Affirmed as Modified and Memorandum Opinion filed October 26, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00302-CR

BILLY POLASEK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 155th District Court
Fayette County, Texas
Trial Court Cause No. 2021R-179

MEMORANDUM OPINION

Appellant Billy Joel Polasek appeals his conviction for felony murder contending in four issues that (1) the evidence is insufficient to support his conviction; (2) the jury charge erroneously authorized the jury to convict Appellant based on an invalid theory of felony murder; and (3) the court erroneously ordered Appellant to pay a "court appointed attorney fee."[1] We affirm the trial court's

[1] This appeal was transferred to the Fourteenth Court of Appeals from the Third Court of Appeals. In cases transferred by the Supreme Court of Texas from one court of appeals to

judgment as modified.

BACKGROUND

After Appellant's seven-month-old godchild died while he was in Appellant's care, Appellant was indicted for capital murder and felony murder. The felony murder count alleged the predicate felony of injury to a child, as follows:

> BILLY JOEL POLASEK, hereinafter referred to as Defendant, did then and there commit or attempt to commit the felony offense of injury to a child, by intentionally, knowingly, recklessly, or with criminal negligence, causing serious bodily injury to Logan Atkins, a child younger than 14 years of age, by striking the head of Logan Atkins with a blunt object or causing the head of Logan Atkins to strike a blunt object, and while in the course of and in furtherance of the commission of said felony offense the Defendant committed or attempted to commit an act clearly dangerous to human life, to-wit: striking the head of Logan Atkins with a blunt object or causing the head of Logan Atkins to strike a blunt object, which caused the death of an individual, namely, Logan Atkins,

A jury found Appellant guilty of felony murder and assessed his punishment at life imprisonment and a $10,000 fine. *See* Tex. Penal Code Ann. § 19.02(b)(3). The trial court signed a judgment in accordance with the jury's verdict and punishment. The trial court also assessed a "$400.00 court appointed attorney fee" and court costs. Appellant filed a motion for new trial and a timely notice of appeal.

ANALYSIS

I. Sufficiency of the Evidence

In his first issue, Appellant contends the evidence is insufficient to support

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another, the transferee court must decide the case in accordance with the precedent of the transferor court under the principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

his felony-murder conviction because he "did not commit an 'act clearly dangerous to human life' other than the act constituting injury to a child." In his second issue, Appellant argues the evidence is insufficient to support his felony murder conviction because injury to a child cannot serve as the predicate offense for felony murder. However, Appellant does not actually challenge the sufficiency of the evidence. Instead, he asks us to interpret the felony murder statute contrary to binding precedent and then conclude, under his proposed interpretation based on Judge Slaughter's dissenting opinion in *Fraser v. State*, 583 S.W.3d 564 (Tex. Crim. App. 2019) (Slaughter, J., dissenting), that there is insufficient evidence to support his conviction. We decline Appellant's request.

The felony murder statute provides that a person commits murder if he "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, the person 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); *Contreras v. State*, 312 S.W.3d 566, 584 (Tex. Crim. App. 2010). "Essentially, the State must prove (1) an underlying felony, (2) an act clearly dangerous to human life, (3) the death of an individual, (4) causation (the dangerous act causes the death), and (5) a connection between the underlying felony and the dangerous act ('in the course of and in furtherance of . . . or in immediate flight from')." *Contreras*, 312 S.W.3d at 583-84. The offense of injury to a child can qualify as an underlying felony in a felony murder prosecution. *Id*. at 584; *Johnson v. State*, 4 S.W.3d 254, 254-58 (Tex. Crim. App. 1999).

Act Clearly Dangerous to Human Life

Although Appellant asserts in his first issue that the evidence is insufficient to support his conviction because he did not commit an act clearly dangerous to

human life other than the act constituting injury to a child, he nonetheless "acknowledges that this Court is bound to follow the holdings of the Court of Criminal Appeals, and that, for now, *Johnson* remains the law." Appellant also states that "*Johnson*, however, was decided without the benefit of Judge Slaughter's dissenting opinion in *Fraser*, which thoroughly and convincingly demonstrates the Texas Legislature did not intend to allow convictions for felony murder unless the defendant commit[t]ed an act clearly dangerous to human life that was separate and distinct from the predicate felony."

As Appellant concedes, the court of criminal appeals already held that "a defendant may be convicted of the offense of felony murder when the underlying felony is injury to a child and the acts that constitute that offense are the same acts that constitute 'an act clearly dangerous to human life.'" *Johnson*, 4 S.W.3d at 254-58; *see also Gallegos v. State*, No. 14-02-00453-CR, 2003 WL 21353934, at *2 (Tex. App.—Houston [14th Dist.] June 12, 2003, pet. ref'd) (mem. op., not designated for publication). Despite his admission that *Johnson* is binding precedent, Appellant still asks us to consider Judge Slaughter's dissent in the *Fraser* case and interpret the felony murder statute to require that a defendant "commit an act clearly dangerous to human life that was separate and distinct from the predicate felony" before a defendant can be convicted of felony murder.

We decline because, under stare decisis, we are bound to follow the precedent established by the court of criminal appeals majority. *See Gardner v. State*, 478 S.W.3d 142, 147 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *see also State ex rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961) ("The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates."); *Mason v. State*, 416 S.W.3d

720, 728 n.10 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("When the Court of Criminal Appeals has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation under the dictates of vertical stare decisis."); *Sherry v. State*, No. 03-13-00126-CR, 2013 WL 4487559, at *1 (Tex. App.—Austin Aug. 16, 2013, pet. ref'd) (mem op., not designated for publication) ("As an intermediate court of appeals, we are bound to follow the precedent of the court of criminal appeals."); *Womble v. State*, No. 03-12-00289-CR, 2013 WL 4007087, at *2 n.1 (Tex. App.—Austin July 31, 2013, pet. ref'd) (mem. op., not designated for publication) ("A dissenting opinion has no precedential value.").

Accordingly, we overrule Appellant's first issue.

Predicate Felony

Again citing to the dissenting opinion in *Fraser*, Appellant contends in his second issue that his conviction is not supported by sufficient evidence because injury to a child cannot serve as the predicate offense for felony murder. However, the court of criminal appeals already determined that the offense of injury to a child may be the underlying felony in a felony murder prosecution. *Contreras*, 312 S.W.3d at 584; *Johnson*, 4 S.W.3d at 254-56, 258. And, as we stated above, we are bound by the precedent established by the court of criminal appeals majority. *See Gardner*, 478 S.W.3d at 147; *see also State ex rel. Wilson*, 351 S.W.2d at 894; *Mason*, 416 S.W.3d at 728 n.10; *Sherry*, 2013 WL 4487559, at *1; *Womble*, 2013 WL 4007087, at *2 n.1.

Additionally, several courts of appeals have applied the court of criminal appeals' established holding. *See Bearnth v. State*, 361 S.W.3d 135, 144 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("[t]he offense of 'injury to a child' can qualify as an underlying felony in a felony murder prosecution"); *Gutierrez v.*

State, No. 04-21-00574-CR, 2023 WL 3730335, at *5 (Tex. App.—San Antonio May 31, 2023, no pet.) (mem. op., not designated for publication) (same); *Keating v. State*, No. 01-19-00981-CR, 2022 WL 1787430, at *5 (Tex. App.—Houston [1st Dist.] June 2, 2022, no pet.) (mem. op., not designated for publication) (same); *Gordy v. State*, No. 05-19-00444-CR, 2022 WL 632169, at *3 (Tex. App.—Dallas Mar. 4, 2022, pet. ref'd) (mem. op., not designated for publication) (same); *Jennings v. State*, No. 02-16-00300-CR, 2017 WL 3633992, at *2 (Tex. App.—Fort Worth Aug. 24, 2017, no pet.) (mem. op., not designated for publication) (same); *Hopper v. State*, No. 03-03-00508-CR, 2004 WL 2108665, at *6 (Tex. App.—Austin Sept. 23, 2004, pet. ref'd) (mem. op., not designated for publication) (same).

Accordingly, we overrule Appellant's second issue.

II. Charge Error

Relying on the arguments in his first and second issues, Appellant contends in his third issue that the jury charge erroneously "allowed the jury to convict Appellant of felony murder based on two incorrect interpretations of Sec. 19.02." According to Appellant, the court's charge should have instructed the jury (1) "it could not find Appellant guilty unless it found Appellant committed an act clearly dangerous to human life that was separate and distinct from the commission of the predicate felony"; and (2) "to find Appellant not guilty, because injury to a child cannot serve as a predicate offense for felony murder."

We review complaints of jury charge error in two steps. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Baban v. State*, 672 S.W.3d 655, 656 (Tex. App.—Houston [14th Dist.] 2023, pet. filed); *McCall v. State*, 635 S.W.3d 261, 265-66 (Tex. App.—Austin 2021, pet. ref'd). First, we determine whether error exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex.

Crim. App. 2005) (en banc); *Baban*, 672 S.W.3d at 656; *McCall*, 635 S.W.3d at 265. Second, we review the record to determine whether sufficient harm was caused by the error to require reversal of the conviction. *Ngo*, 175 S.W.3d at 743; *Baban*, 672 S.W.3d at 656; *McCall*, 635 S.W.3d at 266. The degree of harm necessary for reversal depends on whether the appellant preserved error by objecting to the charge. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc) (op. on reh'g). When charge error is not preserved, as in this case, reversal is not required unless the resulting harm is egregious. *Id*.; *Baban*, 672 S.W.3d at 656; *McCall*, 635 S.W.3d at 266.

We rejected Appellant's arguments in issues one and two and concluded that, based on binding precedent, (1) a defendant may be convicted of felony murder when the underlying felony is injury to a child and the acts that constitute that offense are the same acts that constitute "an act clearly dangerous to human life"; and (2) injury to a child may serve as the predicate offense for felony murder. Therefore, there was no charge error in this case.

Accordingly, we overrule Appellant's third issue.

III. Attorney Fee

In his fourth issue, Appellant argues that the assessment of a "court appointed attorney fee" in the amount of $400.00 should be deleted from the trial court's judgment because there is insufficient evidence to support the assessment of such a fee. We agree.

Article 26.05(g) of the Texas Code of Criminal Procedure allows a trial court to order a defendant to re-pay costs of court-appointed legal counsel that the court finds the defendant is able to pay. Tex. Code Crim. Proc. Ann. art. 26.05(g); *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013). Under Article

26.05(g), a defendant's "financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Cates*, 402 S.W.3d at 251 (quoting *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)). Additionally, a "defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs." Tex. Code Crim. Proc. Ann. art. 26.04(p). Thus, court-appointed attorney's fees cannot be assessed against an indigent defendant unless there is proof and a finding that he is no longer indigent. *See Cates*, 402 S.W.3d at 251-52.

In this case, the trial court determined Appellant was indigent and appointed him trial counsel. Further, there appears no finding by the court in the record that Appellant's financial circumstances had materially changed so that he was able to re-pay any amount of the costs of court-appointed legal counsel. Therefore, Appellant is correct that the proper remedy is to reform the trial court's judgment by deleting the $400.00 court-appointed attorney fee from the judgment.

Accordingly, we sustain Appellant's fourth issue.

CONCLUSION

We modify the trial court judgment to delete the court-appointed attorney fee in the amount of $400.00. We affirm the judgment as modified.

/s/ Meagan Hassan
Justice

Panel consists of Justices Jewell, Hassan, and Wilson

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