or impairment of the function of any bodily part or organ; by withholding the basic necessities of life, i.e., necessary medical treatment.

In this case, evidence was admitted showing that the baby died from blunt force trauma to the head, shaking baby syndrome. Whereas there was

some evidence from which a jury could include that either Carrisa or Witherspoon or both may have shaken the baby at some point in time, there was no evidence from which a jury could conclude that Carrisa recklessly withheld medical attention. As defined above, one acts recklessly if they know of and disregard a substantial risk that a wrongful act would occur and that this disregard was a gross deviation from conduct that a reasonable man would exercise in the same situation.

The evidence introduced at trial was that there were no external injuries to the baby that were apparent from shaken baby syndrome. (RP 167, 448-449) The testimony from Yolanda Duralde was that there are no external injuries, and the signs of shaken baby syndrome are very confusing to a layperson because they are not often distinguishable from a fussy baby or one with the flu. (RP 180-181, 191) The testimony from Dr. Ramoso was that there was evidence of two injuries from shaken baby syndrome, one was about two weeks old and the other was several days old.(RP 474-475, 482-483) The baby died on the 14<sup>th</sup> of September and the last doctor appointment occurred on the 5<sup>th</sup> of September, nine days before the baby's death. This would have been five days after the first incident of shaken baby occurred.

It should also be noted that the baby was seen almost weekly by doctors up until the 5<sup>th</sup> of September. There was nothing noted on the September 5<sup>th</sup> visit to indicate that this baby had suffered a head trauma such as shaken baby syndrome. Dr. Duralde also testified that shaken baby syndrome can occur with as little as 10 seconds of shaking.(RP 200) There was no evidence that Carrisa would have or should have known that in as little as 10 seconds of shaking the baby she could have caused a life-threatening injury to the child. Especially in light of her having taken the child to a hospital emergency room to see a doctor on the 5<sup>th</sup> of September, apparently five days after the first shaking would have occurred, and the emergency medical doctor failed to notice any signs of shaken baby syndrome. There was simply insufficient evidence to establish that she recklessly withheld medical treatment for her baby. How could she have known of or disregarded a substantial risk to her baby that medical professionals could not even observe and that lay persons would have only been confused by?

In *State v. Bartlett*, 74 Wash.App. 580, 875 P.2d 651 (1994) the defendant argued that there was insufficient evidence to find him guilty of criminal mistreatment in the second degree. The court there began by citing the standard for review as follows:

Evidence is sufficient to uphold a criminal conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Tacoma v. Luvane, 118 Wash.2d 826, 849, 827 P.2d 1374 (1992). (at 588-589)

The court then proceeded to find that in that case there was sufficient evidence as follows:

Here, Bartlett acted recklessly by repeatedly refusing to get medical assistance for Brandon even after the child stopped breathing. A reasonable person would have known of the risks involved when an infant stops breathing and would have taken steps to get help, such as calling 911 or a 24- hour clinic or driving to the nearest hospital. The hospital was only a 3- minute drive from the Bartletts' home.

Further, the evidence, viewed in the light most favorable to the State, indicates that Bartlett's failure to get medical help for Brandon for more than 6 hours after noticing his symptoms created "an imminent and substantial risk of death or great bodily harm" to Brandon. Dr. Feldman specifically testified that the risk of permanent brain damage was increased because Brandon did not receive prompt care. Likewise, Dr. Clark testified that, if Brandon had been taken to the hospital immediately after he was injured, "it would have made a difference". Dr. Newell also testified that "if treatment is instituted very promptly after a severe head injury, that offers the best chance to survive." That evidence is sufficient to support Bartlett's second degree criminal mistreatment conviction.(at 589)

There was some contradictory evidence presented in Carrisa's case about whether or not she was told by Weatherspoon that the baby had stopped

breathing. However, she was not present at the apartment at that time and she returned to the apartment immediately following the second phone call to tend to her baby. Upon arriving at the apartment she did call a worker at Maternity Support Services at St. Clare hospital after she was unable to get through on 911 and she also continued to call until she did get through to 911. She cannot be held liable for the failure of Weatherspoon to call 911 if he noticed that the baby had stopped breathing.

In *State v. Jackson*, 137 Wn.2d 712, 976 P.2d 1229 (1999) the state Supreme Court held that the assault of a child by a third party was insufficient to prove criminal mistreatment in the first degree. The court stated:

We agree with the Court of Appeals that when one looks at the term "shelter" in light of the words surrounding it in RCW 9A.42.010(1) (i.e., "food, water ... clothing, and medically necessary health care") it is clear that the Legislature did not mean for it to encompass the protection of a child from the criminal act of a third person. Rather, it was referring to a parent's duty to take affirmative acts to provide the basic necessities of life for his or her children.(at 729)

If a defendant cannot be held responsible for the criminal acts of a third person, it appears reasonable to conclude that they equally cannot be held responsible for the criminal failure of a third person to act on the, such as Weatherspoon's failure to immediately call 911. There was simply

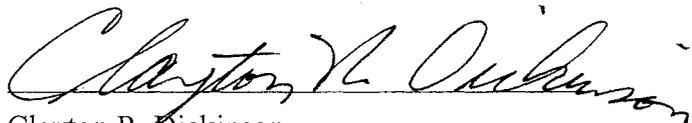
insufficient evidence to establish the crime of criminal mistreatment in the first degree in the case must be reversed.

**CONCLUSION**

This case must be reversed. The *Andress* case cited above has made clear that assault in the second degree cannot be used as the predicate offense for felony murder in the second degree. That seem analysis makes it equally clear that criminal mistreatment in the first degree also cannot be used as the predicate offense for felony murder in the second degree. Because these were both of the alternative methods used to obtain a conviction for felony murder in the second degree, this case must be reversed.

Also, there was insufficient evidence to support a conviction for the underlying offense of criminal mistreatment in the first degree because the evidence was insufficient to show that Carrisa acted recklessly under the circumstances. Therefore the trial court must be reversed.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2003.



Clayton R. Dickinson

WSBA #13723

Attorney for Appellant