

CAUSE NO. A18554 & A18555

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
v.	§	KERR COUNTY, TEXAS
	§	
KEVIN WILLIAM FRANKE	§	216 TH JUDICIAL DISTRICT

CCP ART. 27.08 SPECIAL EXCEPTIONS TO INDICTMENT

Kevin William Franke, Defendant, under Code Crim. Pro. 27.08(1) specially
excepts to the indictment.

Special Exception No. 1:

Defendant specially excepts to the following language in Paragraph One of the
indictment: "and the defendant did not voluntarily deliver the child to a designated
emergency infant care provider under Section 262.302 of the Texas Family Code." An
omission cannot be the basis for felony murder. *Rodriguez v. State*, 454 S.W.3d 503, 507
(Tex. Crim. App. 2014).

SUSTAINED _____ OVERRULED _____

Special Exception No. 2:

Defendant objects to the following underlined language in Paragraph Two: "the
defendant committed or attempted to commit the felony offense of endangering a child,
by intentionally, knowingly, recklessly, or with criminal negligence, engage in conduct,
by act or omission, that placed the child, younger than 15 years of age, in imminent
danger of bodily injury, or physical or mental impairment." A conviction for felony

murder under Penal Code § 19.03(2) is not allowed when the underlying felony is manslaughter or a lesser included offense of manslaughter. *Fraser v. State*, 523 S.W.3d 320, 333 (Tex. App - Amarillo 2017, PDR refused).

SUSTAINED _____ OVERRULED _____

Special Exception No. 3:

Defendant objects to the language in Paragraph Two that states “and the defendant did not voluntarily deliver the child to a designated emergency infant care facility under Section 262.303...” An omission (failure to act) cannot form the basis for felony murder. *Rodriguez v. State*, 454 S.W.3d 503, 507 (Tex. Crim. App. 2014).

SUSTAINED _____ OVERRULED _____

ARGUMENT & AUTHORITIES

A conviction for felony murder under § 19.02(3) will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.

A person commits the offense of felony 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 of the attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. (*ital. added*). Penal Code § 19.02(3).

In *Fraser v. State*, 523 S.W.3d 320, 333 (Tex. App. - Amarillo 2017, PDR refused) the court reversed a conviction for felony murder because the underlying offense of

reckless or criminally negligent injury to a child was a lesser-included offense to manslaughter. The defendant operated a child daycare center out of her home. A four month old girl died and toxicology tests revealed toxic levels of diphenhydramine (active ingredient of Benadryl, Tylenol P.M.) in her blood. The indictment and jury charge allowed a conviction based on either reckless or criminally negligent injury to a child, or reckless or criminally negligent endangerment, and the acts that constituted these offenses were the "act clearly dangerous to human life charged in the indictment." "Finding the State's theory of prosecution and arguments, and the court's charge and instructions, allowed for a murder conviction on a basis not authorized by law," the court reversed the conviction. *Fraser*, 325.

A person commits manslaughter if he recklessly causes the death of an individual. Penal Code §19.04. Therefore, the only distinguishing difference between murder and manslaughter is the *mens rea*, or the culpable mental state associated with the result of the defendant's conduct. *Fraser*, 328, citing *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013). 19.02(b)(3), the underlying felony offense must be an offense other than manslaughter or any lesser-included offense to manslaughter. *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999).

An omission or failure to act cannot support a conviction for felony murder.

Paragraphs One and Two of the indictment includes this language: "the

defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code..." The felony murder statute makes clear that an "act clearly dangerous to human life" must be the cause of death of the victim. An "act" is a voluntary or involuntary bodily movement, while and omission is a "failure to act." *Rodriguez v. State*, 454 S.W.3d 503, 507 (Tex. Crim. App. 2014) (mother's failure to feed or hydrate child could not support felony murder conviction).

CONCLUSION & PRAYER

1. Accordingly, Defendant asks the Court to order the State to amend the indictment within ten days as follows:
 - a. In Paragraph One delete the language "the defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code..."
 - b. In Paragraph 2 delete the language "recklessly, or with criminal negligence " and the language "the defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code..."

Respectfully submitted,

Richard L. Ellison, PC

/s/ Richard L. Ellison

500 Main Street Suite J

Kerrville, Texas 78028

State Bar No. 06580700

Telephone: 830.792.5601

Facsimile: 830.792.5602

rellison@richardellisonlaw.com

ATTORNEY FOR DEFENDANT

KEVIN WILLIAM FRANKE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing motion has been served on the 216th District Attorney on July 24, 2019.

/s/ Richard L. Ellison

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ORDER ON DEFENDANT'S SPECIAL EXCEPTIONS TO INDICTMENT

On the 22nd of August 2019 came to be heard the Defendant's Special Exceptions to Indictment. The Defendant appeared by attorney and the State of Texas appeared by her Criminal District Attorney.

After considering the motion, the pleadings and the argument of counsel, the Special Exceptions are GRANTED. The State is ORDERED to amend the indictment within ten days as follows:

- a. In Paragraph One delete the language "the defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code..."
- b. In Paragraph 2 delete the language "recklessly, or with criminal negligence," and the language "the defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code..."

SIGNED AND ENTERED on this ____ day of August, 2019.

N. Keith Williams

Prepared by and Entry Requested:

/s/ Richard L. Ellison

SBOT: 06580700

Richard L. Ellison, P.C.

Broadway Bank Building

500 Main St., Suite J

Kerrville, Texas 78028

Tel. (830) 792-5601

Fax. (830) 792-5602

rellison@richardellisonlaw.com

Lucy Wilke 830.896.2620 Fax

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ORDER SETTING HEARING

Defendant's Special Exceptions to the Indictment is set for oral hearing on the 22nd day of August, 2019 at 8:30 a.m. in the 216th Judicial District Court of Kerr County, Texas.

SIGNED this ____ day of February, 2019.

N. Keith Williams, District Judge

Prepared by and Entry Requested:

SBOT: 06580700
/s/ Richard L. Ellison
Richard L. Ellison, P.C.
500 Main St., Suite J
Kerrville, Texas 78028
Tel. (830) 792-5601
Fax. (830) 792-5602
rellison@richardellisonlaw.com

cc: Lucy Wilke by fax to 896.2620