IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0711-17

MARIAN FRASER, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS McLENNAN COUNTY

WALKER, J., filed a concurring opinion.

CONCURRING OPINION

I agree with the Court's decision to reverse the judgment of the court of appeals, and I respectfully concur in the judgment, but I concur for a completely different reason. My opinion is based on the fact that Appellant committed felonies against multiple children that can be used as underlying felonies to support the felony murder charge in this case.

I — What Constitutes Felony Murder in Texas?

I disagree with the majority's adherence to *Johnson v. State*, which apparently overruled *Garrett v. State*. *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999) (disapproving of and

limiting *Garrett v. State*, 573 S.W.2d 543 (Tex. Crim. App. [Panel Op.] 1978)). In *Garrett*, we held that, in a felony murder case, the felony had to be felonious conduct other than the assault causing the homicide. *Garrett*, 573 S.W.2d at 546. "This limitation on the felony-murder rule" became "known as the merger doctrine." *Murphy v. State*, 665 S.W.2d 116, 119 (Tex. Crim. App. 1983). In *Johnson*, however, we limited *Garrett* to its facts and declared that *Garrett* did not create a general merger doctrine. *Johnson*, 4 S.W.3d at 258. I agree with *Johnson* that *Garrett* did not create a general merger doctrine, because, in my opinion, the merger doctrine was built into the statute by the Legislature. *Garrett*, instead of creating a new doctrine, simply recognized what was already encompassed within the statute. I read the statute to require that the act clearly dangerous to human life that causes the death of an individual be a separate and distinct act from the act which constitutes the underlying felony. However, I recognize that the statute can be confusing and that reasonable minds can differ as to its interpretation.

I believe this Court's adherence to *Johnson* and the majority opinion's analysis in this case opens the door to absurd results that our Legislature never intended. The majority opinion could lead to travesties of justice. Consider this: What if a young mother is bathing her toddler when she hears her four-year old screaming from the other side of the house. The mother leaves the toddler in the tub and runs to the screaming child. After taking care of the screaming child, she goes back to the bathroom to find that her toddler has slipped in the tub, hit her head, and drowned. The mother's act of leaving the toddler alone in the tub could certainly be negligent and lead to a conviction for injury to a child, which is a state jail felony and carries a maximum sentence of two years. *See* TEX. PENAL CODE Ann. § 22.04(a)(1), (g). The act could also be charged as criminally negligent homicide, also a state jail felony. *See* TEX. PENAL CODE Ann. § 19.05. Leaving the child alone in the tub could also

be considered an act clearly dangerous to human life which caused the child's death. Under the precedent set today, this young mother can now be tried for felony murder and sentenced to life in prison. I cannot imagine how this result could possibly be what our Legislature intended when drafting our felony murder statute. Reading the statute to require that the act clearly dangerous to human life that causes the death of an individual must be a separate and distinct act from the act which constitutes the underlying felony would not lead to the absurd result in this hypothetical, because the act that caused the death—leaving the toddler alone in the tub— was the same act that constituted the underlying felony. This is a fair way to read the statute. When looked at carefully, this interpretation of the statute is also unambiguous.

The felony murder statute reads:

> (b) A person commits an offense if he:
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> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE Ann. § 19.02(b)(3). In other words, a person commits an offense if he commits a felony and, in the course of and in furtherance of the commission, he commits an act clearly dangerous to human life that causes the death of an individual. How could one commit a criminal act and, in the course of the commission of the act, commit the same act? In other words, how can one act be done in the course of the commission of the same act? Take murder, for instance: how could one commit a murder, and in the course of committing the murder, he commits the same murder. In my opinion, interpreting the statute in that way is illogical. On the other hand, one could certainly commit a criminal act and, in the course of the commission of the act, commit a separate

act. There is nothing about this interpretation of the statute that is illogical. Furthermore, how could one commit a criminal act and, in furtherance of the act, commit the same act? And again, take murder for instance: how can one commit a murder, and in furtherance of the murder, commit the same murder. I do not see how an act can be in furtherance of itself. In my opinion, interpreting the statute that way is also illogical. Again, on the other hand, one can commit a criminal act and, in furtherance of the act, commit a separate act. There is nothing about this interpretation of the statute that is illogical. Therefore, in my opinion, my interpretation of the statute is not only correct but also unambiguous.

In this case, the Court upholds Appellant's conviction because whatever constitutes a felony other than manslaughter or a lesser included offense of manslaughter should be determined only by comparing the statutory elements of manslaughter and the statutory elements of whatever felony is identified in the indictment. This is so even if the facts of the case show that the defendant actually committed manslaughter or a lesser included offense of manslaughter. The Court does so even though we have recently held that the cognate pleading approach is the only approach to be used in deciding whether an offense is a lesser included offense of another. *Hall v. State*, 255 S.W.3d 524, 535 (Tex. Crim. App. 2007).

Certainly, we can all agree that children can be the victims of manslaughter. But, according to the Court, in any case where the facts show that the defendant has literally committed manslaughter against a child, the State can charge felony murder with an underlying felony of injury to a child, even though the underlying felony is the same act as the act that caused the death. The same would apply when the manslaughter victim is an elderly individual or a disabled individual. The Court is giving a green light to the State to seek and secure first degree murder convictions even

in cases that should be charged as manslaughter or even criminally negligent homicide when children, elderly individuals, or disabled individuals are the victims.

II — The Felony Murder Conviction in This Case is Fine

That being said, I ultimately agree with the Court's decision to reverse the judgment of the court of appeals in this case. Not because I agree with the Court that injury to a child and endangering a child are, on a purely statute-to-statute comparison, definitively and forever-more not lesser included offenses of manslaughter under *Johnson*, and thus eligible to underlie a felony murder conviction when alleged as the felony. Instead, even under a correct interpretation of the felony murder statute, the actual circumstances of this case and the State's case at trial show that the act clearly dangerous to human life that caused the death of the victim, C.F., was separate and apart from alleged felonies of injury to a child and endangering a child. Appellant committed the underlying felonies of injury to a child or endangering a child against nearly a dozen other children.

III — The Facts

A full recitation of the facts is necessary to show the full scope of the felonies committed by Appellant that can properly underlie her conviction for felony murder, separate and apart from the act that caused the death of C.F.

Appellant ran a licensed child care home, Spoiled Rotten, from her home in Waco for over twenty years. The day care, staffed by herself and one assistant, provided care for twelve children, all typically under two years of age. Appellant maintained a well-defined schedule for the infants in her care, including a nap time of 12:00 to 3:00 p.m.

Before C.F. was born in October of 2012, her parents reserved a slot at Appellant's day care based on several strong recommendations. After spending her first two months at home, C.F. began

attending Appellant's day care at the start of the new year. C.F.'s mother was happy with the care C.F. was receiving, and all seemed well. However, during the afternoon nap on March 4, 2013, Appellant found C.F. had stopped breathing, had vomited, and was unconscious. Appellant attempted CPR and told her assistant to call 9-1-1. Firefighters with the Waco Fire Department quickly arrived and took over providing pediatric CPR. Paramedics showed up not long afterwards and transported C.F. and Appellant to a nearby hospital. C.F.'s family came to the hospital as soon as possible. Despite the best efforts of the doctors, C.F. died.

Based on standard procedure following a child death, a police investigation was initiated and C.F.'s body was sent to Dallas for an autopsy, even though her parents thought that she died from sudden infant death syndrome (SIDS). Simultaneously, an administrative investigation with child care licensing began, and Appellant's day care was temporarily closed for a week. A few days later, a child care investigator went to Appellant's day care for a follow-up visit, but Appellant was not home and the investigator had to wait outside the house. Appellant's daughter, coming home from college for spring break, saw the investigator and sent a text message to Appellant informing her about the visit. Appellant instructed her daughter to go inside and move a box of medication from a cabinet in the day care room to her daughter's closet.[1] The investigator paid Appellant another visit at the end of April, during which she observed a number of medication bottles, including melatonin, a sleep aid, on the counter and in the cabinets of Appellant's kitchen.

Meanwhile, the Dallas County Medical Examiner's Office, at the Southwestern Institute of

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[1] Appellant later explained at trial that she was not trying to hide Benadryl or diphenhydramine. Instead, the medications were Tylenol and Motrin, which she got permission to give through text messages from parents. She said that she panicked because she did not have signed, written authorization from the parents.

Forensic Sciences, performed the autopsy of C.F.'s body. C.F. appeared to be otherwise healthy and had no signs of natural disease, trauma, or external injuries. Toxicology revealed that C.F. had a high level of a drug, diphenhydramine, in her body at the time that she died.

Diphenhydramine is an antihistamine used in common over-the-counter drugs such as Benadryl, Unisom, and some formulations of Dimetapp. One side-effect of diphenhydramine is sedation and sleepiness, and for that reason it is also used as a sleep aid. It also causes dizziness and a lack of coordination. Additionally, diphenhydramine has an anticholinergic effect and can cause dry mouth. According to the State's medical expert, the dryness in turn causes production of thick mucus in the lungs. If given in excess amounts, diphenhydramine's sedative effect can affect greater parts of the brain, eventually including the part of the brain that controls essential bodily functions like heartbeat and respiration, potentially leading to death. Diphenhydramine is especially harmful to infants because their livers are underdeveloped and incapable of metabolizing the drug, and, therefore, the drug remains in their bodies for much longer periods of time than it does for adults.

According to the medical examiner, the amount of diphenhydramine in C.F.'s postmortem blood was 1.3 milligrams per liter, which was significant enough to cause death. This was so because the level was within the 1.1 to 1.6 milligram per liter range documented in the medical literature to have caused deaths in infants. Thus, the medical examiner determined that the diphenhydramine caused C.F.'s death due to the lack of any other cause. However, the medical examiner could not determine how C.F. ingested the drug or whether it was one large dose or numerous smaller doses over time. Accordingly, the manner of death was undetermined.

In the meantime, C.F.'s parents maintained their close relationship with Appellant, and they regularly contacted each other, sharing supportive text messages. Nearly two months passed after

C.F.'s death before her parents learned the results of the autopsy. After that point, her parents ceased all contact with Appellant. C.F.'s cousin, T.F., was pulled from Appellant's day care the next day. Other parents, however, kept their children with Appellant, maintained their close relationships with her, and supported her.

The detective investigating C.F.'s death contacted the mother of M.J., one of the other children in Appellant's care. He asked M.J.'s mother if she wanted to submit a sample of M.J.'s hair to test for diphenhydramine. Initially, M.J.'s mother was eager to help, hoping that a negative test result would exonerate Appellant. However, M.J.'s mother did not feel comfortable with the detective and declined to provide a sample to him. Instead, she scheduled an appointment to have M.J.'s hair tested through an independent private laboratory. She then called Appellant to apologize for not going through with the detective's request for testing. M.J.'s mother felt remorse because testing with the detective could have cleared Appellant's name sooner. M.J.'s mother did not get the reaction from Appellant that she expected. Instead of being relieved to hear that there was a way to prove that Appellant did not dose the children, Appellant reacted to the phone call with concern that she would be blamed for more children having diphenhydramine in their bodies. Appellant also sarcastically remarked that "Belize is looking better and better." The conversation unnerved M.J.'s mother, and she chose not to tell Appellant about the private testing. She took M.J. to Austin where a sample of M.J.'s hair was cut from her head and sent to a laboratory in Houston for testing. A week later, the test results revealed that M.J. had a significant amount of diphenhydramine in her hair sample.

Thus began a chain reaction of parents taking their children to submit hair for testing. Eventually, over the next several months, all of the other children who were in Appellant's care at

the time C.F. died, except for one, were tested.[2] Additionally, four other children who attended Spoiled Rotten prior to C.F.'s attendance also had hair samples tested. Like M.J., most of the children had hair samples cut directly from their heads. Others, however, had intervening haircuts. Accordingly, hair which corresponded with the time they were in Appellant's care was lost, and new hair growth since those haircuts post-dated their attendance and would not have revealed information about whether they received the drug at the day care. Their parents were able to work around that problem after they were each able to find and send in hair they had saved from the children's first haircuts which occurred during the relevant time frame.

The testing revealed that all of the children's hair samples contained varying levels of diphenhydramine. On one end of the scale, R.R., who had several samples tested, had two tests come back with no diphenhydramine detected and one just barely over the cutoff (58 pg/mg, with a cutoff of 50 pg/mg).[3] On the other end of the scale, D.S.'s level was so high that it was off the chart (over 10,000 pg/mg) and could not be determined.

The revelation that the children were exposed to diphenhydramine correlated with ailments that some of them suffered while in Appellant's care. For example, M.J. had chronic ear infections. She also had an episode where she came home from Appellant's day care feeling unwell, laying still, and not wanting to eat. She then started shaking and was unresponsive. M.J.'s parents took her to a hospital where the violent episode continued, and M.J. started vomiting as well. M.J. got better after a couple of hours, but the doctors could not determine what caused the incident.

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[2] The twelfth and final child, B.B., had allergy problems and was on a combination of antihistamines, including Children's Benadryl, which contains diphenhydramine. B.B.'s parents even provided the drug to Appellant so he could be treated while at day care.

[3] R.R. also had results much higher than the cutoff (112 pg/mg, 305 pg/mg, and 213 pg/mg).

F.B. also had several ear infections as well as constant congestion while he was attending Appellant's day care. R.C. had ear infections too. R.R. was difficult and fussy. She had mucus that she could not clear, threw up frequently, and would not eat much. As a result, she was sickly and underweight. R.R.'s doctors were so baffled by her condition that they tested for cystic fibrosis. H.M. was constantly thirsty. K.D. had congestion which was being treated with a nasal aspirator. I.M. had a lot of ear infections, which her parents had trouble getting cleared up. I.M. was also difficult to get to sleep at home, but she always slept well at Appellant's day care. I.M. was very thirsty, such that her thirst was "unquenchable."

D.S. got his first ear infection a month after beginning at Appellant's day care, and his parents had a difficult time controlling his congestion and ear infections during the first year of his life. Tubes were placed, but the ear infections continued with lots of ear drainage and mucus. He was also abnormally thirsty. Toward the end of his time at Appellant's day care, he starting developing issues with tremors. His pediatrician tested for glucose problems, including hypoglycemia and diabetes, but those causes were ruled out. D.S. was referred to a neurologist, and his parents were going to schedule a sedation MRI to get an image of D.S.'s brain. In one particular episode, D.S. could not move his arm, and the doctors could not figure out what was wrong. They considered a spinal tap to check for meningitis, but the blood markers would not corroborate that diagnosis. The issue eventually subsided, and D.S. could move his arm again; however, his pediatrician could not explain what had happened. As for C.F., she had a cough and a little congestion when she visited her doctor a few weeks before her death.

After the other children left Appellant's day care, many of their health problems went away. F.B., for instance, had much less congestion, and illness was no longer a normal state of being for

him. R.R. stopped throwing up, started eating, and gained weight rapidly. She also had a change in personality from fussy to outgoing, talkative, and funny. I.M., after leaving Appellant's day care and going to a new school, became a happy and healthy child, and her ear infections went away. D.S., who had been suffering from unexplained tremors and whose parents were going to schedule a sedation MRI, did not need to get that MRI examination. By the time of his next scheduled evaluation, D.S. had aged out of and left Appellant's day care, and he began attending preschool. The tremors subsided, the neurologist cleared D.S. from care, and D.S. no longer had health problems.

Appellant was charged with felony murder for allegedly causing C.F.'s death by giving C.F. diphenhydramine, which was an act clearly dangerous to human life, and Appellant did so while committing felony offenses of injury to a child or endangering a child. On the third and fourth days of trial, over Appellant's objection, each of the parents of the other children testified that they all had their children's hair samples submitted for testing. The State then presented the results of the testing, revealing that the children had all received doses of the drug, and the State's expert witness explained how dangerous such doses could be. The jury found Appellant guilty of felony murder and assessed a sentence of fifty years imprisonment.

IV — Identifying the Underlying Felonies

After reviewing the record, it is obvious to me that the underlying felonies were committed against the larger group of children, all of whom, with the exception of C.F., were not killed as a result of the felonies, and that each underlying felony was a separate criminal offense. *Ex parte Hawkins*, 6 S.W.3d 554, 560 (Tex. Crim. App. 1999) ("in Texas the allowable unit of prosecution for an assaultive offense is each victim"). The State's theory at trial and the evidence presented to support that theory showed that Appellant committed, or attempted to commit, injury to a child or

child endangerment against at least ten of the children in her care, not just C.F. Furthermore, the offenses committed against the group of children involved Appellant giving each child a separate bottle containing diphenhydramine, thus involving separate criminal acts for each child.

The sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one which accurately sets out the law, is authorized by the indictment, does not necessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* The indictment alleged:

> that MARIAN FRASER, hereinafter called Defendant . . . did then and there commit or attempt to commit an act clearly dangerous to human life, namely, by administering diphenhydramine to [C.F.] and/or causing [C.F.] to ingest diphenhydramine, which caused the death of [C.F.], and the said Defendant was then and there in the course of or attempted commission of a felony, to-wit: Injury to a Child,
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> PARAGRAPH II
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> And it is further presented in and to said court that the Defendant . . . did then and there commit or attempt to commit an act clearly dangerous to human life, namely, by administering diphenhydramine to [C.F.] and/or causing [C.F.] to ingest diphenhydramine, which caused the death of [C.F.], and the said Defendant was then and there in the course of or attempted commission of a felony, to-wit: Endangering a Child,

Clerk's R. 6. The indictment, as shown above, did not allege anything particular about the underlying felonies beyond their statutory titles. There were no allegations that the child being injured was C.F. There were no allegations that the child being endangered was C.F.

Because the hypothetically correct jury charge is the one authorized by the indictment, and the indictment, as recited above, merely alleged that either "Injury to a Child" or "Endangering a Child" were committed, the hypothetically correct jury charge thus embraced any and every injury

to a child or endangering a child that was fairly raised by the evidence. *Compare Taylor v. State*, 450 S.W.3d 528, 535 (Tex. Crim. App. 2014) ("When an indictment alleges theft in the most general of statutory terms, as did the indictment in this case, the hypothetically correct jury charge embraces any and every statutorily defined alternative method of committing the offense that was fairly raised by the evidence."); *and Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011) ("When a statute lays out several alternative methods of committing the offense, and the indictment alleges only one of those methods, 'the law as authorized by the indictment' is limited to the method specified in the indictment."); *see also* 43A GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES, CRIMINAL PRACTICE AND PROCEDURE § 51:27 (3d ed. 2011) ("If the indictment should have been more specific but the defendant did not challenge the indictment, the hypothetically correct jury charge does not contain those specifics."). Thus, evidence relating to the other children should be considered in determining whether the evidence was sufficient to show that Appellant committed an underlying felony of injury to a child or endangering a child.

The State presented evidence that the other children in Appellant's care at the time of C.F.'s death also received doses of the drug. The parents of each child testified that their children were in the care of Appellant, that they submitted hair samples for testing, and that after they received the hair follicle test results, they stopped supporting and contacting Appellant. The State's medical expert provided the actual results of the testing, which showed that each child had diphenhydramine in their hair samples that correlated with the time that they were at Appellant's day care. The medical expert also explained the harmful effects diphenhydramine could have on infants. Before each child's parent testified about the testing, the jury was repeatedly instructed that the evidence regarding the other children was being presented to show that Appellant had a common scheme,

plan, or opportunity to administer drugs to the children, and to show the absence of mistake or accident.

Although the evidence regarding the other children was admitted for limited purposes, those purposes go directly to the issue of Appellant's guilt. According to Professors Dix and Schmolesky, "[a]s a general rule, if evidence has been admitted for limited purposes that do not include proving the defendant's guilt, that evidence cannot be considered in reviewing the sufficiency of the evidence to support a conviction." DIX & SCHMOLESKY, *supra*, § 51.39. The flip-side of that coin is self-evident: if evidence has been admitted for purposes that do include proving the defendant's guilt, that evidence can be considered in reviewing the sufficiency of the evidence to support a conviction. Whether Appellant had a common scheme, plan, or opportunity to drug the children and whether their being drugged was the result of an accident or a mistake are central to the issues of whether she committed a felony of injury to a child or endangering a child against the other children and also whether she committed an act clearly dangerous to human life against C.F. The court of appeals's failure to consider the evidence in its sufficiency review cannot find justification under the limiting instruction. Just as the jury was authorized to consider the evidence regarding the other children as evidence that Appellant had a common scheme, plan, or opportunity to administer the drugs and to show the absence of mistake or accident, the court of appeals should have considered the evidence for those purposes, which ultimately go towards Appellant's guilt or innocence of felony murder.

Furthermore, during closing argument, the State emphasized what happened with the other children:

> I mean, a common scheme. I mean, it's pretty evident the nap nazi up here wanted those kids asleep from noon until 3:00, and she was going to make it happen. She was going to dope those kids up so they got to sleep so she could do whatever she

> wanted around the house. She made the bottles. You had her testimony from that. She was the one that was in charge for the medicine. If those kids got it, she was in charge of it. She told you it was her business, and her business was putting kids to sleep, and she was good at it, because she used medication, again an act clearly dangerous to human life. You cannot give small children medicine to make them sleep to make your life easier, and then if it wasn't bad, if it wasn't an act clearly dangerous to human life, why didn't she tell the parents? Because she knew, she knew it was wrong. And then the other reason you can consider it — you can go back there and talk about all these kids, all of them. I mean, their tests are in evidence. Absence of mistake, that's why they matter. This was no mistake. This is what she did. This was her MO.

Rep. R. vol. 8, 25.

> And then just to make her day easier, she gave them — she doped them up. She doped them up so she could have a couple of hours of quiet. You've heard about some of these kids. I mean, [D.S.], the shakes, he was having seizures, the constant congestion. Did you-all hear from one parent that didn't talk about — maybe there were two or three that didn't talk about some type of ear infections or constant mucus. Remember what Dr. Lykissa said . . . it's a production — it's a side effect of taking too much Diphenhydramine.

Id. at 26.

> About the only thing that that defense expert said yesterday that made any sense was talking about clusters, because when you have clusters, what you look for is one common denominator, and the common denominator is sitting right over there, and she sat there and lied to you yesterday. She lied to you, because she did it, because she is the one thing that is common between every one of those kids and [C.F.]. She is the one thing that binds all this together. She is the one person that had opportunity to dose every one of those kids, and she admitted that to you on the stand.

Id. at 27. During rebuttal argument, the State added:

> Marian had other plans. She wanted — it was her time. So as she checked — as she cashed all those checks, taking in her $93,000 while she's dosing kids every single day with Benadryl or Melatonin, whatever she was putting in. We know for sure we have Diphenhydramine, because we have tests for that, because that's what we tested for. So every single day, she would give those kids their bottles . . . Every single day she made those bottles and she had put some type of sleep aid, whether it was Diphenhydramine, Melatonin, whatever she could find, she would put in those bottles so those kids would sleep. And when they didn't sleep, she complained.

> . . .
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> And what about these children? Cystic fibrosis testing? [R.R.'s mother] told you about [R.R.]'s testing. What about [M.J.'s family]? [M.J.] had a violent episode of vomiting, and they had to take her to the hospital, and no one could figure out what it was. And worse yet, what about little [D.S.]? This little boy was having seizures, he was having withdrawals, he was having tremors. One day he couldn't move his arm, and his levels were so high the instrument couldn't even register any more. And you know how you know how narcissistic she is and how much Marian Fraser does not care about these children, is that she knew every single time these kids had something wrong with them, and she continuously did it over and over and over again[,]
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> . . .
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> every single day, just like Dr. Lykissa told you. This is not a one-time dosage. The poison is in the dosage amount, not the medicine. These are very, very high amounts. Take the tests back there with you. They are high. This is not a parent giving their children half a teaspoon of Dimetapp. Every single day, knowing these kids are sick, she keeps doing it. And you want to know why [C.F.] had a cough, because she had Diphenhydramine in her body. That's why she had a cough. It causes congestion, and she was coughing. So not only did she keep dosing those kids when she knows how sick they are, she's dosing those kids after [C.F.] died. It could have been any one of these children.

Id. at 54–56. Thus, the State's case was that Appellant gave diphenhydramine not just to C.F., but to all of the other children as well. From the circumstantial evidence that Appellant gave the children diphenhydramine, the medical testimony describing what diphenhydramine could do, and the testimony from the children's parents about the various maladies suffered by their children while in the care of Appellant which cleared up after leaving Appellant's care, the jury could infer that Appellant caused the children to ingest diphenhydramine and by doing so either caused those children bodily injury or serious bodily injury, or placed the children in imminent danger of death, bodily injury, or physical or mental impairment.

As for the mental state element of the underlying offenses, Appellant testified that she was

aware that diphenhydramine was harmful to young children. The jury could infer that Appellant disregarded the risk from the drug because there was circumstantial evidence indicating that Appellant gave the drug to the children. Thus, the jury could infer that Appellant was reckless, and the jury could rationally conclude that Appellant recklessly caused serious bodily injury to the other children or recklessly endangered the other children. The underlying felonies were established, and those felonies were committed against children other than C.F.

Thus, the indictment alleged and the proof showed that Appellant was engaged in felonious criminal conduct, namely, injury to a child or endangering a child, at the time C.F. was killed. The State's case was that Appellant regularly and systematically administered diphenhydramine to a dozen children, not just C.F., in order to sedate them for their designated afternoon nap time. There was a showing of felonious criminal conduct other than the assault which caused the homicide. The victims of Appellant's underlying felonies were children other than C.F. Appellant's acts of injury to a child or endangering a child and the act that caused C.F.'s death were not one and the same.

The evidence presented by the State to the jury showed more than one felonious or dangerous act. The evidence showed that Appellant committed multiple felonies against the larger group of children, not only to C.F. The felonies and the dangerous act are not one and the same.

V — Conclusion

In conclusion, I believe that our felony murder statute, § 19.02(b)(3), requires proof of an underlying felony, that is not manslaughter, that is also separate and distinct from the act clearly dangerous to human life that caused the death. Our felony murder jurisprudence should be revisited. In this case, however, there is evidence from which the jury could find that Appellant committed multiple underlying felonies, that are not manslaughter, that are also separate and distinct from the

act clearly dangerous to human life which caused the death of C.F.

With these thoughts, I concur in the judgment of the Court.

Filed: September 11, 2019
Publish