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 REPLY BRIEF

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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.

There can be no doubt that Isaiah, Jr.'s death, at the hands of his father, was a heinous and senseless tragedy. Isaiah Washington, Sr., was found guilty of murdering his son and is serving a life sentence in prison. *See State v. Washington*, 121 S.W.3d 578 (Mo. App., W.D. 2003). But the question before the Western District Court, and now this Court,

is whether Brandy's actions, in allowing the child to have contact with the father on that particular date, rose to the level of *first* degree child endangerment and, hence, felony murder – i.e., whether the evidence established that Brandy was practically certain that allowing contact with the father on that date would present a substantial risk of abuse (first degree) or whether she was criminally negligent in failing to be aware that allowing contact on that date would create a substantial risk of abuse (second degree).

The State failed to show that Brandy's actions in allowing contact with the father on that date was "practically certain" to endanger her son's life. While the record indicates that Brandy knew that Isaiah, Sr., had "whooped [Isaiah, Jr.] hard on his butt," and had punched and/or kicked Isaiah, Jr., on at least a few occasions, the evidence does not reflect how frequently those incidents occurred or what triggered them, or the nature of the injuries suffered by Isaiah, Jr., on those occasions. Furthermore, there is no evidence whatsoever that the father had ever beaten Isaiah Jr., while they were out in public, as they were on the date charged. The State failed to prove that Brandy was practically certain that being in contact with Isaiah, Sr., on that day would place her son at substantial risk of abuse – especially at a location away from her home.

Respondent asserts that Brandy acted with "practical certainty" because she knew that Isaiah, Sr., had previously abused their son severely (Resp. BR 17). It says that there is a reasonable inference that Brandy "would have noticed that Isaiah had pain in his stomach and chest from these injuries." (Resp. BR 17). However, there is absolutely no evidence in the record as to when the previous abuse occurred, or the extent or nature of the injuries suffered on those occasions. 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). There was no testimony from any doctor regarding what symptoms the child would have exhibited with certain injuries.

Although DFS had apparently come 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. While a probation officer had 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). Indeed, Brandy "was allowed to have contact" with Isaiah, Sr., "but she just was not allowed to have him living with her." (Tr. 425).

Respondent is frustrated at the way the prosecutor charged this case. Respondent now wants to convict Brandy of first degree child endangerment because Brandy failed to intervene in the assault or failed to seek medical treatment afterwards (Resp. BR 18-19), but that is not how she was charged. The specific factual language of the charge is critical. Brandy was charged with placing her son *in contact* with his father, which contact allowed the child to be assaulted by Isaiah, Sr. She was not charged with failing to seek medical care for her son following the assault, nor was she charged with failing to intervene during the assault. "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) (quoting *State v. Armstrong,* 863 S.W.2d 374, 377 (Mo. App., E.D. 1993)) (emphasis added); *State v. Edsall,* 781 S.W.2d 561, 564 (Mo. App., S.D. 1989) (bench trial).

The specific charging instrument and factual scenario are also what distinguish this case from the case relied on in Respondent's brief, *State v. Fuelling*, 145 S.W.3d 464 (Mo. App., W.D. 2004). *Fuelling* was decided by the Western District Court of Appeals less than a month after its *Burrell* decision. The Court discussed its *Burrell* decision at length:

FN4. Our conclusion in this case does not conflict with our recent decision in *State v. Burrell,* WD62062, --- S.W.3d ----, 2004 WL 1440393 (June 29, 2004), where we reversed the first degree child endangerment conviction, along with the felony murder conviction, of a mother who either allowed or acquiesced to her child having contact with his father, who had previously beaten and kicked the child. *Burrell* is readily distinguishable by virtue of the charging documents utilized in that case.

Our opinion in *Burrell* hinged largely upon the narrowly focused language employed by the State in charging Burrell. In that case, the State charged the defendant with, on a specific date, "placing the child, I.W., in direct contact with Isaiah Washington who defendant ha[d] previously seen physically abuse I.W. and by so doing, defendant allowed the child to be assaulted by Isaiah Washington." Accordingly, the information dealt solely with the defendant's actions on the date in question and the fact that the child was allowed to have contact with his father on that date.

The information in the case at bar charged Fuelling with first degree child endangerment in the following manner:

> The Prosecuting Attorney of the County of Johnson, State of Missouri, charges that the defendant, in violation of Section

568.045 RSMo, committed the class D felony of endangering the welfare of a child in the first degree, punishable upon conviction under Sections 558.011 and 560.011 RSMo, in that from March 27, 2001, through June 23, 2001, in the County of Johnson, State of Missouri, the defendant knowingly acted in a manner that created a substantial risk to the life, body and health of Raven Ridgeway, a child less than seventeen years old, by leaving Raven Ridgeway in the care of Carlos Luna Mendoza, knowing that said Mendoza abused the child.

Under the language of this information, Fuelling was charged with repeatedly leaving the child alone with a known abuser over a period of three months. Thus, the State needed to prove that the defendant knew that repeatedly leaving the child alone with Mendoza over a period of three months was practically certain to result in injury to the life, body, or health of the child at some point during that period.

In contrast, in *Burrell* the State was required to prove that the child was practically certain to sustain injury on the day referenced in the information by virtue of the "contact" with the

father. In that case, unlike the instant appeal, the State failed to prove the charge as drawn.

State v. Fuelling, 145 S.W.3d 464, 471, fn4 (Mo. App., W.D. 2004).

Respondent's brief does not acknowledge this factual distinction between *Fuelling* and *Burrell*, which the Western District took care to explicate at length. Brandy was charged with allowing Isaiah, Jr., to be in contact with his father on October 26, 2001, but Ms. Fuelling was charged with continuously leaving her child *alone* with a known abuser over a three month time period. There is *no* evidence in the case at bar that Brandy *ever* left Isaiah, Jr., alone with his father. The evidence simply does not support a finding of first degree child endangerment – that Brandy was practically certain that allowing contact with the father on that date would create a substantial risk of harm.

Second degree child endangerment

However, as the Western District noted, the State's evidence may support second degree child endangerment, in that she negligently placed the child in a position of substantial risk by her conduct and that she should have been aware of such risk. See *State v. Brock*, 113 S.W.3d 227, 232 (Mo. App., E.D. 2003). The Court found that, given the father's abusive history towards Brandy and the child, Brandy should have been aware that continued exposure to the father would pose a substantial

risk that the father would again abuse the child. Her conduct amounted to "negligently exposing Isaiah, Jr., to a substantial risk of being beaten by Washington on or about October 26, 2001." Since the Western District found that Brandy "should have been aware" of the substantial risk, it entered a conviction for second degree child endangerment.

Brandy respectfully suggests that the unique facts of this case did not present a question of general interest and importance and she requests that this Court retransfer her case to the Western District Court of Appeals for reinstatement of that Court's opinion.

CONCLUSION

For the reasons stated herein, and in her opening brief, Appellant respectfully requests that this Court retransfer her case to the Western District Court of Appeals.

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 **1,766** words, which does not exceed the 7,750 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 January 9, 2005). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were hand-delivered, this 13th day of January 2005, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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