IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 86306
	)	
BRANDY BURRELL,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE PATRICK K. ROBB, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On October 26, 2001, Isaiah Washington, Sr., assaulted his two-year-old son, Isaiah, Jr., resulting in the child's death several hours later. In addition to charging Isaiah, Sr. with murder, the State charged the mother, Brandy Burrell, Appellant, with felony murder based on the predicate act of child endangerment for "placing [her son] in direct contact with [his father]" which "allowed the child to be assaulted by [his father]." Brandy was bench-tried before the Honorable Patrick K. Robb, who found her guilty of felony murder, Section 565.021,[1] and first degree child endangerment, Section 568.045. Judge Robb sentenced Brandy to life imprisonment and seven years, respectively. After the Missouri Court of Appeals, Western District, issued its opinion in WD62062, reversing Appellant's convictions for felony murder and first degree child endangerment and entering a conviction for second degree child endangerment, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] Statutory references are to RSMo 2000, unless otherwise noted.

INTRODUCTION

The facts of Ms. Burrell's case are unique. The Western District acknowledged the limited scope of its *State v. Burrell* decision when it refused to apply its holding to another felony murder/child endangerment case one month later: *State v. Fuelling*, 145 S.W.3d 464 (Mo. App., W.D. 2004). In an extended five-paragraph footnote in *Fuelling*, the Western District explained why *Burrell* and *Fuelling* are different, based in large part upon the State's charging instruments and the amount of proof presented at trial. This Court denied Ms. Fuelling's transfer application, apparently unpersuaded that *Fuelling* and *Burrell* are in conflict.

The State was bound by the way it charged Ms. Burrell, and it failed to prove that Isaiah, Jr. was practically certain to be abused on the date charged by virtue of "contact" with Isaiah, Sr. alone. While the evidence did not show that "contact" was "practically certain" to result in abuse, the Western District found that the evidence did support a finding that exposing the child to Isaiah, Sr. posed a "substantial and unjustifiable risk" that Isaiah, Sr. would abuse him and that Ms. Burrell "should have been aware" of that risk. Therefore, it found sufficient evidence for second degree child endangerment.

STATEMENT OF FACTS

At the end of 2001, Brandy Burrell had known Isaiah Washington, Sr. for almost five years (Ex. 26).[2] They had been together for a year when she became pregnant with their son (Ex. 26). Brandy's son was named Isaiah, Jr., after his father (Tr. 121-122, 154-155).

In 1999, Brandy had been placed on probation for marijuana possession and while she was getting treatment for that, Isaiah, Jr., lived with Isaiah, Sr.'s aunt, Virginia Weston (Tr. 168, 361, Ex. 26). During his stay with Ms. Weston, Isaiah, Jr. also would spend Sundays at the home of his paternal grandmother, Diane Washington (Tr. 171). Isaiah Sr. would see his son during those Sunday visits, too (Tr. 171). Brandy did not see Isaiah, Sr. for about a year during this time (Ex. 26).

In the late spring of 2000, Brandy and Isaiah, Sr. reunited (Ex. 26). Brandy got her own apartment in October or November of 2000 (Ex. 26). Everything was fine for awhile, but then Isaiah, Sr. started to get angry at her and their son over little things (Ex. 26). He would hit Brandy for no reason (Ex. 26). He would spank Isaiah, Jr., which sometimes escalated to punching and kicking (Ex. 26, Tr. 350). Brandy tried to stop him, but Isaiah, Sr. would turn and beat on her (Ex. 26).

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[2] Ex. 26 is Brandy's written statement to police, introduced by the State.

The State presented no evidence regarding the frequency, location or severity of Isaiah, Sr.'s inflictions upon Isaiah, Jr. (Tr. 360). Isaiah, Jr. never sustained injuries that required treatment at a hospital (Tr. 361). Brandy was scared to call the police on Isaiah, Sr. (Ex. 26). DFS apparently came to Brandy's house on three different occasions (Ex. 26. Tr. 350-351). The record is unclear as to what prompted the visits or what, if anything, happened as a result of the visits, as the State presented no evidence on this issue.

In September, 2001, Isaiah, Sr. was arrested on drug charges (Ex. 26). When Brandy's probation officer found out, he directed that Isaiah, Sr. could not live with Brandy anymore (Ex. 26, 424-425). The probation officer felt that Isaiah, Sr. was a strain on the household, in that he did not provide any financial assistance, nor did he contribute to the household in any way, there was concern about Isaiah, Sr.'s involvement in drugs, and Brandy had indicated that Isaiah, Sr. abused her (Tr. 58, 424-425). Isaiah, Sr. moved to his mother's house, but he and Brandy still saw each other two or three times a week (Ex. 26).

Brandy's probation officer had originally directed Brandy to have no contact with Isaiah, Sr.; however, that directive was later withdrawn as "unreasonable," when Probation and Parole realized that it could not order a probationer to have "no contact" with a person with whom she

shared a child (Tr. 424). While the probation officer told Brandy that Isaiah, Sr. should move out of Brandy's home, the prosecutor conceded that this directive "had nothing to do with the abuse to [Isaiah, Jr.]." (Tr. 424). Brandy "was allowed to have contact" with Isaiah, Sr., "but she just was not allowed to have him living with her." (Tr. 425).

In October, 2001, Brandy and two-year-old Isaiah, Jr. moved to Cameron, Missouri (Tr. 50, 121-122, 131, 155, 284, 289). On October 26, 2001, Brandy, Isaiah, Jr. and Isaiah, Sr. drove from Cameron to St. Joseph to visit Diane Washington (Tr. 122-123, 155, 187). Isaiah, Sr. is the oldest of Diane's six children (Tr. 154). Her other five children were still living with her (Tr. 153-154).

Willie Washington, the second oldest at 18, was getting ready for work when his brother's family arrived (Tr. 123, 139-141, 154, 161). Willie could hear his older brother screaming and yelling (Tr. 123). Diane also heard Isaiah, Sr. "hollering and carrying on" (Tr. 156). He was calling Isaiah, Jr. "all kinds of names" and Isaiah, Jr. was crying (Tr. 123). Apparently, Isaiah, Jr. had said a bad word on the way into the house (Ex. 26).

All of a sudden, Isaiah, Sr. kicked his son in the buttocks sending him up the flight of stairs which led to Diane's apartment (Tr. 124, 134). "He went flying like superman," landing on his belly (Tr. 124-125). Diane

saw Isaiah, Jr. fly into the middle of the floor onto his stomach (Tr. 157-158). Isaiah, Sr. told his son to get up in a "real harsh" voice (Tr. 126). As Isaiah, Jr. tried to get up, his father picked him up and slammed him to the floor (Tr. 126). The entire incident happened very quickly, lasting only a matter of seconds (Tr. 135, 172).[3]

Brandy's location at the time of the kick was a subject of dispute at trial. According to Willie, Brandy was already in the dining room and "she just stood there" (Tr. 125, 135, 141). Willie said that neither Brandy nor Diane said or did anything (Tr. 126-128). But according to Diane, Isaiah, Jr. was the first person to come into the room and that Brandy was behind Isaiah, Sr. on the stairs (Tr. 158-159, 167-168). Brandy came into the room after Isaiah, Sr. had kicked Isaiah, Jr. into the room (Tr. 158-159, 167). Diane then saw Isaiah, Sr. place his foot on his son's head (Tr. 159). It happened so fast that she did not have time to get up off the couch (Tr. 171).

When the assault was over, Willie said that he looked at Brandy and asked if she was going to do anything, but she did not respond (Tr. 128). Willie then "got up in [his] brother's face" and told him, "Keep your hands off that child." (Tr. 128, 160-161). Willie took Isaiah, Jr. by the

[3] The State alleged that these actions of Isaiah, Sr. in Buchanan County caused Isaiah, Jr.'s death (Tr. 52).

arm and moved him out of the way (Tr. 129). Isaiah, Sr. began calling Willie "all kinds of names," and they got into a fist fight (Tr. 128, 137, 161).

Diane stepped in between her two sons and told them that she did not want to hear that in her house (Tr. 161). According to Diane, the fist fight began almost immediately -- less than a minute -- after Isaiah, Sr. kicked Isaiah, Jr. into the house (Tr. 168, 172). Willie and Isaiah, Sr. were fist-fighting all over the front room (Tr. 169). Diane called the police (Tr. 129, 143, 161-162, 351-352). When she did, Isaiah, Sr. ordered Brandy to get Isaiah, Jr. so the three of them could leave before the police arrived (Tr. 130, 137, 143, 162, 169). Brandy carried her son down the stairs (Tr. 148, 163).

Officer Santos arrived to investigate (Tr. 144, 148, 169, 187). He spoke to Willie and Diane (Tr. 187). Willie was upset, but Diane only seemed concerned about the property in her apartment (Tr. 190). Both Willie and Diane told him that Isaiah, Jr. was "fine" when he left (Tr. 144, 148, 169). Willie described Isaiah, Jr. as sad and not wanting to leave, but Willie did not notice any injuries or anything wrong with the child (Tr. 146-147). Diane told Officer Santos that Isaiah, Jr. was fine when he left with his parents (Tr. 163-164). Since both Willie and Diane

assured Officer Santos that Isaiah, Jr. was okay, he was not concerned about the child's well-being (Tr. 192).

Isaiah, Sr., Brandy, and Isaiah, Jr. went from Diane's house to Aunt Trina Wilson's house, Diane's sister (Tr. 176-178, 352). Isaiah, Sr. entered Trina's house first, then Brandy and Isaiah, Jr. came in about five minutes later (Tr. 178). When Brandy and Isaiah, Jr. came inside, Isaiah, Sr. was in the bathroom (Tr. 178). Trina noticed a knot on Isaiah, Jr.'s forehead (Tr. 178, 181, 352). She asked Brandy what had happened, and Brandy said that he fell (Tr. 179-180). Trina told Brandy that she should take him to the hospital, and Brandy said that they were going to wait and take him when they got home (Tr. 180).

When they arrived home, Brandy tried to feed Isaiah, Jr. a sandwich, but he would not eat (Ex. 26, Tr. 353). He drank a little milk, stayed up for awhile, and then went to bed (Ex. 26, Tr. 353). Later, Isaiah, Sr. went to wake his son to go to the bathroom (Ex. 26, Tr. 353). Isaiah, Sr. yelled for Brandy because Isaiah, Jr. could not stand on his own and his eyes were rolled back in his head (Ex. 26, Tr. 353). Brandy could see that Isaiah, Jr. was not breathing, and she tried to do CPR (Ex. 26, Tr. 354). Isaiah, Sr. began slapping and kicking at him to try and wake him up (Ex. 26, Tr. 363, 365). While Brandy did CPR, Isaiah, Sr. got dressed (Ex. 26). He then shoved Brandy into a door frame, cutting

her eye, and yelled at her to hurry (Ex. 26, Tr. 354). He yelled that she was going to tell the hospital that Isaiah, Jr. fell and bumped his head (Ex. 26, Tr. 354). Brandy was afraid that her son was dead (Ex. 26).

At midnight, Isaiah, Sr., carried his son, wrapped in a blanket, into the Cameron Community Hospital emergency room (Tr. 95, 102). Isaiah, Jr. was cool, limp, his eyes were fixed and dilated, he was not breathing and he had no pulse (Tr. 96, 103). Attempts to revive him were unsuccessful (Tr. 96-97, 103). He was declared dead at 12:12 a.m. (Tr. 99). It was later determined that Isaiah, Jr. bled to death from acute injuries to his internal organs (Tr. 256, 261).

At the hospital, Isaiah, Sr., Brandy, and two other women were sitting in a small room when Isaiah, Sr. yelled, "I told the -- F-word -- police that the boy fell" and then he instructed someone in the room to stick to the story (Tr. 301-302). Brandy told the emergency room nurse that Isaiah, Jr. fell and hit his head on a coffee table earlier in the day (Tr. 111).

After viewing the body, Brandy and Isaiah, Sr. went to the police station to fill out forms for the coroner (Tr. 278-280). Brandy told the police that Isaiah, Jr. had tripped on the edge of a carpet and hit his head on a coffee table at her residence at 3:00 p.m. the previous day (Tr. 281-282). She said that she kept him awake until 8:00 or 9:00 p.m. and

then allowed him to go to sleep (Tr. 282). She woke him up between 10:00 and 11:00 to go to the rest room (Tr. 282).

Meanwhile, police officers at the hospital took a statement from Willie regarding Isaiah, Sr.'s assault on Isaiah, Jr. (Tr. 283). When this information was relayed to Brandy by the officers at the station, she laid her head down on the table, saying nothing (Tr. 283-284, 293). When they pressed her about her status as a witness to the assault, she asked for an attorney (Tr. 284).

Isaiah, Sr. was arrested at Brandy's apartment on October 29, 2001 (Tr. 311-312). They did not arrest Brandy (Tr. 312). The next morning, Brandy went to the police department to discuss funeral arrangements that had been made for her son (Tr. 313-314). Brandy's mother had made the funeral arrangements without her input and she wanted to discuss whether they could change that (Tr. 315). She also thought that the police probably wanted to talk to her about Isaiah Jr.'s death (Tr. 315).

The police interviewed Brandy for six hours (Tr. 326, 328). Officer Scott Coates interviewed her for the first four hours (Tr. 326). She told him that Isaiah, Jr. had tripped over a piece of loose carpet and hit his head on the coffee table after they had arrived home in Cameron (Tr. 319, 324). Officer Coates knew of the preliminary autopsy findings while

talking to Brandy (Tr. 324). He had seen the photos of Isaiah, Jr., and he knew about the internal injuries (Tr. 325). He confronted Brandy with that information (Tr. 325-326). He also confronted her with witnesses who had observed the bump on his head prior to them returning to Cameron (Tr. 325-326). "She didn't come up with a reasonable explanation for those injuries." (Tr. 326). There came a time when all communication broke down between Officer Coates and Brandy, so he left the room to confer with another officer about using a female investigator to continue the interview (Tr. 326).

Detective Trenny Wilson went to talk to Brandy (Tr. 327). During that interview, Brandy left the room and walked towards the lobby area (Tr. 327-328). Detective Wilson went after her and met her in the hallway and brought Brandy back in the interview room (Tr. 328). Wilson interviewed her for another two hours (Tr. 328). At the end of Detective Wilson's interview, Brandy left the police station (Tr. 327-328). She was not under arrest at the time, and no one followed her (Tr. 327, 329).

Brandy was arrested a week later, on November 6, 2001 (Tr. 329). On November 9, she told jail personnel that she wanted to speak with Officer Coates (Tr. 329). Coates indicated that he was not going to speak with her unless he received a written request (Tr. 329). Brandy filled out

an inmate special request form, and Officer Coates went to talk to her (Tr. 330).

He asked her what she had to tell him that was different from what she already told him (Tr. 331). She said she wanted to tell him the truth (Tr. 331). She wanted to know what was going to happen to her (Tr. 331). She wanted a guarantee or promise about what would happen to her (Tr. 331). He told her he could not make any guarantees (Tr. 332). He asked her again what she wanted to tell him (Tr. 332). Brandy said that Isaiah Sr. had hit or kicked Isaiah, Jr. (Tr. 332, 339).

Officer Coates told her that he would try to speak with the prosecutor in regards to any deals that could be made about her case (Tr. 340). He told her that until he and the prosecutor could evaluate the truthfulness of her entire statement there would not be any promises made (Tr. 340). He read Brandy her the Miranda rights again (Tr. 341). Thereafter, she made the written statement which was admitted as State's Exhibit 26.

The State originally charged Brandy with felony murder predicated on child endangerment for the act of "knowingly associating with Isaiah Washington in the presence of [Isaiah, Jr.] after having been ordered not to associate with Isaiah Washington…" (L.F. 10-12). However, when the parties deposed the supervising probation officer, they discovered that

the "no contact" provision was not in effect and that Brandy was only told that Isaiah, Sr. could not live with her (Tr. 424). Probation & Parole had a "policy discussion" wherein they determined that their "no contact" policy was "unreasonable and that they could no longer order someone who had a child with someone to have no contact with that person because there is a child in the middle of that relationship." (Tr. 424). The trial court confirmed that "she was allowed to have contact…but she just was not allowed to have him living with her" (Tr. 425).

The State amended the charge to state that Brandy "knowingly acted in a manner that created a substantial risk to the life and body and health of [Isaiah, Jr.] by placing [him] in direct contact with Isaiah Washington who defendant has previously seen physically abuse [Isaiah, Jr.] and by so doing defendant allowed the child to be assaulted by Isaiah Washington." (L.F. 17). Brandy waived her right to a jury trial (Tr. 71-75), and she was tried before Judge Patrick K. Robb (Tr. 1 *et. seq*). At the close of all the evidence, defense counsel moved for a judgment of acquittal on both counts, which was denied (Tr. 390). Judge Robb found Brandy guilty of both counts and thereafter sentenced Brandy to life imprisonment for felony murder and seven years for first degree child endangerment (Tr. 410, 436-439). This appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Brandy's motion for judgment of acquittal at the close of all of the evidence and in sentencing her for endangering the welfare of a child in the first degree, § 568.045, because this deprived Brandy of her right to due process, as guaranteed by the U.S. Const., Amends 5 & 14, and the Mo. Const., Art. I, § 10, in that the State failed to prove beyond a reasonable doubt that placing her son, Isaiah, Jr., in contact with his father, would result in an "actual" risk to his life, body or health; or that Brandy, "knowingly" created that risk. While "the potential for harm exists when a victim comes into 'contact' with the person who abused them," such harm is not "practically certain to occur by the contact alone." And, absent sufficient proof of the underlying felony, Brandy's conviction for felony murder must also be reversed.

Carmons v. State, 26 S.W.3d 382 (Mo. App., W.D. 2000);

State v. Wilson, 920 S.W.2d 177 (Mo. App., W.D. 1996);

Ivy v. State, 81 S.W.3d 199 (Mo. App., W.D. 2002);

U.S. Const., Amends 5 & 14; Mo. Const., Art., I, Section 10; and

Sections 562.016 & 568.045.

II.

The trial court erred in overruling Brandy's motion for judgment of acquittal at the close of all of the evidence and in sentencing her for second degree felony murder, § 565.021, because this deprived Brandy of her right to due process, under the 5th and 14th Amendments to the U.S. Constitution, and Article I, § 10 of the Missouri Constitution, in that the State failed to prove beyond a reasonable doubt that Brandy's act of "allowing Isaiah to come in contact" with his father was the proximate cause of death. Isaiah, Sr.'s actions were an intervening cause of his son's death, which was not a direct, natural or reasonably foreseeable consequence of Brandy's action in allowing him to have contact with Isaiah, Jr.

State v. O'Dell, 684 S.W.2d 453 (Mo. App., S.D. 1984);

State v. Moore, 580 S.W.2d 747 (Mo. banc 1979);

Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985);

People v. Lowery, 687 N.E.2d 973 (Ill., 1997);

U.S. Const., Amends 5 & 14;

Mo. Const., Art. I, Section 10; and

Section 565.021.

ARGUMENT

I.

The trial court erred in overruling Brandy's motion for judgment of acquittal at the close of all of the evidence and in sentencing her for endangering the welfare of a child in the first degree, § 568.045, because this deprived Brandy of her right to due process, as guaranteed by the U.S. Const., Amends 5 & 14, and the Mo. Const., Art. I, § 10, in that the State failed to prove beyond a reasonable doubt that placing her son, Isaiah, Jr., in contact with his father, would result in an "actual" risk to his life, body or health; or that Brandy, "knowingly" created that risk. While "the potential for harm exists when a victim comes into 'contact' with the person who abused them," such harm is not "practically certain to occur by the contact alone." And, absent sufficient proof of the underlying felony, Brandy's conviction for felony murder must also be reversed.

The evidence does not support Brandy's conviction for first degree child endangerment, which also served as the predicate felony for Brandy's felony murder conviction. While "the potential for harm exists when a victim comes into 'contact' with the person who abused them," it cannot be said "that harm would occur or would be practically certain to

occur by the contact alone." ***Carmons v. State*, 26 S.W.3d 382, 385 (Mo. App., W.D. 2000)**. By its charging document, the State sought to punish Brandy *only* for placing her child in "contact" with his father on a certain date, thereby allowing the child to be assaulted (L.F. 17). But under the specific circumstances of this case, the State did not prove that Brandy was aware that Isaiah, Jr.'s contact with his father on that date was practically certain to result in abuse.

The Standard of Review

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which she is charged. ***In re Winship*, 397 U.S. 358, 364 (1970)**. The sufficiency of the evidence presented in a judge-tried case is determined by the same standard as in a jury-tried case. ***State v. Price***, **928 S.W.2d 429, 431 (Mo. App., W.D. 1996)**. Therefore, accepting all reasonable inferences supporting the verdict, and disregarding all evidence contrary to the verdict, this court must decide whether there was sufficient evidence from which the trial court could have reasonably found guilt. ***Id.***

The Charge

To sustain a conviction for first degree child endangerment, the state had to prove that Brandy "knowingly act[ed] in a manner that

create[d] a substantial risk to the life, body, or health of a child less than seventeen years old[.]" **Section 568.045.1(1)**; ***Carmons v. State*, 26 S.W.3d at 384**.

The specific factual language of the charge brought by the State is critical to the legal analysis of this issue. "Where the act constituting the crime is specified in the charge, the State is held to proof of that act; and a defendant may be convicted *only on that act*." ***State v. Jackson*, 896 S.W.2d 77, 82 (Mo. App., W.D. 1995)** (emphasis added)**; *State v. Edsall*, 781 S.W.2d 561, 564 (Mo. App., S.D. 1989) (bench trial)**. Brandy was *not* charged with failing to seek medical care for her son following the assault by Isaiah, Sr. Nor was she charged with failing to intervene in that assault. Rather, she was charged with placing Isaiah, Jr. in contact with his father, which contact allowed the child to be assaulted by his father (L.F. 17). Specifically, Brandy was charged with endangering the welfare of a child in the first degree under **§568.045**, for "placing [Isaiah, Jr.] in direct contact with Isaiah Washington who [Brandy] has previously seen physically abuse [Isaiah, Jr.] and by so doing [Brandy] allowed the child to be assaulted by Isaiah Washington." (L.F. 17).

The State clearly explicated its theory during closing argument: "Did she pose a significant risk to the life and body and health of this

child by allowing this child to have contact with Isaiah Washington? Absolutely." (Tr. 399-400). "The only way that she would not be guilty of that is by refusing at all opportunities to place her child in the presence of him." (Tr. 400). "Why was [Isaiah, Jr.'s] death the natural and proximate result of that? Because if that child had not been placed in contact with Isaiah Washington, Senior by her, Isaiah Washington, Senior would have never kicked him." (Tr. 401). "[If] she had never placed her child in that position, her child would be alive." (Tr. 401).

Before trial, the trial court confirmed the State's theory by asking the prosecutor, "So you're basically saying that she endangered the welfare of the child by allowing Isaiah Washington to associate with her child?" (Tr. 53). The state agreed (Tr. 53).

The Law

"The criminal statutes for child endangerment are meant to apply to situations where [a person] *creates an actual risk* to the life, body, or health of a child. They are not meant to apply to situations where there is only the potential for risk to the health of the child." ***State v. Wilson*, 920 S.W.2d 177, 180 (Mo. App., W.D. 1996)** (emphasis added). Further, according to **§ 562.016.3**, a person acts knowingly "[w]ith respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist" or "[w]ith

respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result." **Section 562.016.3(1)** and **(2)**. Thus, while the failure to act may subject an individual to prosecution for child endangerment, in such cases the failure to act must pose an actual or "practically certain" risk or danger and not simply the potential for risk or danger. ***Carmons*, 26 S.W.3d at 385; *Wilson*, 920 S.W.2d at 180; *State v. Riggs*, 2 S.W.3d 867, 872-73 (Mo. App., W.D. 1999)**.

Dicta in ***State v. Wilson, supra,*** suggests that a child endangerment charge may lie for "knowingly permitting" abuse to continue. In ***Wilson***, the defendant was charged with one count of the endangering the welfare of a child in the first degree, **§568.045**. ***Wilson*, 920 S.W.2d at 179**. The complaint alleged that on or about the 29th of September, 1993, Ms. Wilson committed the crime of "failing to obtain or provide medical care for [her child] for recently sustained injuries inflicted upon [her child] by another..." ***Id.*** This Court reversed Wilson's conviction because "there was no evidence presented that [her child] had injuries which, without medical treatment, would have created a substantial risk to her health." ***Id.* at 181**. "Therefore, Ms. Wilson's failure to seek medical treatment on that date did not, as charged in the information, constitute endangering the welfare of a child." ***Id.*** However, the Court stated in footnote 2, "it is arguable that Ms. Wilson is guilty of

endangering the welfare of [a child] in violation of §568.045 for knowingly permitting [her child] to be abused, but this court is not aware of any cases which have considered this application of §568.045." ***Id.***

Four years later, in ***Carmons v. State***, ***supra***, the Western District was presented with an appellant who had pleaded guilty to first degree child endangerment, §568.045, for her actions in allowing D.J. (a minor) to be placed in contact with an uncle, Juan Carmons, whom appellant knew had abused the child sexually. ***Carmons*, 26 S.W.3d at 384-385**. The Court found that the facts in ***Carmons*** did not present the hypothetical situation suggested in the ***Wilson*** footnote - i.e., the facts did not establish that Carmons created a situation in which it was "practically certain" that her acts would create a substantial risk to D.J.'s life, body or health, for example, by knowingly leaving D.J. alone with Juan Carmons. ***Id.*** She did not knowingly permit the abuse to continue. ***Id.*** The Court recognized that the potential for harm exists when a victim comes into "contact" with the person who has abused them, but it could not say that harm would occur or would be practically certain to occur by the contact alone. ***Id.* at 385**.

The Facts Applied to the Law

Just like the appellant in ***Carmons***, Brandy was charged only with placing her child in contact with a person who had previously abused

him. She was not charged with knowingly permitting the abuse to continue on October 26, 2001. Perhaps this is because the evidence showed that the assault on Isaiah, Jr. happened so quickly - it was over within seconds (Tr. 135, 172). It happened so fast that Diane did not have time to get off the couch (Tr. 171). By the time Willie asked Brandy if she was going to do anything, the assault was over (Tr. 128). It was at that point that Willie got into a fight with Isaiah, Sr. (Tr. 128). Willie did not say anything until the assault had ended by Isaiah, Sr. "slamm[ing] the child's face to the floor (Tr. 136). When the fight started, Isaiah, Jr. went to stand by his mother, Brandy (Tr. 129). Diane called the police because Willie and Isaiah, Sr. were fist-fighting so intensely (Tr. 129, 143, 161-162).

On this record, where the assault occurred spontaneously on the way up the stairs and was over within seconds, the State could not, and did not, charge Brandy with permitting the abuse to continue (L.F. 17). Rather, the State charged Brandy only with placing her son in contact with his father, thus allowing an assault to occur. The State argued that Brandy "knowingly acted in a manner that created a substantial risk to the life, body, and health of her child when she let him be in contact with the man who previously abused him." (Tr. 407). Under ***Carmons,***

***supra*,** this cannot sustain a conviction because harm was not "practically certain" to occur from the contact alone.

Furthermore, the evidence is insufficient to show that Brandy "knowingly" created a substantial risk of harm by allowing her son to have contact with his natural father. Just as in ***Carmons***, ***supra***, the facts here do not establish that Brandy, armed with the knowledge that Isaiah, Sr. had abused their son in the past, knowingly permitted the abuse to continue. The facts do not establish that Brandy, on the date charged, created a situation in which it was "practically certain" that her acts would create a substantial risk to Isaiah, Jr.'s life, body or health, for example, by knowingly leaving Isaiah, Jr. alone with his father. Indeed, the three of them were going together to visit Isaiah, Sr.'s mother.

The State presented no evidence regarding the frequency, location or severity of any previous abuse of Isaiah, Jr. by his father (Tr. 360). The evidence only showed that Isaiah, Jr. had never sustained injuries that required treatment at a hospital (Tr. 361). This falls far short of establishing that Brandy acted knowingly with practical certainty that abuse would result from contact with Isaiah, Sr. on that date.

Even the Department of Probation and Parole recognized that it could not order Brandy to have no contact with the child's natural father. Ironically, the *State argued* that "[Brandy] would not be criminally liable

if Isaiah Washington had that child and she wasn't around and he killed that child. She is criminally liable because she chose to let that child be around Isaiah Washington, Senior." (Tr. 408). This argument seems to suggest that if Isaiah, Sr. had killed his son during a regularly scheduled visitation time -- for instance, when Isaiah, Jr. was with his great-aunt or grandmother, then Brandy would not be guilty of child endangerment, even though she knew that Isaiah, Sr. would be having contact with the child. It is unclear how this fits into the State's theory when the entire prosecution was based upon the fact that Brandy allowed Isaiah, Sr. to have contact with his child - which contact also would have occurred if she allowed contact during a court-sanctioned visitation period.

The State's theory, if accepted, would require any parent, with knowledge of prior abuse, to seek a restraining order or violate a visitation order, rather than allow contact, because the potential for harm to the child would subject that parent to prosecution for child endangerment. This is contrary to the caselaw which states that a potential for harm is not enough. Harm is not practically certain to occur by the contact alone. ***Carmons*, 26 S.W.3d at 385**.

The State did not prove that Brandy did anything beyond merely allowing contact with the father, to create a substantial risk to Isaiah, Jr.'s life, body or health. Nor did the State prove that it was "practically

certain" that Brandy's actions created a substantial risk to Isaiah, Jr.'s life, body or health. This Court must reverse her conviction for first degree child endangerment, and order her discharged.

Additionally, there can be no felony murder charge or conviction absent proof of the underlying felony. The intent to commit the underlying felony is the gravamen of the felony murder offense. ***Ivy v. State*, 81 S.W.3d 199, 207 (Mo. App., W.D. 2002)**. Therefore, this Court must likewise reverse Brandy's conviction for felony murder, and order her discharged.

II.

The trial court erred in overruling Brandy's motion for judgment of acquittal at the close of all of the evidence and in sentencing her for second degree felony murder, § 565.021, because this deprived Brandy of her right to due process, under the 5th and 14th Amendments to the U.S. Constitution, and Article I, § 10 of the Missouri Constitution, in that the State failed to prove beyond a reasonable doubt that Brandy's act of "allowing Isaiah to come in contact" with his father was the proximate cause of death. Isaiah, Sr.'s actions were an intervening cause of his son's death, which was not a direct, natural or reasonably foreseeable consequence of Brandy's action in allowing him to have contact with Isaiah, Jr.

As fully discussed in Point I, Brandy is not guilty of the felony of child endangerment for placing Isaiah, Jr. in contact with his father; therefore, a felony murder conviction predicated upon that theory also cannot stand. Alternatively, there is another reason why Brandy's felony murder conviction must be reversed: Isaiah Washington's, Sr.'s act was an intervening cause of Isaiah, Jr.'s death. Therefore, because the death was not a direct, natural or reasonably foreseeable consequence of

Brandy's actions, she cannot be held criminally liable for his death under Missouri's proximate cause theory of felony murder.

Standard of Review

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which she is charged. ***In re Winship*, 397 U.S. 358, 364 (1970)**. The sufficiency of the evidence presented in a judge-tried case is determined by the same standard as in a jury-tried case. ***State v. Price***, **928 S.W.2d 429, 431 (Mo. App., W.D. 1996)**. This Court considers the evidence, along with all reasonable inferences drawn therefrom, in the light most favorable to the verdict and disregards evidence and inferences to the contrary. ***State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993)**.

The Charge

The State charged Brandy with second degree felony murder, Section 565.021, "in that on or about October 26, 2001, in the County of Buchanan, State of Missouri, [Isaiah, Jr.] was killed by being struck and kicked by Isaiah Washington *as a result of* the perpetration of the Class D felony of endangering the welfare of a child in the first degree committed by [Brandy] on or about October 26, 2001. (L.F. 15) (emphasis added). The language "*as a result of*" is the key element at issue in this

point. Isaiah Jr.'s death did not arise "*as a result of*" Brandy's actions, but from the intervening act of his father, Isaiah, Sr.

The Law of Felony Murder

The felony murder rule derives from common law and permits a homicide to be classified as murder, even though committed unintentionally, if it occurred during the pursuit of a felony. ***State v. Clark*, 652 S.W.2d 123, 125-26 (Mo. *banc* 1983)**. However, the doctrine only extends to a death that is the proximate result of the act of the felon or felons. ***State v. O'Dell*, 684 S.W.2d 453, 461 (Mo. App., S.D. 1984)**. "The significant factor is whether the death was the natural and proximate result of the acts of the appellant or of an accomplice. Of course, an independent intervening cause might relieve appellant of criminal responsibility for the killing." ***State v. Moore*, 580 S.W.2d 747, 752 (Mo. banc 1979)**.

With respect to felony murder, two opposing theories of criminal responsibility exist. Under the "agency theory," the State must prove that either the defendant or someone acting in concert with him, an accomplice, killed the victim and that the killing occurred during the perpetration of and in furtherance of the underlying felony offense. ***Moore v. Wyrick*, 766 F.2d 1253, 1255-1256 (8th Cir. 1985); *State v. Chambers*, 53 Ohio App.2d 266 (1977)**. Under the "proximate cause

theory," it is irrelevant whether the killer was the defendant, an accomplice, or some third party such as the victim of the underlying felony or a police officer. Defendant can be held criminally responsible for the killing so long as the death is the "proximate result" of Defendant's conduct in committing the underlying felony offense; that is, *a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience*. ***State v. Dixon* 2002 WL 191582 (Ohio App. 2 Dist., 2002)** (emphasis added); ***See also Moore v. Wyrick*, 766 F.2d at 1255-1256.**

Missouri is in the minority of states that follow the proximate cause theory of felony murder in interpreting whether a death resulted from the perpetration of a felony. ***See State v. Sophophone*, 19 P.3d 70, 75 (Kan. 2001)**. Again, under that theory, a defendant may only be considered responsible for deaths which are the natural and proximate result of the underlying felony, even if the actual killer was not an accomplice. ***State v. Blunt*, 863 S.W.2d 370, 371 (Mo. App., E.D. 1993); *State v. Davis*, 797 S.W.2d 560, 563 (Mo. App., W.D. 1990)**; ***State v. Moore*, 580 S.W.2d 747, 752 (Mo. banc 1979); *State v. Baker*, 607 S.W.2d 153, 156 (Mo. banc 1980); *Moore v. Wyrick*, 766 F.2d at 1255-57.**

Illinois is another state which subscribes to the “proximate cause” theory of felony murder. ***See People v. Lowery*, 687 N.E.2d 973, 976-977 (Ill., 1997)**. In ***Lowery***, the Illinois Supreme Court explained why the “proximate cause” requirement -- that the death be a "proximate result" of a defendant's conduct in committing the underlying felony -- makes sense:

> Causal relation is the universal factor common to all legal liability. In the law of torts, the individual who unlawfully sets in motion a chain of events which, in the natural order of things, results in damages to another is held to be responsible for it. It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. Thus, there is no reason why the principle underlying the doctrine of proximate cause should not apply to criminal cases. Moreover, we believe that the intent behind the felony-murder doctrine would be thwarted if we did not hold felons responsible for the foreseeable consequences of their actions.

Id. **at 976-977**. Thus, under the proximate cause test of felony murder, a defendant is guilty of murder if: (1) he participated in the underlying felony and (2) it was reasonably foreseeable that an innocent person would be killed during the commission of the felony. ***People v. Hickman,*** **319 N.E.2d 511 (Ill., 1974)**. A defendant is responsible for the foreseeable consequences of his unlawful acts; he need not anticipate the precise sequence of events that caused the victim's death. ***Id.*** **at 513**.

Stated another way, even if the government proves the commission of a felony, a legal cause defense is available if an extraordinary intervening event supersedes the defendant's act and becomes the sole legal cause of the result. ***Bonhart v. U.S.*** **691 A.2d 160, 162 - 163 (D.C.,1997);** ***citing*** **Perkins & Boyce,** ***Criminal Law*** **781-782 (3d ed. 1982)**. "If this extraordinary event is the victim's own response to the circumstances that the defendant created, the victim's reaction must be an abnormal one in order to supersede the defendant's act." ***Id.,*** ***citing*** **1 LaFave & Scott,** ***Substantive Criminal Law*** **§ 3.12(h), at 416-17 (1986)**. ([L]egal cause will not be present where there intervenes ... an abnormal response.) The defendant in ***Bonhart*** was charged with felony murder predicated upon the felony of arson. ***Id.,*** **691 A.2d at 161**. An issue on appeal was whether the victim's response to reenter

the burning apartment to save his dog's life was "abnormal." ***Id.* at 163**. The Court found that it was not, and that this reaction was foreseeable.

A similar question must be addressed in the present case: Was Isaiah, Sr.'s reaction an abnormal one that would supersede Brandy's act? The ***Bonhart*** court cited to ***State v. Leopold*, 110 Conn. 55, 147 A. 118 (1929)**, which analyzed a legal cause defense to felony murder. After a building was set on fire, two sons of a tenant there either remained inside voluntarily or were sent back in by their father to recover property. The ***Leopold*** court reasoned as follows: "If the death of these boys resulted in a *natural sequence* from the setting of the building on fire, even though their conduct contributed to, or was the immediate cause of it, the accused would be responsible, and the effort of a person to save property of value which is liable to destruction by fire is such a *natural and ordinary* course of conduct that it cannot be said to break the sequence of cause and effect." ***Id.* 147 A. at 121** (emphasis added).

Here, the death of Isaiah, Jr. did not result from the *natural sequence* of Brandy placing him in contact with his biological father. Isaiah, Sr.'s actions were not "*a direct, natural, reasonably foreseeable consequence*"; rather they were an "*extraordinary or surprising consequence when viewed in the light of ordinary experience*." The

heinous assault on a child is not a natural and ordinary course of conduct resulting from merely being in contact with a child. The assault stemmed from a two-year-old boy uttering a "bad word." (Ex. 26). Kicking and slamming a child to the floor is not, in any context, a *natural* response. Isaiah, Sr.'s actions in committing the unanticipated assault broke the sequence of cause and effect between Brandy placing Isaiah, Jr. in contact with his father and his unfortunate death. The sole responsible party to Isaiah's death was his father, who has since been tried, convicted and sentenced. This Court must reverse Brandy's conviction for felony murder and order her discharged from her sentence.

CONCLUSION

Because the trial court erred in overruling Brandy's motions for judgment of acquittal and sentencing her upon her convictions for first degree child endangerment (Point I) and felony murder (Point II), Brandy respectfully requests that this Court reverse her convictions and discharge her from her sentences.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Bookman Old Style size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **7,794** words, which does not exceed the 31,000 words allowed for Appellant's brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on November 14, 2004). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were hand-delivered, this 15th day of November, 2004, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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