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

NEWELL, J., filed a concurring opinion in which Hervey and Richardson, JJ., joined.

We have previously considered "the merger doctrine" in the context of felony murder cases where there is little dispute that the defendant has committed an act clearly dangerous to human life. For example, we upheld a felony murder conviction based upon the underlying offense of arson where the defendant had set fire to a house causing the death of

someone inside it.[1] And, we upheld a felony murder conviction based upon intentional injury to a child where the defendant beat the child with a blunt object.[2] In such circumstances, it is easy to forget that the statute requires proof of both the commission of a felony and an act clearly dangerous to human life even if proof of the former can satisfy the latter. Holding that there is only a very limited "merger doctrine" under the statute doesn't mean that the commission of a felony always constitutes an act clearly dangerous to human life.[3]

Indeed, that is what makes this case challenging. It is not so obvious that the act alleged is one that is clearly dangerous to human life. Sure, most reasonable people would agree that it is risky to give a child Benadryl simply to make the child sleep even though the instructions warn against it. Although such conduct may be dangerous–and in extreme cases like this one cause death–depending on how it is administered it may cause no lasting harm at all. Without knowing how the antihistamine was administered and over what time period, I question

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[1] *Murphy v. State*, 665 S.W.2d 116, 120 (Tex. Crim. App. 1983).

[2] *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999).

[3] *See, e.g., Rodriguez v. State*, 454 S.W.3d 503, 508 (Tex. Crim. App. 2014) (holding that criminally negligent injury to a child by omission did not constitute an affirmative act clearly dangerous to human life).

the ability to infer that the person who gave the medication to the child committed "an act clearly dangerous to human life"—even if it's undisputed that the person committed the felony offense of injury to a child. Further, whatever else can be said of feeding over-the-counter medication contrary to the provided instructions, it is qualitatively different conduct than setting fire to a house that might have someone inside or beating a child with a blunt object.

However, Appellant does not ask us to consider whether the evidence in this case was sufficient to establish that she had committed an act clearly dangerous to human life. Instead, she asks us to re-examine our prior holding that limits the court-made "merger doctrine" to the text of the statute. And in that regard, I join the Court because it correctly resolves only what is before it. While I agree that the text of the statute allows for a conviction for felony murder when the underlying felony is separate from the act clearly dangerous to human life, the statute does not expressly require a separate act. After all, the statute reads "commit an act" not "commit a separate act."[4]

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[4] TEX. PENAL CODE § 19.02(b)(3) (A person commits an offense 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, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.").

Further, we held in 1999 that the only statutory restriction on the type of felony that forms the basis of a felony murder conviction is either manslaughter or a lesser-included offense of manslaughter.[5] If our interpretation of the felony murder statute was incorrect in 1999, our Legislature has had multiple opportunities to fix the statute since then.[6] Given our Legislature's inaction, I see little reason to reconsider our interpretation of the statute. This Court is not free to substitute our policy preferences for those of the Legislature.[7] Writing a more expansive version of the merger doctrine into the statute than the statutory text requires is beyond the authority of this Court.

With these thoughts, I join the Court's opinion.

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[5] *Johnson*, 4 S.W.3d at 258.

[6] *See, e.g.*, *Southwestern Bell Telephone Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) ("We have observed that 'in the area of statutory construction, the doctrine of *stare decisis* has its greatest force' because the Legislature can rectify a court's mistake, and if the Legislature does not do so, there is little reason for the court to reconsider whether its decision was correct.") (quoting *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968)).

[7] *Parnham v. Hughes*, 441 U.S. 347, 351 (1979).