

NO.



---

**THE SUPREME COURT  
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

CARISSA MARIE DANIELS, RESPONDENT

---

Court of Appeals Cause No. 28610-6  
Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 00-1-05286-5

---

**PETITION FOR REVIEW**

---

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

**Table of Contents**

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

    1. 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? ..... 1

    2. 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? ..... 1

    3. Should this petition for review be consolidated with State v. Linton, Supreme Court Case No. 75784-4, a case pending review before this court, as it presents many of the same legal issues for review, or, in the alternative, should consideration of this petition be stayed pending the decision on Linton?..... 2

    4. Did both the trial court and the Court of Appeals render decisions that conflict with this court’s decisions as to the proper standard to apply in determining whether a suspect is in “custody” for the purposes of giving Miranda warnings?..... 2

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 7

1. WHEN THE JURY EXPRESSLY INDICATED ITS INABILITY TO AGREE ON THE GREATER CHARGE OF HOMICIDE BY ABUSE, THE STATE SHOULD BE ALLOWED TO RETRY DEFENDANT ON THAT CHARGE FOLLOWING DEFENDANT'S SUCCESSFUL APPEAL OF HER CONVICTION OF FELONY MURDER; THE COURT OF APPEALS ERRED IN FINDING THAT THE JURY IMPLICITLY ACQUITTED DEFENDANT OF THE GREATER CHARGE ..... 7

2. THIS COURT SHOULD TAKE REVIEW AND CONSOLIDATE THIS CASE TO STATE v. LINTON, A CASE WITH SIMILAR ISSUES THAT THE COURT HAS ALREADY ACCEPTED FOR REVIEW ..... 13

3. THE DECISION BELOW AND THAT OF THE TRIAL COURT CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHEN MIRANDA WARNINGS ARE REQUIRED ..... 15

F. CONCLUSION..... 19

## Table of Authorities

### Federal Cases

<u>Berkemer v. McCarty</u> , 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984).....	4, 15, 16, 17, 18, 19
<u>Green v. United States</u> , 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957).....	8, 9
<u>Richardson v. United States</u> , 468 U.S. 317, 324, 82 L. Ed. 2d 242, 104 S. Ct. 3081 (1984).....	8
<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101, 154 L.Ed.2d 588, 123 S. Ct. 732 (2003).....	12, 15
<u>United States v. Bourdeaux</u> , 121 F.3d 1187, 1192 (8th Cir. 1997) .....	9
<u>United States v. Allen</u> , 755 A.2d 402, 408-09 (D.C. App. 2000), cert. denied, 533 U.S. 932, 150 L. Ed. 2d 722, 121 S. Ct. 2556 (2001).....	9

### State Cases

<u>In re PRP of Andress</u> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	6
<u>State v. Corrado</u> , 81 Wn. App. 640, 646, 915 P.2d 1121 (1996).....	8
<u>State v. D.R.</u> , 84 Wn. App. 832, 836, 930 P.2d 350 (1997) .....	16
<u>State v. Davis</u> , 190 Wash. 164, 67 P.2d 894 (1937) .....	9, 10, 11
<u>State v. Gocken</u> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) .....	7
<u>State v. Green</u> , 91 Wn.2d 431, 94 Wn.2d 216, 588 P.2d 1370, 616 P.2d 628 (1980).....	16
<u>State v. Harris</u> , 106 Wn.2d 784, 790, 725 P.2d 975(1986).....	16, 19
<u>State v. Heritage</u> , 152 Wn.2d 210, 217-218, 95 P.3d 345 (2004).....	15, 19
<u>State v. Hescock</u> , 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999)....	7, 11
<u>State v. Labanowski</u> , 117 Wn.2d 405, 816 P.2d 26 (1991) .....	11, 12

<u>State v. Linton</u> , 122 Wn. App. 73, 93 P.3d 183 (2004), <u>review granted</u> , ____ Wn.2d ____, ____ P.3d ____, 2005 Wash. LEXIS 223 (2005), Supreme Court Case No. 75784-4 .....	2, 13, 14, 15
<u>State v. Martinez</u> , 120 N.M. 677, 905 P.2d 715, 716-17 (1995) .....	9
<u>State v. Russell</u> , 101 Wn.2d 349, 351, 678 P.2d 332 (1984) .....	8
<u>State v. Sargent</u> , 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).....	16, 17, 18, 19
<u>State v. Short</u> , 113 Wn.2d 35, 40, 775 P.2d 458 (1998) .....	15-16, 19

**Constitutional Provisions**

Art. 1, § 9, Washington State Constitution .....	8
Fifth Amendment, United States Constitution.....	8

**Rules and Regulations**

CrR 3.5 .....	3
RAP 13.4(b)(1) .....	19
RAP 13.4(b)(3) and (4) .....	13

**Appendices**

Appendix “A”, “B”, “C” and “D”.

A. IDENTITY OF PETITIONER.

The State of Washington, respondent/cross-appellant below, asks this court to accept review of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed on December 21, 2004, in the State of Washington v. Carissa Marie Daniels, in COA No. 28610-6-II. See Appendix A. The court denied a motion for reconsideration on February 10, 2005. See Appendix B. The court entered an amended order denying the motion to reconsider on March 10, 2005. See Appendix C.

C. ISSUES PRESENTED FOR REVIEW.

1. 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?

2. 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?

3. Should this petition for review be consolidated with State v. Linton, Supreme Court Case No. 75784-4, a case pending review before this court, as it presents many of the same legal issues for review, or, in the alternative, should consideration of this petition be stayed pending the decision on Linton?

4. Did both the trial court and the Court of Appeals render decisions that conflict with this court's decisions as to the proper standard to apply in determining whether a suspect is in "custody" for the purposes of giving Miranda warnings?

D. STATEMENT OF THE CASE.

CARISSA MARIE DANIELS, hereinafter "defendant," went to trial on a second amended information alleging that she committed homicide by abuse or, in the alternative, murder in the second degree (felony murder). CP 5-6. The State alleged two predicate felonies for the felony murder charge – assault in the second degree and criminal mistreatment in the first degree. Id. The victim of these charges was defendant's two-month old son, Damon-Krystopher Daniels or "DK". Id.

The facts underlying these charges are detailed in the factual statement of the State's response brief and, to a lesser degree, in the decision below. Essentially, DK lived from July 9 to September 14, 2000. The autopsy of his body revealed numerous injuries occurring over the last week to two weeks of his life, including multiple rib fractures, two incidents of cranial bleeding caused by blunt force trauma or shaking, a torn frenulum, and a bruised and swollen eye. RP 425-492. With the exception of two instances, defendant and her boyfriend were the only caregivers for the infant. The jury heard testimony from the boyfriend, the two babysitters and the defendant. RP 368-373, 393-401, 815, 1047. The two babysitters, who took care of DK two and three days before his death, noticed behavior that was consistent with internal bleeding such as vomiting, refusal to eat, and extreme fussiness, but did not see the bruises on his face that were apparent at the time of his death. RP 373-375, 380-381, 395-397. Both defendant and her boyfriend denied causing harm to DK. RP 924-926, 1107-1108.

Prior to trial the court held a hearing pursuant to CrR 3.5 to determine the admissibility of statements defendant made to detectives on September 19 and 20, 2000, and on the date that defendant was arrested, October 31, 2000. The court ruled that the statements made on September 19 and October 31 were admissible in the State's case-in-chief. CP 91-96.

The court suppressed the statements made on September 20, when defendant came to the Lakewood precinct for an interview. CP 91-96.

The court entered the following findings as to what occurred at this interview:

6. The interview which lasted from approximately 9:40 a.m. to 11:19 a.m.. Defendant was not given her Miranda rights at beginning of the interview. Toward the end of the interview, the detectives advised defendant of her Miranda rights and, after defendant indicated she understood her rights and was willing to speak, they continued to question her. Defendant signed a written waiver of her rights. ...

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

CP 92-93. Defendant was temporarily placed into a holding cell but was released and left the precinct that day with her boyfriend. CP 93. The court ruled that defendant should have been advised of her Miranda rights at the outset of the September 20<sup>th</sup> interview as she was “the focus of the investigation as the most likely suspect.” The court relied on cases that predated the United States Supreme Court’s decision in Berkemer v. McCarty in making this decision. CP 95.

The State brought a motion asking the court to reconsider its ruling because the court had applied an outdated standard as to when Miranda

warnings were necessary. CP 88-90. After hearing argument on the motion for reconsideration, the court maintained its original ruling. RP 52-59. The court also found that the statements were “not coerced.” CP 96.

At trial, there were no objections or exceptions taken to the court’s proposed jury instructions. RP 1281-1282. Under these instructions the jury was instructed to:

[F]irst 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 deision 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. The jury completed Verdict Form B which read :

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. Thus, after hearing the evidence and being unable to agree on the charge of homicide by abuse, the jury convicted defendant of murder in the second degree. RP 1380-1385; CP 33-57, 107,

108. The jury was not given a special verdict form or interrogatory to specify the underlying predicate felony for the felony murder. CP 33-57.

When the jury returned with its verdict, the judge announced that Verdict Form A was blank and that the jury had found defendant guilty on verdict Form B. RP 1380-1381. Defendant asked to have the jury polled, but made no further request that the jury continue to deliberate on the charge of homicide by abuse and did not object to the discharge of the jury. RP 1381-1386.

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. Defendant was entitled to a new trial on felony murder predicated on criminal mistreatment. See Appendix A. The State does not seek review of this portion of the decision granting a new trial.

However, the Court of Appeals also ruled that the State could not retry defendant upon the charge of homicide by abuse as it was barred by double jeopardy. Nor did it disturb the trial court's ruling excluding

defendant's statements to detectives on September 20 from the State's case-in-chief. The State now seeks review of these portions of the decision of the Court of Appeals.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. WHEN THE JURY EXPRESSLY INDICATED ITS INABILITY TO AGREE ON THE GREATER CHARGE OF HOMICIDE BY ABUSE, THE STATE SHOULD BE ALLOWED TO RETRY DEFENDANT ON THAT CHARGE FOLLOWING DEFENDANT'S SUCCESSFUL APPEAL OF HER CONVICTION OF FELONY MURDER; THE COURT OF APPEALS ERRED IN FINDING THAT THE JURY IMPLICITLY ACQUITTED DEFENDANT OF THE GREATER CHARGE.

The Court of Appeals ruled that retrying defendant on the charge of homicide by abuse would violate double jeopardy as the jury had implicitly acquitted on that offense. The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. State v. Hescock, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Assuming a court has jurisdiction over a case, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first

witness is sworn. State v. Corrado, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996). 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, however, 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, 82 L. Ed. 2d 242, 104 S. Ct. 3081 (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).

The failure of a jury to return verdicts on some counts or on greater offenses will act as an implicit acquittal of those counts if the record is silent as to why the court discharged the jury without it having returned verdicts on all the counts or charges. Green v. United States, 355 U.S.

184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957); State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937).

Green did not involve issues of jury deadlock. United States v. Bourdeaux, 121 F.3d 1187, 1192 (8th Cir. 1997)(jury indicated by note on verdict form that, after reasonable efforts, it was unable to agree on greater offense; it then found defendant guilty on lesser offense; when defendant obtained new trial he could be retried on greater offense); United States v. Allen, 755 A.2d 402, 408-09 (D.C. App. 2000), cert. denied, 533 U.S. 932, 150 L. Ed. 2d 722, 121 S. Ct. 2556 (2001); State v. Martinez, 120 N.M. 677, 905 P.2d 715, 716-17 (1995).

An express failure to agree is not an “implicit acquittal” despite the presence of a "blank" verdict form. In State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937), this Court indicated that it was the trial court’s failure to make a proper record of the reason it was discharging the jury, rather than the fact of the blank jury forms, that led it to find retrial was barred by double jeopardy.

Had it been made to appear in the record that the court exercised its discretion and discharged the jury on counts two and three because it satisfactorily appeared that there was no probability of their agreeing upon a verdict on those counts, then the respondent could have been put on trial again as to counts two and three.

Davis, 190 Wash. at 167. The Court of Appeals, in the decision now before the court, improperly equated a blank verdict form with jury silence and improperly found an implicit acquittal on the homicide by abuse charge. The court below failed to consider the true meaning of the blank verdict form under the trial court's instructions to the jury.

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. The fact that Verdict Form A was left blank shows that the jury was expressing its *inability to agree* as to that charge. If it had found defendant "not guilty" it would have entered those words into the 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 instruction of the court and indicating its inability to agree by leaving Verdict Form A blank. Thus, unlike the record in Davis, the record in this case is clear why the verdict form on the homicide by abuse charge was left blank. The verdict forms in this case show an express inability to agree, not an implicit acquittal. The court below misapplied Davis<sup>1</sup> as the record below is not ambiguous as to why the jury was discharged without returning a verdict on the greater charge. The record is explicit that the jury was unable to agree on the greater charge and so proceeded to consider the alternative charge of felony murder.

Secondly, in reaching the decision below, the Court of Appeals failed to consider the impact of this court's decision in State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). In Labanowski, this

---

<sup>1</sup> The Court of Appeals also improperly relied upon State v. Hescok, 98 Wn. App. 600, 989 P.2d 1251 (1999). Hescok involved a bench trial where the case had been tried to the court on alternative means of committing forgery. The court entered findings of fact and conclusions of law regarding the basis for its determination of guilt; the trial court had found guilt on only one of the means. When the appellate court found that there was insufficient evidence to support the means found by the trial court, the case was dismissed rather than remanded as the court found that the judge's silence to the alternative means was the equivalent to an implicit acquittal. Hescok has no application to jury verdicts where the jury has expressly indicated its inability to agree.

court indicated a preference that juries be instructed that it could consider a lesser offense if unable to agree on the charged offense after full and careful consideration. Prior to that, juries had been instructed to consider the lesser offense *only* after having acquitted defendant of the greater charged offense. When considering Washington cases that concern blank jury forms and whether such indicates an implicit acquittal, the court must examine whether those cases issued before or after this change in the law as to whether a jury could consider a lesser offense before it had decided to acquit a defendant of a greater charge. Before Labanowski, a guilty verdict on a lesser charge coupled with a blank verdict form on a greater offense indicated that the jury had acquitted on the greater offense. After Labanowski, a blank jury form on a greater offense did not hold the same meaning and, thus, should not act as a bar to retrial.

Finally, Washington courts must reevaluate past double jeopardy decisions in light of the United States Supreme Court recent decision in Sattazahn v. Pennsylvania, 537 U.S. 101, 154 L.Ed.2d 588, 123 S. Ct. 732 (2003). In Sattazahn, the Court analyzed whether the double jeopardy clause was implicated when the state sought the death penalty on retrial for a defendant who successfully challenged his conviction for first degree murder where the first jury had not been able to reach a decision as to whether aggravating circumstances existed that would make defendant eligible for the death penalty. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L.Ed.2d 588 (2003). The court held that there was no

double jeopardy bar to retrying Sattazahn on the capital offense or the lesser charge of murder because jeopardy had never terminated with respect to either offense. Id., 537 U.S. at 112-115.

Washington and federal constitutional law is clear that the unanimous decision of twelve jurors finding a criminal defendant not guilty will forever bar his retrial on that offense. However, constitutional law is equally clear that a hung jury is not a bar to retrial. The Court of Appeals' decision erodes the distinction between these two situations. Treating a hung jury as an implicit acquittal gives more power to an individual juror than the legal system envisions. The power to acquit properly belongs only to a unanimous jury – not to one in disagreement. No single juror should have the power to bar retrial of a defendant of the crime charged whenever all the jurors agree that the defendant committed some lesser offense. The lower court's decision to the contrary creates a significant question of constitutional law and an issue of substantial public interest. Review should be granted under RAP 13.4(b)(3) and (4).

2. THIS COURT SHOULD TAKE REVIEW AND CONSOLIDATE THIS CASE TO STATE v. LINTON, A CASE WITH SIMILAR ISSUES THAT THE COURT HAS ALREADY ACCEPTED FOR REVIEW.

On March 1, 2005, this court granted a petition for review on State v. Linton, 122 Wn. App. 73, 93 P.3d 183 (2004), review granted, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2005 Wash. LEXIS 223 (2005), Supreme Court Case

No. 75784-4. There are many similarities between the issues presented in this case and those presented in Linton, but there is also a major difference in the procedural history. This case does not merely duplicate the issues in Linton. Linton went to trial on the charge of assault in the first degree, but was found guilty of the lesser included offense of assault in the second degree when the jury was unable to agree on the charged offense. Linton, 122 Wn. App. at 75-76. The prosecutor sought to retry Linton on the greater charge immediately but the trial judge ruled that this was not permissible because it would expose Linton to double jeopardy. Id. The Court of Appeals, Division I, affirmed this ruling. Id. at 83.

In this case the State did not seek to retry defendant immediately on the greater charge. Rather, the State is only seeking to retry defendant on the greater charge after defendant has successfully obtained a new trial on appeal. As mentioned above, by appealing a conviction a defendant remains in continuing jeopardy. Here the State accepted the jury verdict on the alternative charge of felony murder and proceeded to sentencing. Had defendant accepted this verdict as well, the State would not be seeking to retry her on the greater offense. But by filing an appeal, defendant continued her jeopardy with regard to the charges below. This decision to appeal should not be without risk of facing the greater charge upon which the jury could not reach agreement, if she is successful at

obtaining a new trial. The State acknowledges that the case must be remanded for new trial, but it should be allowed to retry her upon the offense for which the jury could not reach agreement. Because the procedural history of this case includes a successful appeal by the defendant, this case presents facts closer to those in Sattazahn v. Pennsylvania than Linton does.

Thus, while this case involves many of the same issues as Linton regarding what constitutes an implicit acquittal and scope of protection of the double jeopardy clause, the cases do not present identical issues as this case has the decision by the defendant to continue her jeopardy by filing an appeal. This case would be a good case to consolidate or link to State v. Linton. In the alternative, this court could defer consideration of this petition for review until the court issues its opinion in Linton.

3. THE DECISION BELOW AND THAT OF THE TRIAL COURT CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHEN MIRANDA WARNINGS ARE REQUIRED.

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.

Once the 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, 94 Wn.2d 216, 588 P.2d 1370, 616 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 D. 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. Despite the State’s motion to reconsider citing authority pointing out the applicability of the Berkemer standard, the trial court refused to alter its decision. RP 52-58. 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. Opinion at pp 13-14. Firstly, the fact that questions may provoke an incriminating response goes to the issue of whether there was *interrogation*. Sargent, 111 Wn.2d at 650-652. This factor is not relevant to the issue of whether the defendant was in custody. State v. Sargent, 111 Wn.2d at 649-650. 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 State cannot see what relevance there is to the fact that defendant’s father wanted to be present in the interview. The defendant did not make this request and it bears no information as to whether her freedom of movement was restrained.

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. As the decision below conflicts with this court's decisions in Harris, Short, Sargent, and Heritage, this court should take review pursuant to RAP 13.4(b)(1).

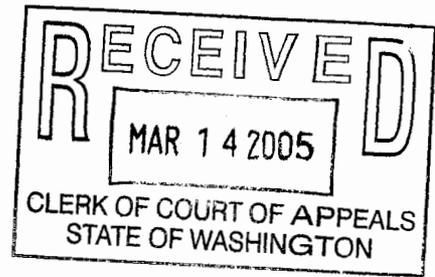
F. CONCLUSION.

The Court of Appeals' decision that the State may not retry defendant on a charge of homicide by abuse should be reversed as well as the ruling upholding the trial court's decision on the admissibility of defendant's September 20th statements to detectives. The State does not dispute that the case should be remanded for new trial. This court should grant review to correct these errors.

DATED: March 14, 2005.

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.

3-14-05   
Date Signature

# **APPENDIX “A”**

*Published Opinion*

FILED  
COURT OF APPEALS  
DIVISION II

04 DEC 21 AM 9:10  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

Respondent and  
Cross Appellant,

v.

CARISSA MARIE DANIELS,

Appellant and  
Cross Respondent.

No. 28610-6-II

PUBLISHED OPINION

HOUGHTON, P.J. -- After Carissa Daniels's nine-week-old son died as a result of various injuries, the State charged her with one count of homicide by abuse and one count of second degree murder-domestic violence (felony murder) based on the alternate predicate offenses of second degree assault or first degree criminal mistreatment. The jury convicted Daniels of second degree murder; it did not convict her of homicide by abuse.

Daniels appeals, arguing that her conviction must be reversed under *In the Matter of the Personal Restraint Petition of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). The State cross-appeals, raising arguments based on evidentiary error and *Andress*.

In light of *Andress*, we reverse Daniels's conviction. In doing so, we hold that the State may retry Daniels only on second degree murder based on the predicate offense of criminal mistreatment.

## FACTS

Seventeen-year-old Daniels gave birth to her son, Damon, on July 9, 2000. On July 18, Daniels took the baby to the emergency department at St. Clare Hospital because he had blood in his mouth; a doctor did not find any problems with the baby.

On July 19, Daniels took Damon to a pediatrician who was not aware of the emergency visit. The doctor found that Damon had a cold and a right ear infection. On July 24, the same pediatrician examined the baby and found nothing wrong with him.

On August 10, the same doctor diagnosed a persistent ear infection and a cold. On August 22, at a follow up visit, the doctor found that the ear infection was resolving but that the baby still had some nasal congestion. Daniels scheduled follow up visits for September 7 and 8, but she cancelled these when her medical insurance changed.

On August 28, a new doctor examined Damon and found him fussy, feverish, and congested. The doctor diagnosed anemia and recommended a spinal tap test. The test results revealed no infection. On August 31, the doctor noted no change in Damon's condition.

On September 5, Daniels took Damon to the emergency department again for bleeding in his mouth. The doctor diagnosed a torn frenulum.<sup>1</sup>

On September 11, Daniels left Damon with a babysitter who noticed a scratch on the baby's nose and that he vomited after each feeding. On September 12, Daniels left Damon at her school's childcare. The caretaker noted Damon's fussiness but did not consider it abnormal because it was his first day at a daycare.

---

<sup>1</sup> At trial, the doctor acknowledged that physical abuse may cause a torn frenulum; however, when he saw Damon he did not suspect abuse.

Early on the morning of September 14, Daniels left Damon with her boyfriend. At approximately 3:00 P.M., her boyfriend called Daniels to say that Damon was not moving. Daniels asked her boyfriend to check Damon's temperature. The boyfriend called Daniels a second time to say that Damon's temperature was 98.7 and that he had a pulse and was breathing. When Daniels returned home, she found Damon "pale and limp." 13 Report of Proceedings (RP) at 1086. She called a nurse at Maternity Support Services, who instructed her to call 911 immediately.

When the paramedics arrived, they found Damon pulseless and not breathing. At approximately 10:00 P.M., a medical investigator examined Damon and noted both rigor mortis and fixed lividity, indicating a time of death approximately 10 to 12 hours earlier.

A later autopsy revealed that Damon had suffered many earlier injuries. The autopsy doctor testified that Damon sustained multiple two- to ten-day-old rib fractures caused by compression of his chest with substantial force. The doctor also stated that approximately one week before his death, Damon sustained an injury to his frenulum, which was caused by a blunt trauma to the upper lip, such as shoving a bottle into his mouth.

In addition, the autopsy showed that a day or two before his death, the baby suffered a blunt head trauma resulting in eye socket bruising and a swollen left eye. Finally, the autopsy revealed recent and older signs of cranial bleeding and shaken baby syndrome.<sup>2</sup> The autopsy results indicated that Damon died by homicide either by shaking or blunt head trauma.

---

<sup>2</sup> At trial, a child abuse expert testified that approximately 10 seconds of shaking can cause shaken baby syndrome. According to the expert, 25 percent of shaken babies die. There may be no external signs of this injury or the signs may be indistinguishable from normal child behavior. A baby may be fussy, irritable, or very quiet. Also, a baby may have no appetite or may vomit after eating.

On September 20, City of Lakewood detectives interviewed Daniels at the precinct station; Daniels's boyfriend and father accompanied her. The detectives declined to allow Daniels's father to be present during the interview.

The detectives interviewed Daniels for more than one and one-half hours before advising her of her *Miranda*<sup>3</sup> rights. Toward the end of the interview, when the detectives advised Daniels of her *Miranda* rights, she waived them. Shortly thereafter, Daniels became upset and asked for an attorney. The detectives ceased questioning her and she gave no further statements. The detectives told Daniels that she would be placed in a holding cell until she calmed down. Daniels remained in the holding cell while the detectives spoke with her boyfriend. The two then left.

The State charged Daniels by second amended information with homicide by abuse and with murder in the second degree-domestic violence, predicated on either second degree assault or first degree criminal mistreatment. The trial court suppressed some statements Daniels made to the law enforcement officers on September 20, because the detectives failed to properly advise her of her *Miranda* rights before questioning her.

After trial, the court provided the jury with two verdict forms, A and B. Verdict Form A, which the jury left blank, stated:

We, the jury, find the defendant \_\_\_\_\_ (Not Guilty or Guilty)  
of the crime of homicide by abuse as charged in Count I.

\_\_\_\_\_  
PRESIDING JUROR

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (before a custodial interrogation takes place, the police must warn the person of the right to remain silent, that any statement may be used as evidence against the person, and that the person has a right to have an attorney).

No. 28610-6-II

Clerk's Papers (CP) at 107. Verdict Form B, which the presiding juror filled in and signed, 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.

[signed by the Presiding Juror]  
PRESIDING JUROR

CP at 108. The court's instructions did not ask the jury to indicate which offense formed the predicate of the second degree murder conviction.

The court polled the jurors individually, inquiring whether it was each individual juror's decision and the jury's decision. All of the jurors answered yes to each question. The trial court dismissed the jury without further inquiry. Daniels appeals her conviction, and the State cross-appeals.

## ANALYSIS

### Daniels's Appeal

#### Second Degree Felony Murder

Daniels contends that *Andress* precludes using assault as a predicate offense to second degree felony murder. 147 Wn.2d 602. She asserts that because the jury did not specify whether it relied on assault or criminal mistreatment in finding her guilty, her conviction must be reversed.<sup>4</sup> We agree that *Andress* requires reversal. 147 Wn.2d at 616 (assault cannot serve as the predicate offense for a second degree felony murder). But our inquiry does not end here. Daniels also contends that (1) double jeopardy bars her retrial on either felony murder or

---

<sup>4</sup> In its supplemental brief, the State concedes that no one can discern whether the jury convicted Daniels based on second degree assault or first degree criminal mistreatment.

homicide by abuse;<sup>5</sup> or (2) insufficient evidence supports that she criminally mistreated Damon; or (3) criminal mistreatment, like assault, is legally insufficient to form a predicate offense to felony murder. We address each argument in turn.

### Double Jeopardy

Daniels argues that retrying her on second degree felony murder based on the alternate predicate offense of criminal mistreatment violates her constitutional rights under the double jeopardy clause. The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), *review denied*, 138 Wn.2d 1011 (1999). “Generally, it bars retrial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *Corrado*, 81 Wn. App. at 645 (citations omitted).

As a general rule, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81 Wn. App. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. *Corrado*, 81 Wn. App. at 646, 647. Also, jeopardy terminates when the State fails to produce evidence sufficient to prove its charge.<sup>6</sup> *Burks v. United States*, 437 U.S. 1, 10-11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

The United States Supreme Court has “‘expressly rejected the view that the double jeopardy provision prevent[s] a second trial when a conviction ha[s] been set aside;’ instead, it

---

<sup>5</sup> After argument, we called for additional briefing narrowing the focus of this appeal. As a result, we address the question of the remedy where *Andress* renders one predicate offense legally insufficient and no special verdict form indicates which predicate offense formed the basis of the jury’s second degree murder conviction.

<sup>6</sup> We address separately the sufficiency of evidence as to the criminal mistreatment charge.

has ‘effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course.’” *Corrado*, 81 Wn. App. at 647 (citations omitted). Thus, the double jeopardy clause imposes no limits on the power to retry a defendant who has succeeded in setting aside his or her conviction, and a defendant’s successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence, poses no bar to further prosecution on the same charge. *Corrado*, 81 Wn. App. at 647-48.

Applying these principles here, Daniels successfully brought this appeal. Therefore, her conviction has been set aside and her jeopardy did not terminate. Because Daniels’s jeopardy is continuing, the double jeopardy rule does not apply. *Corrado*, 81 Wn. App. at 648. Thus, because assault no longer serves as a predicate offense to felony murder and because double jeopardy does not apply, we hold that Daniels may be retried on second degree felony murder, provided no other legal principle precludes retrial.

#### Criminal Mistreatment

Daniels contends that insufficient evidence supports finding her guilty of criminal mistreatment. Therefore, she asserts, her felony murder conviction must be reversed and dismissed.

When a defendant challenges sufficiency of the evidence, we draw all reasonable inferences in favor of the State. *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). If, after viewing the evidence in the light most favorable to the State, we determine that any rational fact finder could have determined guilt beyond a reasonable doubt, we affirm. *State v. Johnson*, 90 Wn. App. 54, 73, 950 P.2d 981 (1998). We need not be convinced of a defendant’s guilt beyond a reasonable doubt, only that substantial evidence supports the State’s case. *State v. Gallagher*, 112 Wn. App. 601, 613, 51 P.3d 100 (2002), *review denied*, 148 Wn.2d 1023 (2003).

We accord circumstantial evidence the same weight as direct evidence. *Johnson*, 90 Wn. App. at 73.

RCW 9A.42.020(1) defines criminal mistreatment:

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<sup>[7]</sup> . . . causes great bodily harm<sup>[8]</sup> to a child or dependent person by withholding any of the basic necessities of life.<sup>[9]</sup>

Here, the State had to prove beyond a reasonable doubt that Daniels was entrusted with the physical custody of Damon and that she recklessly caused or allowed someone else to cause great bodily injury to Damon, resulting in his death.

The record shows that during the days before he died, Damon sustained many severe blunt trauma injuries, including: multiple two- to ten-day-old rib fractures caused by substantial force compression of his chest, cranial bleeding and shaken baby syndrome, eye socket bruising and swelling, and a torn frenulum. Other than brief instances, Daniels and her boyfriend were Damon's caretakers throughout his short life. This evidence sufficiently establishes that Daniels caused or encouraged, aided, or assisted someone else to cause the baby's injuries.

---

<sup>7</sup> "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." RCW 9A.08.010(1)(c).

<sup>8</sup> Great bodily harm is "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(2)(c).

<sup>9</sup> Food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication comprise basic life necessities. RCW 9A.42.010(1).

Criminal Mistreatment as a Predicate Offense

Daniels further argues that, because any criminal mistreatment here resulted in death, the conduct constituting criminal mistreatment is the same as the conduct causing the homicide.

And because the criminal mistreatment is not independent of the homicide, here, as in *Andress*, it cannot serve as a predicate offense to second degree felony murder.

According to former RCW 9A.32.050(1)(b) (2002), a person is guilty of second degree murder when:

He commits or attempts to commit any felony 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;

In *Andress*, our Supreme Court held:

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.

147 Wn.2d at 610. Similarly, Daniels argues, because it is impossible to commit homicide without criminally mistreating a victim, criminal mistreatment as a predicate offense of felony murder becomes a legal impossibility. We disagree.

Although one cannot commit homicide without assaulting a victim, one can commit homicide without criminally mistreating the victim. One commits first degree criminal mistreatment of a victim when he or she recklessly causes great bodily harm by withholding basic necessities of life. RCW 9A.42.010(1), (2)(c), .020(1). But to commit a homicide, it may not be necessary to withhold the basic necessities of life. Therefore, we hold that criminal mistreatment is independent of homicide and thus can serve as a predicate offense to second degree felony murder.

Homicide by Abuse

Finally, Daniels argues that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge, thereby terminating her jeopardy, and that double jeopardy bars her retrial on that charge.

We must first determine whether Daniels's jeopardy terminated. Because jeopardy terminates with a verdict of acquittal, *Corrado*, 81 Wn. App. at 646, we must first determine whether the jury acquitted her on the homicide by abuse charge. Two cases add insight into the question of under what circumstances jury silence as to a particular charge constitutes an acquittal: *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937)<sup>10</sup> and *State v. Hescocock*, 98 Wn. App. 600, 602, 989 P.2d 1251 (1999).

In *Davis*, the jury returned a not guilty verdict on count I (vehicular homicide) and did not return verdicts as to counts II (driving while intoxicated) and III (reckless driving). 190 Wash. at 164-65. The record showed that the jury foreman told the court that a "verdict had been reached on count one, but that the jurors could not agree upon verdict on counts two and three." *Davis*, 190 Wash. at 165 (citing the trial court's clerk's papers). The court discharged the jury without explanation. *Davis*, 190 Wash. at 165. *Davis* moved to dismiss counts II and III, arguing that double jeopardy barred retrial. *Davis*, 190 Wash. at 165. The court granted the motion and the State appealed. *Davis*, 190 Wash. at 165.

In deciding *Davis*, our Supreme Court noted that,

[as] a general rule supported by the great weight of authority, . . . where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not

---

<sup>10</sup> *Bickelhaupt v. Inland Motor Freight*, 191 Wash. 467, 471, 71 P.2d 403 (1937) also follows *Davis* (jury silence as to a defendant's charge is equal to a verdict amounting to acquittal).

show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

190 Wash. at 166. The Court further noted that “[t]he fact that the foreman of the jury informed the court that they could not reach a verdict on those counts does not make a record of the reason why the court so acted.” *Davis*, 190 Wash. at 166.

In sum, the *Davis* court held that because the jury was silent as to counts I and II, and the record did not show why the court discharged the jury, double jeopardy barred the State from retrial on counts II and III; the effect being that the jury’s silence amounted to an acquittal. But the *Davis* court also noted that, had something in the record explained why the court discharged the jury, the explanation might allow the State to retry *Davis* on both counts. 190 Wash. at 167.

In *Hescock*, 98 Wn. App. at 602, the State charged *Hescock* in juvenile court with one count of forgery by two alternate means, RCW 9A.60.020(1)(a), (b). The trial court found *Hescock* guilty of violating only RCW 9A.60.020(1)(a), but it was silent as to the (1)(b) alternative. *Hescock*, 98 Wn. App. at 602.

On appeal, *Hescock* argued, and the State conceded, that insufficient evidence supported his conviction under alternative (1)(a). *Hescock* then argued that double jeopardy prevented his retrial under alternative (1)(b). *Hescock*, 98 Wn. App. at 602. As to the (1)(b) alternative, the *Hescock* court noted that, because the trial judge had ample opportunity to convict *Hescock* but he did not, the trial judge’s silence as to the (1)(b) alternative constituted an implicit acquittal, barring *Hescock*’s retrial on that charge.

Here, *Daniels* was put in jeopardy when the jury was sworn. *Corrado*, 81 Wn. App. at 646. Next, we must determine whether the jury’s silence as to an adjudication of the homicide

by abuse charge amounts to an acquittal, thereby terminating Daniels's jeopardy as to that charge.

The jury had ample opportunity to convict Daniels but it left the corresponding verdict form blank. Moreover, the record insufficiently shows why the court dismissed the jurors without reaching a decision on homicide by abuse. Under these facts, the jury's silence constitutes an implicit acquittal.

Finally, our determination that the jury implicitly acquitted Daniels of homicide by abuse is bolstered by the language of the Verdict Form B, which recites, "having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count 1, or being unable to unanimously agree as to that charge . . . ."<sup>11</sup> CP at 108. As such, Daniel's jeopardy terminated when the jury implicitly acquitted her. Therefore, double jeopardy bars the State from retrying her on the homicide by abuse charge.<sup>12</sup>

#### The State's Cross-Appeal

##### *Andress*

In its cross-appeal, the State argues that we should abandon *Andress* as erroneous and harmful or that we should apply it prospectively only. Our Supreme Court and we have addressed and rejected these arguments in *State v. Hanson*, 151 Wn.2d 783, 784, 91 P.3d 888 (2004); *In the Matter of the Personal Restraint Petition of Hinton*, \_\_\_ Wn.2d \_\_\_, 100 P.3d

---

<sup>11</sup> Under these circumstances, the principles of lenity require us to interpret any ambiguity in favor of the criminal defendant. *State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998).

<sup>12</sup> Because we hold that the jury implicitly acquitted Daniels, and because an acquittal terminated her jeopardy, it is unnecessary for us to consider whether the State produced sufficient evidence to prove homicide by abuse charge, as insufficient evidence would have also terminated Daniels's jeopardy. *Burks*, 437 U.S. at 10-11.

No. 28610-6-II

801 (2004); *State v. Hughes*, 118 Wn. App. 713, 721 n.12, 77 P.3d 681 (2003); *State v. Gamble*, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003).

#### *Miranda* Warnings

The State also argues that the trial court erred in excluding Daniels's statements to the police made on September 20, 2000, before she received her *Miranda* warnings. The State asserts that Daniels knew she was not in custody and that *Miranda* did not apply.

The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of his or her *Miranda* rights before a custodial interrogation. *State v. Baruso*, 72 Wn. App. 603, 609, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008 (1994). The *Miranda* exception applies when the interview or examination is (1) custodial, (2) through interrogation, and (3) by a state agent. *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), *cert. denied*, 525 U.S. 1158 (1999).

A suspect is deemed in custody for *Miranda* purposes as soon as his or her freedom is curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of an interrogation: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. *Thompson*, 516 U.S. 112. An interrogation occurs when the investigating officer should have known his or her questioning would provoke an incriminating response. *State v. Sargent*, 111 Wn.2d 641, 650-52, 762 P.2d 1127 (1988).

Here, 17-year-old Daniels spent more than one and one-half hours in the precinct station where detectives asked her questions knowing that their questioning could provoke an

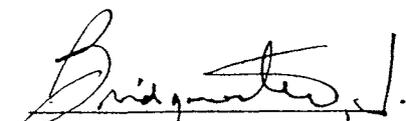
No. 28610-6-II

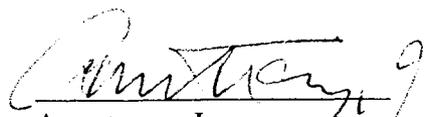
incriminating response. And the detectives declined to allow Daniels's father to remain with her. These circumstances sufficiently demonstrate that *Miranda* applied. The trial court properly suppressed any Daniels's statements.

Reversed and remanded for further proceedings consistent with this opinion.

  
Houghton, P.J.

We concur:

  
Bridgewater, J.

  
Armstrong, J.

**APPENDIX "B"**

*Order Denying Motion to Reconsider*

*\*-st*  
*Notes for review*  
*Dec 21*

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,  
  
Respondent/Cross-Appellant,  
  
v.  
  
CARRISSA M. DANIELS,  
  
Appellant/Cross-Respondent.

No. 28610-6-II

ORDER DENYING MOTION TO  
RECONSIDER

FILED  
COURT OF APPEALS  
DIVISION II  
05 FEB 10 AM 10:19  
STATE OF WASHINGTON  
BY *[Signature]* DEPUTY

**RESPONDENT** moves for reconsideration of the court's decision terminating review, filed **December, 21, 2004**. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Houghton, Bridgewater, Armstrong

**DATED** this 10<sup>th</sup> day of February 2005.

**FOR THE COURT:**

*[Signature]*  
PRESIDING JUDGE

Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
Rm 946  
930 Tacoma Ave S  
Tacoma, WA, 98402-2102

Clayton Richard Dickinson  
Attorney at Law  
6314 19th St W Ste 20  
Fircrest, WA, 98466-6223

West Group

Reporter of Decisions

**COPY RECEIVED**

**FEB 11 2005**

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY  
APPELLATE DIVISION

## **APPENDIX “C”**

*Amended Order Denying Motion to Reconsider*

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON

Respondent/Cross-Appellant,

v.

CARRISSA M. DANIELS,

Appellant/Cross-Respondent.

No. 28610-6-II

AMENDED ORDER DENYING MOTION TO  
RECONSIDER

FILED  
COURT OF APPEALS  
DIVISION II  
05 MAR 10 AM 9:26  
STATE OF WASHINGTON  
DEPUTY

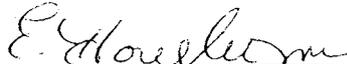
**APPELLANT/CROSS-RESPONDENT** moves for reconsideration of the court's decision terminating review, filed **December 21, 2004**. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Houghton, Bridgewater, Armstrong

**DATED** this 10<sup>th</sup> day of March, 2005.

**FOR THE COURT:**

  
PRESIDING JUDGE

Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
Rm 946  
930 Tacoma Ave S  
Tacoma, WA, 98402-2102

Clayton Richard Dickinson  
Attorney at Law  
6314 19th St W Ste 20  
Fircrest, WA, 98466-6223

West Group

Report of Decisions

COPY RECEIVED

MAR 11 2005

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY  
APPELLATE DIVISION

## **APPENDIX “D”**

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



00-1-05286-5 16378524 FNCL 03-25-02



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

## UNDISPUTED FACTS

1  
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 FINDINGS OF FACT AND  
28 CONCLUSIONS, CrR 3.5 - 2

00-1-05286-5

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

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  
19 10. Defendant and her boyfriend were not arrested until October 31, 2000. Defendant was taken  
20 to the precinct and advised of her Miranda rights, which she waived. Defendant spoke with the  
21 Detective Berg and Detective Farrar and then gave a taped statement. Defendant signed a written  
22 waiver of her rights. There was nothing about defendant's demeanor or appearance which gave  
23 any indication that defendant was under the influence of drugs or alcohol or other mental  
24 disability. All of her answers tracked the questions asked. She did not ask any questions  
25  
26

27  
28 FINDINGS OF FACT AND  
CONCLUSIONS, CrR 3.5 - 3

OO-1-05286-5

1  
2 regarding her rights. When the detectives began the taped statement, they re-advised defendant  
3  
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  
26

27 FINDINGS OF FACT AND  
28 CONCLUSIONS, CrR 3.5 - 4

00-1-05286-5

1  
2  
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 preceding by Miranda warnings.

17  
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.  
20

21  
22  
23  
24  
25  
26  
27  
28 FINDINGS OF FACT AND  
CONCLUSIONS, CrR 3.5 - 5

00-1-05286-5

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

DONE IN OPEN COURT this 22<sup>ND</sup> day of March, 2002

[Signature]  
BRIAN TOLLEFSON, JUDGE

Presented by:

[Signature]  
SUNNI KO/KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811



Approved as to Form:

[Signature]  
JOANNA DANIELS,  
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS, CrR 3.5 - 6