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

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, YEARY, NEWELL AND KEEL, JJ., joined. NEWELL, J., filed a concurring opinion in which HERVEY and RICHARDSON, JJ., joined. WALKER, J., filed a concurring opinion. SLAUGHTER, J., filed a dissenting opinion.

We held in *Johnson* that any felony may serve as a predicate for felony murder as long as it is not manslaughter or a lesser-included offense of manslaughter.[1] We also that held that, for the purpose of serving as a predicate felony, "[t]he offense of injury to a child is not a lesser included

[1] *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999). *See also* TEX. PENAL CODE § 19.02(b)(3).

offense of manslaughter."[2] Nevertheless, the court of appeals in this case concluded that certain versions of the offense of injury to a child can be lesser-included offenses of manslaughter for the purpose of the felony-murder statute.[3] The court of appeals held that the same could be said for certain versions of the child-endangerment offense.[4] We disagree and reverse the judgment of the court of appeals. In assessing whether a particular felony is a lesser-included offense of manslaughter for the purpose of the felony-murder statute's manslaughter exclusion, a court must consider the offense of manslaughter only by its statutory elements. Because the victim's status as a child is necessarily an element of the offenses of injury to a child and child endangerment, and that element is not within (or deducible from) the statutory elements of manslaughter, the offenses of injury to a child and child endangerment are never lesser-included offenses of manslaughter for the purpose of the felony-murder statute's manslaughter exclusion.

I. BACKGROUND

A. Facts Leading to Prosecution

Appellant ran a licensed day care center out of her home. She provided care for twelve children, all typically under two years of age. During an afternoon nap at the center, one of the children, C.F., stopped breathing, vomited, and became unconscious. Emergency personnel transported C.F. to the hospital, but despite the best efforts of the doctors, she died. A toxicology report revealed that C.F. had a high level of the drug diphenhydramine in her body. Diphenhydramine is an antihistamine common in certain over-the-counter drugs such as Benadryl.

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[2] *Johnson*, *supra*.

[3] *Fraser v. State*, 523 S.W.3d 320, 329-33 (Tex. App.–Amarillo 2017).

[4] *Id.* at 329-34.

Testing of other children at the day care center showed that most of them had been exposed to diphenhydramine.

B. Indictment and Jury Charge

Appellant was indicted for felony murder. The felony-murder count contained two paragraphs, each alleging a different predicate felony. The first alleged the predicate felony of injury to a child, as follows:

> [Appellant] . . . 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."

The second paragraph contained identical language, except that it alleged the predicate felony of endangering a child.[5]

The abstract portion of the jury charge tracked the statutory language of the offense of felony murder.[6] It also instructed the jury on the elements of the predicate felony offenses of injury to a child and endangering a child, and those elements included all four of the potentially applicable culpable mental states for those offenses: intentionally, knowingly, recklessly, and with criminal

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[5] The indictment also contained a second "count" that alleged that Appellant "intentionally or knowingly caused serious bodily injury to C.F., a child younger than 15 years of age," and the indictment contained a separate "deadly weapon" allegation. This second count and the deadly-weapon allegation are not relevant to our resolution of the issue before us.

[6] The jury was instructed that a person commits the offense of murder if she "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, she commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." *See* TEX. PENAL CODE § 19.02(b)(3).

negligence.[7] The application paragraph of the jury charge listed injury to a child and endangering a child as alternative methods of satisfying the predicate felony element of felony murder.

C. Appeal

The court of appeals began its analysis by saying, "While 'injury to a child' and 'child endangerment' *can* qualify as the underlying felony in a felony-murder prosecution, the two offenses do not qualify as such *ipso facto*."[8] In support of that contention, the court of appeals discussed our opinions in *Lawson* and *Johnson.*[9] The court pointed out that *Lawson* held that an "intentional" or "knowing" aggravated assault could support a felony-murder conviction because that kind of aggravated assault was not a lesser-included offense of manslaughter (because it requires a greater culpable mental state than the "reckless" culpable mental state required by manslaughter).[10] The court of appeals believed that this distinction applied to the holding in *Johnson* (that injury to a child was not a lesser-included offense of manslaughter) because *Johnson* involved a prosecution only for *intentionally* causing injury to a child.[11] The court of appeals acknowledged that *Johnson* did not

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[7] The jury was instructed that a person commits the felony offense of injury to a child if she "intentionally, knowingly, recklessly, or by criminal negligence, causes bodily injury or serious bodily injury to a child fourteen years old or younger." *See* TEX. PENAL CODE § 22.04(a), (c)(1). The jury was also instructed that a person commits the felony offense of endangering a child if she "intentionally, knowingly, recklessly, or with criminal negligence, engages in conduct that places a child younger than fifteen years old in imminent danger of death, bodily injury, or physical or mental impairment." *See* TEX. PENAL CODE § 22.041(c).

[8] *Fraser*, 523 S.W.3d at 329-30 (emphasis in original).

[9] *Id.* at 330, 332 (discussing *Lawson v. State*, 64 S.W.3d 396 (Tex. Crim. App. 2001) and *Johnson*, cited at *supra* at n.1).

[10] *Id.* at 332 (citing *Lawson*, 64 S.W.3d at 397, and with respect to recklessness, referring to *Garrett v. State*, 573 S.W.2d 543 (Tex. Crim. App. 1978)).

[11] *Id.* at 330, 332.

mention the culpable mental state applicable to the injury-to-a-child offense at issue in that case,[12] but the court of appeals reviewed the clerk's record in *Johnson* and found the "intentional" culpable mental state in the jury charge.[13] Consequently, the court of appeals concluded that *Johnson* left open the possibility of reckless or criminally negligent injury to a child being a lesser-included offense of manslaughter.[14]

The court of appeals further concluded that the offense of reckless or criminally negligent injury to a child is in fact a lesser-included offense of manslaughter because, the court claimed, it is established by proof of the same facts required to establish manslaughter and differs only in the respect that a less serious injury or risk of injury suffices to establish its commission.[15] According to the court of appeals, reckless or criminally negligent injury to a child is established by the same facts as manslaughter because "every 'child' is an 'individual' and every 'death' is both a 'serious bodily injury' and a 'bodily injury.'"[16] The court of appeals engaged in a similar analysis with respect to the offense of endangering a child through recklessness or criminal negligence.[17]

Looking at the jury charge in Appellant's case, the court of appeals observed that the predicate felonies (injury to a child and endangering a child) contained all four of the statutory

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[12] *Id.* at 332 & n.11.

[13] *Id.* at 332 n.11.

[14] *Id.* at 332-33.

[15] *Id.* at 333.

[16] *Id.*

[17] *Id.* at 333-34.

culpable mental states: intent, knowledge, recklessness, and criminal negligence.[18] Given the reasoning discussed above, the court of appeals concluded that the predicate felonies were valid on some of the theories submitted to the jury (intentional or knowing conduct) but invalid on other theories (reckless or criminally negligent conduct).[19] Because it found that the jury charge contained invalid theories of felony murder, the court of appeals reversed the conviction and remanded the case for a new trial.[20]

D. Discretionary Review

The State contends that injury to a child and endangering a child are never lesser-included offenses of manslaughter because they include the element that the victim is a child and manslaughter does not include that element. Appellant contends that the reckless and criminally negligent versions of the offenses of injury to a child and endangering a child are lesser-included offenses of manslaughter *in this indictment*. She claims that we should use the cognate-pleadings test from *Hall*[21] to determine whether the alleged predicate felonies are lesser-included offenses and that, because the victim's status as a child is in the indictment, that status has to be incorporated as one of the elements of manslaughter. She argues that this result is required by this Court's analysis in *Salazar*[22] that an offense is lesser-included if it can be deduced from the allegations in the

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[18] *Id.* at 336.

[19] *Id.*

[20] *Id.* The court of appeals concluded that the record contained evidence supporting a finding of reckless or criminally negligent conduct. *Id.* at 334.

[21] *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007).

[22] *Salazar v. State*, 284 S.W.3d 874 (Tex. Crim. App. 2009).

indictment and that the result is also supported by appellate court decisions holding injury to a child to be a lesser-included offense of capital murder when the victim is alleged in the indictment to be a child.

II. ANALYSIS

A. Cognate Pleadings Test Inapplicable

Under the cognate-pleadings test, the statutory elements of an offense and non-statutory allegations in the indictment combine to describe what the defendant is charged with.[23] Consequently, as long as all of the elements of a purported lesser offense are contained (or deducible from what is contained) in the indictment, then the purported lesser offense can be said to be "lesser-included" of the indicted offense.[24] This allows a defendant a broader ability to obtain the submission of a lesser-included offense than if he were limited to the statutory elements of the charged offense. Consequently, if the victim's status as a "child" is included as a non-statutory allegation in the indictment, then it would be an element of the charged offense for the purpose of determining what lesser-included offenses may be submitted in the jury charge.[25]

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[23] *Hall*, 225 S.W.3d at 534 (quoting *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Cr. App. 1994): "Statutory elements will, of course, always make up a part of the accusatory pleading, but additional non-statutory allegations are necessary in every case to specify the unique offense with which the defendant is charged.").

[24] *Id.* at 535 ("This comports with the pleadings approach: the elements and the facts alleged in the charging instrument are used to find lesser-included offenses; therefore, the elements of the lesser offense do not have to be pleaded if they can be deduced from the facts alleged in the indictment.").

[25] *See State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013) (quoting *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009): "An offense is a lesser-included offense . . . if the indictment for the greater-inclusive offense . . . alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for the purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced.").

But Appellant's indictment in this case is not for manslaughter; it is for felony murder. And the claimed error is not that the trial court failed to submit a lesser-included-offense instruction. Appellant's claim is that the injury-to-a-child offense, as pled, does not qualify as a valid predicate for felony murder. *Hall* and *Salazar* involved defendants who sought the submission of a lesser-included offense, and those cases compared the charged offense to the requested lesser offense.[26] The same is true for the capital murder cases in which the defendant requests the lesser-included offense of injury to a child.[27] In this case, however, the charged offense is not being compared to anything. Instead, the predicate felonies (injury to a child and endangering a child), which are themselves lesser-included offenses of the charged offense, are compared to an uncharged statutory offense (manslaughter) that is disqualified from being a predicate felony.

The cognate-pleadings test allows a court to look to non-statutory elements only for the charged offense; lesser offenses are examined only for their statutory elements.[28] It is not clear whether manslaughter is a lesser-included offense of felony-murder, but that is not something we have to decide here. Manslaughter is a less serious offense than felony murder, and it is at least true that manslaughter is more like a lesser-included offense of felony murder than a stand-in for felony murder. Further, the hypothetical nature of the manslaughter offense would suggest the appropriateness of applying a strict statutory approach to determining its elements.

Declining to add elements to manslaughter makes sense when one considers that a typical

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[26] *See Salazar*, 284 S.W.3d at 878-80; *Hall*, 225 S.W.3d at 536.

[27] *See Lucio v. State*, 351 S.W.3d 878, 880, 896 n.19 (Tex. Crim. App. 2011).

[28] *Ex parte Castillo*, 465 S.W.3d 165, 169 (Tex. Crim. App. 2015) (lesser-included offense inquiry "requires us to compare the elements of the greater offense as pled to the statutory elements of the potential lesser-included offense in the abstract").

feature of a lesser-included offense is the lack of at least one element of the charged offense. Why would we use the indictment to add extra elements to a lesser-included offense when a lesser-included offense is not expected to have all of the elements in the indictment in the first place? And even viewing manslaughter as a hypothetical offense rather than a lesser-included offense, why would it need to import extra elements from the indictment?

Moreover, the victim's status as a child is a statutory element of the predicate felonies.[29] Requiring the hypothetical manslaughter offense to import this statutory element would be bootstrapping: the element would become part of manslaughter simply because it is part of the predicate felony. If one element of the predicate felony can be added to the hypothetical offense of manslaughter, why not all elements of the predicate felony? The answer is that doing so would nullify the felony-murder statute by making all felonies ineligible for use in the statute. But there is no principled reason to import some elements of a predicate felony but not others. The only principled approach to the felony-murder statute's manslaughter exclusion is to look solely to the statutory elements of manslaughter in determining lesser-included offenses. Consequently, if the victim's status as a child is not an element of, or deducible from, the statutory elements of manslaughter, then the predicate felonies that include the "child" element are not lesser-included offenses of manslaughter under the manslaughter exclusion.[30]

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[29] The victim's status as a child is not actually a non-statutory fact. The only reason the victim's status as a child is apparent from the indictment is because "child" is part of the *title* of each of the predicate felonies. *See* TEX. PENAL CODE §§ 22.04 (title), 22.041 (title). The statutory elements of the respective predicate felonies are simply being incorporated by reference to their titles.

[30] Whether the "child" element of the predicate felonies is contained in or deducible from the statutory elements of manslaughter is an issue we address in the next section.

This discussion has no effect on the ability of a defendant to obtain a lesser-included offense under a manslaughter indictment. Under the cognate-pleadings test, if a manslaughter indictment contains extra averments that cause it to encompass an offense that would not otherwise be a lesser-included offense under manslaughter's statutory elements, a defendant could nevertheless obtain a lesser-included instruction on the encompassed offense.[31] What we hold here is that the cognate-pleadings test does not apply to the manslaughter exclusion in the felony-murder statute. The cognate-pleadings test cannot be used to import the "child" element into manslaughter for the purpose of the manslaughter exclusion if the "child" element is not contained in or deducible from the statutory elements of manslaughter.

B. "Child" Element Not Within or Deducible from Statutory Elements of Manslaughter

All versions of the predicate felonies of injury to a child and endangering a child require proof that the victim was a child.[32] The court of appeals indicated that the "child" element of the predicate felonies is deducible from the elements of manslaughter because every "child" is an "individual."[33] In doing so, the court of appeals engaged in a logical fallacy. All children are individuals, but not all individuals are children. Status as a "child" is an extra fact beyond simply being an "individual."[34] The manslaughter statute does not require proof of that extra fact, as it

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[31] *See supra* at n.25.

[32] TEX. PENAL CODE §§ 22.04(a), (c)(1) ("child" defined as "a person 14 years of age or younger"), 22.041(c) ("a child younger than 15 years").

[33] *See supra* at n.16 and accompanying text.

[34] *See Ochoa v. State*, 982 S.W.2d 904, 910 (Tex. Crim. App. 1998) (Keller, J., concurring) ("The element 'a child under age seventeen' is logically a lesser-included fact of the element 'a child under age fourteen.'").

simply requires that a person "recklessly causes the death of an individual."[35] Consequently, compared to the manslaughter offense in the abstract, injury to a child and endangering a child are never lesser-included offenses.

The court of appeals relied on *Lawson* for the proposition that the culpable mental state was crucial to determining what was a lesser-included offense of manslaughter.[36] And for the predicate felony in *Lawson*, aggravated assault,[37] that is sometimes true. At least one version of aggravated assault *is* a lesser-included offense of manslaughter in the abstract—when the defendant acts recklessly and causes serious bodily injury.[38] The culpable mental state matters when the predicate felony is aggravated assault because the higher culpable mental state of intentional or knowing makes aggravated assault *not* a lesser-included offense of manslaughter.[39] But the predicate offenses at issue in the present case are not aggravated assault, and they contain the "child" element that aggravated assault does not contain. The court of appeals erred in relying upon *Lawson* to reach a result at odds with *Johnson*.[40]

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[35] TEX. PENAL CODE § 19.04.

[36] *See supra* at nn.10-14 and accompanying text.

[37] *See* 64 S.W.3d at 396.

[38] *See* TEX. PENAL CODE §§ 22.01(a)(1) ("A person commits an offense if the person . . . recklessly causes bodily injury to another"), 22.02(a)(1) ("A person commits an offense if the person commits assault as defined in § 22.01 and the person . . . causes serious bodily injury to another.").

[39] *See Lawson*, 64 S.W.3d at 397. Some legal theories of aggravated assault may contain extra elements aside from the culpable mental state. *See* TEX. PENAL CODE §§ 22.01(b)-(c), 22.02(b).

[40] The dissent seeks to resolve the case on a different argument: that the act clearly dangerous to human life must be separate from the underlying felony. We have already rejected what was essentially the same argument in *Johnson*. There, we discussed the claim that the "underlying felony

As a result of its holding, the court of appeals appears to have left one of Appellant's claims unresolved.[41] We reverse the judgment of the court of appeals and remand the case to address this remaining claim.

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has to be an act separate and apart from the assault resulting in death" also known as the "merger doctrine." 4 S.W.3d at 255-56. We discussed two cases that rejected the notion that the dangerous act must be separate from the underlying felony. *Id.* at 257-58 (discussing *Murphy v. State*, 665 S.W.2d 116 (Tex. Crim. App. 1983) and *Aguirre v. State*, 732 S.W.2d 320, 324 (Tex. Crim. App. 1982) (op. on reh'g)). Those cases involved the offenses of arson and criminal mischief, where the dangerous act, in each case respectively, was setting the fire or blowing a hole through a door with a shotgun. *Id.* That discussion illustrates that the separate-act requirement envisioned by the dissent would prevent many legitimate felony-murder prosecutions involving the underlying offenses of arson and criminal mischief because the dangerous act that causes death and the act constituting the underlying felony are usually the same. The dissent's proposed separate-act requirement also does not account for the "attempt" language in the felony-murder statute. *See* TEX. PENAL CODE § 19.02(b)(3) ("commits or *attempts* to commit a felony . . . and in the course and furtherance of the commission or *attempt*, he commits an act clearly dangerous to human life . . .") (emphasis added). Any dangerous act that is in the course and furtherance of an attempt would be part of the attempt, and so the dissent's requirement would read the attempt language out of the statute.

[41] *See Fraser*, 523 S.W.3d at 341-42 (Appellant's claim that the definition of "reckless" in the jury charge was overly broad).