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TEXAS COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
PETITION FOR WRIT OF CERTIORARI TO THE

THE STATE OF TEXAS
Respondent

v.

AMBER RENEE CRAKER
Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

Did the Court of Appeals Err in holding Craker's mistaken belief that she killed her baby was sufficient evidence to support her capital murder conviction?

QUESTION PRESENTED

All parties are included in the caption of the case.

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The Opinion of the highest state court to Rule upon the merits is Exhibit "A" in the

Appendix. The Eastland Court of Appeals did not designate the opinion for publication.

On January 29, 2020, the Texas Court of Criminal Appeals refused Petitioner's Petition for

Discretionary Review. The refusal notice is Exhibit "C" of the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the

Eastland Court of Appeal for which petitioner seeks review was issued on September 19, 2019. The

Texas Court of Criminal Appeals order refusing petitioner's timely petition for discretionary review

was filed on January 29, 2020. This petition is filed within 150 days of the Texas Court of

Criminal Appeals' refusal of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. XIV, Sec. 1 establishes:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following are Texas Statutes that are involved in the case, and set forth more fully in

the Appendix (Apx. D):

TEX. PEN. CODE ANN. §6.04(a) (Causation for Criminal Responsibility)

TEX. PEN. CODE ANN. §19.02(b)(1) (Murder)

TEX. PEN. CODE ANN. §19.03(a)(8) (Capital murder)

STATEMENT OF THE CASE

Petitioner was charged by indictment with the capital murder of her infant daughter A.C., causing serious bodily injury to A.C., injury to A.C. by failing to get medical attention to facilitate her birth, tampering with evidence and abuse of a human corpse. (CR: 4,5) The offenses were alleged to have been committed on January 18, 2016. (CR: 5,6) On October 4, 2017, the jury found the Appellant guilty of capital murder and tampering with evidence. (CR: 37, 39) Punishment, assessed by the Court on October 5, 2017, was confinement for life without parole in the Texas Department of Criminal Justice- Institutional Division on the capital murder conviction and nineteen (19) years on the tampering with evidence conviction. (CR 49, 51)

Craker appealed to the Eastland Court of Appeals and asserted the sole point of legal insufficiency she now makes before this Court. (Brief of Appellant, p.27-31).

On September 19, 2019, in a memorandum opinion authored by the Honorable Jim R. Wright, the Court affirmed Craker's conviction. (Apx. A).

Craker then timely filed her Petition for Discretionary Review, which was accepted for filing. (Apx. 2). Craker again asserted her sole insufficiency of evidence point that she now brings to this Court. (Apx. B, p. 6-16).

On January 29, 2020, the Texas Court of Criminal Appeals refused review. (Apx. C).

Petitioner Craker now respectfully appeals and petitions this Court for relief.

REASONS FOR GRANTING THE PETITION

In *Jackson v. Virginia*, 443 U.S. 307, 314 (1979), this Court observed:

It is axiomatic that a conviction upon a charge not made or upon a charge not tried

constitutes a denial of due process. (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978)).

In *Jackson*, the Court affirmed that the Fourteenth Amendment demands that a state court conviction be predicated only upon proof of guilt beyond a reasonable doubt. *Id.*, 443 U.S. at 318. The Court expounded that when there is a challenge to the sufficiency of the evidence to sustain a criminal conviction, the question presented is whether, after viewing all the evidence in the light most favorable to the verdict, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.*, at 319 (1979). The reviewing court may impinge on the trier of fact's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Id.*

This case involves the vitally important issue of what evidence of life or chance of life, at a minimum, is necessary for the state to prove capital murder beyond a reasonable doubt. In the instant case, the charge of capital murder implicates the following statutes of the State of Texas:

TEX. PEN. CODE ANN. § 6.04(a) provides:

[A] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

TEX. PEN. CODE ANN. § 19.02(b)(1) provides:

(b) A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual;

TEX. PEN. CODE ANN. § 19.03 provides, in relevant part:

CAPITAL MURDER:

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(8) the person murders an individual under 10 years of age;

The salient facts of this case are as follows:

In the early morning hours of January 18, 2016, Miss Craker who at the time was a high school senior who performed her schoolwork at the level of a fifth or sixth grader was admitted to the Hendrick Medical Center emergency room in Abilene, Texas suffering from acute profuse vaginal hemorrhage. The medical staff determined from blood testing that Craker was pregnant and a surgeon performed emergency surgery to stop the bleeding. The medical staff called the Abilene, Texas Police Department (APD). Immediately after Craker regained consciousness following the emergency surgery, APD detectives interviewed Craker about her pregnancy. After two hours of questioning, Craker admitted she had given birth. Craker told the detectives that she gave birth while she was alone in her bedroom and while her boyfriend and family were in another room. She said that she cut the baby's umbilical cord and then flushed it. When questioned about whether the baby had moved or was breathing, Craker said "no" and the baby "was not moving at all." She described the baby as "blue." She also said that the baby did not move when she hit the baby on the "butt." She stated that the baby "didn't even start breathing at all" and was "pretty much dead." Because the baby was "dead blue" and because Craker was scared that her parents would find out, she flushed the baby. Ultimately, the police recovered the placenta from the sewer lines and discovered A.C.'s body in a trash can with injuries to the body, specifically around the neck area that were caused by a knife. During a third interview, a detective showed Craker a picture of A.C.'s body. Craker repeated that she did not mean to hurt or kill her child and that the baby was not crying and was not moving. She further stated that when she did cut the baby, she did not hear the baby make any noise. At the end of the third

interview and being told repeatedly by the detectives that she killed her baby, Craker said that she killed her own child. The next day, Dr. Susan Jean Roe, a Tarrant County Medical Examiner conducted an autopsy of A.C. During the autopsy, Dr. Roe attempted to determine whether A.C. was born alive or stillborn. Ultimately, Dr. Roe testified that she could not determine from the autopsy whether the baby was born alive or stillborn and labeled A.C.'s cause of death as "undetermined." Dr. Roe testified at trial that four other physicians who reviewed the case came to the same conclusion. Only Craker's misleading statements concerning her pregnancy and mistaken belief that she killed her child support Craker's capital murder conviction. No direct evidence exists that the baby was ever alive or that the baby would have lived but for the actions of Craker. Such evidence is legally insufficient to support a finding of life or chance of life that are required for a capital murder conviction.

Under the applicable Texas Penal Code provisions set forth above, "a person is criminally responsible" for a particular result "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." *Tex. Penal Code Ann. §6.04(a); Garcia v. State*, 112 S.W.3d 839, 852-54 (Tex.App.-Houston [14th Dist.] 2003, no pet.) This "but for" causation must be established by providing evidence of a connection between an accused's conduct and the resulting harm. *Robbins v. State*, 717 S.W.2d 348, 351 (Tex.Crim.App. 1986).

Dr. Roe and her peers concluded the cause of death was inconclusive. (RR7: 109-112). The lungs did not show signs of aeration, meaning A.C. had not breathed. (RR7: 101-2). This expert evidence is consistent with the testimony of Detective Cisneros who stated that despite multiple inquiries, Craker never said that the baby ever moved or made a noise. (RR7: 32).

Craker does not argue that one can never be convicted of murder absent conclusive

forensics regarding causation. The acts of the accused and admissions can in some instances establish guilt absent conclusive forensics. Admittedly, Craker intentionally stabbed the child (RR7: 76; 83), lied during her interviews with the detectives (RR7: 10), hid evidence (RR6: 98), and said she killed her baby. (RR7: 38) However, no rational trier of fact could reasonably conclude that Craker could have possibly known that cutting the child would have deprived the child from life. The concrete facts despite hours of interviews of Craker are that the child never moved or made a noise and was the child was blue. Such evidence is corroborated by Dr. Roe's autopsy findings and testimony that the lungs showed no sign of aeration. (RR7: 101-2) At most, the State adduced evidence that Craker may have thought she killed her baby after three interviews by detectives during which they instructed her that she had killed her baby and showed her photographs of the body.

Why does this legal insufficiency case warrant inclusion in the tiny fraction of cases that enjoy Supreme Court review? *Life or a chance of life* is a timely and worthy topic for Supreme Court review especially in light of Craker's confinement to life in prison without parole.

PRAVER

For the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

- A. Opinion of Eastland Court of Appeals
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V



In The

Eleventh Court of Appeals

No. 11-17-00299-CR

AMBER RENEE CRAKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court
Taylor County, Texas
Trial Court Cause No. 27346A

MEMORANDUM OPINION

The jury convicted Amber Renee Craker of the first-degree felony offense of capital murder and the second-degree felony offense of tampering with evidence. The trial court assessed Appellant's punishment at confinement for life for the capital murder conviction and nineteen years for the tampering-with-evidence conviction. In a single issue on appeal, Appellant argues that the evidence is

insufficient to support her capital murder conviction because there is no evidence that she caused her infant daughter's death. We affirm.

We review a challenge to the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). When we conduct a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the defendant. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004).

In the early morning hours of January 18, 2016, Appellant was admitted to the emergency room at Hendrick Medical Center in Abilene for profuse vaginal bleeding. The medical staff administered a blood test and determined that Appellant was pregnant; Appellant told medical staff that she was not aware that she was

pregnant. Dr. Preston Clay Alexander, a hospitalist who performs GYN surgeries and was on call at the time, treated Appellant and observed that she was "pale, alert, conversant, [and] in quite a bit of distress."

Dr. Alexander eventually performed emergency surgery on Appellant. Appellant was anesthetized for the surgery; Dr. Alexander testified that "it didn't take more than 20 minutes from the time [Appellant] was put to sleep until the time she was awakened." After the surgery, Dr. Alexander confronted Appellant and asked her to explain to him what had happened. Dr. Alexander testified at trial that Appellant did not answer him. In Dr. Alexander's opinion, Appellant was "fully awake" from the anesthesia, could hear his questions, and could speak. Dr. Alexander informed medical staff in the emergency room that he thought that Appellant had abandoned her baby somewhere.

Nurse Buffi Lake contacted personnel at the Abilene Police Department and informed them that there was a baby somewhere in the community that needed to be found. Jerame Shawn Montgomery, a detective with the Abilene Police Department, and other members of law enforcement were dispatched to Appellant's home in Abilene.

Around that same time, Detectives Stacey Cisneros and Jonathan Merrick with the Abilene Police Department interviewed Appellant about the events surrounding her visit to the emergency room. The first interview lasted about three hours. In this interview, Appellant initially denied knowing that she was pregnant and impliedly denied that she had given birth. Appellant variously told the detectives that she was bleeding that day because she passed a "blood clot," because she had cut herself shaving with a broken razor and a serrated knife, and because she had used the serrated knife to engage in self-mutilation of her vagina.

After the detectives questioned Appellant for two hours, Appellant finally admitted that she had given birth. Appellant explained that she had given birth to

the baby while she was alone in her bedroom and while her boyfriend and family were in another room. Appellant said that she cut the baby's umbilical cord and then "flushed it." Detective Cisneros asked her whether it was possible that the baby was "cut," and Appellant responded, "I don't know."

Detective Cisneros asked whether the baby had moved at all or was breathing; Appellant said "no" and the baby "was not moving at all." She described the baby as "blue." She also said that the baby did not move when she hit the baby on the "butt." Yet, Appellant said that the baby "tried" to take a breath and that Appellant used her own pinky to remove fluid from the baby's mouth. However, Appellant then reiterated that the baby did not move; the baby "didn't even start breathing at all" and was "pretty much dead." Because the baby was "dead blue" and because Appellant was scared that her parents would find out, Appellant flushed the baby.

The detectives interviewed Appellant a second time. During this second interview, Appellant stated that, after she had given birth to the baby, she passed out. She explained that the baby was "still attached" to her while she was passed out, although she also stated that she could not remember. She said that, when she woke up at one point, the baby did not make any noise and "wasn't even moving."

While the interviews were taking place, Detective Montgomery, Abilene Police Criminalist Wallace McDaniell, and other Abilene police officers searched Appellant's home. Officer McDaniell and Detective Montgomery observed blood in several locations throughout the home. Specifically, they observed blood throughout Appellant's bedroom and the bathroom next to Appellant's bedroom; Detective Montgomery also saw bloodstained sheets in the washing machine. Officer McDaniell and Detective Montgomery found a bloody knife and a pair of scissors on the bedroom floor. There were also bloodstains on the underside of the mattress in Appellant's bedroom; Officer McDaniell and Detective Montgomery believed that the mattress had been flipped. In the bathroom, Officer McDaniell and

Detective Montgomery found a pair of pliers with blood on them and also a trash can that had blood on it; Officer McDaniel took the trash can and placed it in the trunk of his vehicle for later examination.

Detective Montgomery received information from Detective Cisneros that "the baby was possibly flushed down the toilet." Detective Lynn Beard of the Abilene Police Department called master plumber Brian Sweat to Appellant's home to look inside the sewer line for a missing baby. When Sweat accessed the sewer lines from outside the home, he found a human placenta inside the lines. Thereafter, Officer McDaniel and Detective Montgomery searched the trash can that Officer McDaniel had placed in his trunk. They recovered the body of a newborn infant approximately halfway down the trash can; the infant was later identified to be the victim in this case, A.C., Appellant's daughter. Officer McDaniel saw "very obvious" injuries to A.C.'s body, specifically around her neck area.

Detective Cisneros acquired a picture of A.C.'s body and showed it to Appellant during her third interview. Appellant repeatedly and frantically explained that it was a "freak accident" and that she "did not mean to hurt [her] child" or "kill it." Detective Cisneros asked her what knife she had used, and Appellant explained: "That green one – I had a green one." Appellant explained: "It had fell" and "I went to get it and I had the knife in my hand" and "then I accidentally hit it." Appellant also said that her "hand slipped" when she tried to cut the umbilical cord; she said her hand was "wet and everything." Next, Appellant said that she tried to "save" the baby. Appellant reiterated her claim that the baby was not crying and was not moving. She said that, when she did cut the baby, she did not hear the baby make any noise.

Detective Cisneros accused Appellant of lying. Detective Cisneros said: "The reason you cut her throat was because she was moving and making noise and you didn't want . . . anybody to hear her." Appellant said: "I'm not lying."

Detective Cisneros asked why she would cut the baby's throat if the baby was not moving or breathing. Appellant responded: "Because she was not moving and so I thought it was something and I was [going to] see if she wasn't going to live or not; I didn't even know if she was dead. I thought she was already dead so I did what I did." At the end of the interview, Appellant said that she "killed [her] own freaking child." Throughout her interviews, Appellant repeatedly referred to A.C. as "it" and "the baby."

The next day, Dr. Susan Jean Roe, a deputy medical examiner with the Tarrant County Medical Examiner's Office, conducted an autopsy of A.C. During the autopsy, Dr. Roe looked for various things in an effort to determine whether A.C. was born alive or stillborn. Ultimately, Dr. Roe testified that she could not determine from the autopsy whether the baby was born alive or stillborn.

Dr. Roe first determined that A.C. had sustained a "sharp-force injury" to her neck that left a "gaping," "large" wound, severed her trachea, and punctured her left lung. After Dr. Roe cleaned the wound, she saw tissue inside the wound that indicated that A.C. had been stabbed at least three times in that area, possibly even more. Although Dr. Roe could not specify the exact type of instrument used to inflict A.C.'s injuries, she opined that the serrated blade that was found in Appellant's room was an instrument that could have caused A.C.'s wounds. Dr. Roe testified that the sharp force injuries to A.C. were intentional and not the result of a "freak accident." Dr. Roe determined A.C.'s gestational age to be thirty-nine to forty weeks based on A.C.'s weight and physical maturation. According to Dr. Roe, A.C. was 6.8 pounds, 20.47 inches, and a "term infant." Dr. Roe plotted A.C.'s height and weight on a growth chart, and she placed A.C.'s weight in the 25th percentile and length in the 75th percentile.

Dr. Roe did not observe signs that A.C. was born prematurely. Specifically, she did not observe that A.C. had translucent skin with visible blood vessels, a

characteristic that Dr. Roe testified is common in premature infants. Rather, Dr. Roe observed that A.C.'s skin was "pink with minimal visible vessels."

When Dr. Roe examined A.C.'s heart, she observed a small atrial septal defect. At trial, she testified that this abnormality, which she described as "tiny holes" in the heart, does not "cause an issue during infancy or childhood" but, if left untreated, could cause a problem in adulthood. Dr. Roe also testified that children are born with this defect every day and survive to adulthood. Dr. Roe did not find any other defects or abnormalities in A.C.'s heart.

Dr. Roe also examined Appellant's placenta. Dr. Roe testified that the placenta was still in adequate condition and that she specifically examined certain bumps located on the placenta, called "cotyledons." Cotyledons, according to Dr. Roe, can cause infections and bleeding in the mother, if abnormalities are present. Dr. Roe did not find any abnormalities in the cotyledons.

Dr. Roe did not find any birth irregularities in A.C.'s pulmonary system. With regard to A.C.'s lungs, Dr. Roe determined that A.C.'s lungs were both collapsed or "atelectatic." According to Dr. Roe, A.C.'s collapsed lungs could mean one of two things. First, her collapsed lungs could mean that A.C. did not breathe very much. Second, A.C.'s collapsed lungs could mean that air entered A.C.'s lungs when one of her lungs was punctured. In any event, Dr. Roe testified that sections of A.C.'s lungs showed no definite aeration; in other words, her lungs were not "fluffy and expanded." Dr. Roe testified that this meant that she could not "tell . . . if [A.C.'s lungs] looked like they were lungs in which a baby had been breathing." However, Dr. Roe testified that this finding was consistent with a child, such as A.C., needing resuscitation at birth. Dr. Roe testified that it was not uncommon to see a baby born alive who had fluid in the nasal cavities and mouth and required suctioning to assist the baby's breathing.

As part of the autopsy, Dr. Roe placed A.C.'s lungs in water to see if they floated. Dr. Roe testified that the "float test" has been used by pathologists to determine whether an infant was born alive. Dr. Roe testified that A.C.'s lungs floated. Yet, Dr. Roe testified that this test was unreliable and that she could not scientifically say with medical certainty whether A.C. had air in her lungs.

Dr. Roe also examined A.C.'s gastrointestinal tract. Dr. Roe observed a small amount of "blood-tinged mucoid material" in A.C.'s stomach; the material contained "tiny gas bubbles." According to Dr. Roe, air could enter the stomach "[i]f a baby cries," if "a baby has lived for a long enough period of time," or if a baby is gasping or swallowing as they are leaving the birth canal. Air, according to Dr. Roe, can enter the stomach even when there is fluid in the infant's lungs, nasal cavities, and mouth. Dr. Roe also determined that A.C.'s liver, pancreas, and thyroid were normal.

Dr. Roe did not see any signs that A.C. was stillborn. Dr. Roe testified that, if a baby dies in utero and there has been enough passage of time, usually the baby starts to exhibit certain signs, such as maceration of the skin. Specifically, Dr. Roe testified that, because of the mother's body temperature, the baby's skull begins to collapse and the baby starts "losing the outer layers of [its] skin"; this usually takes hours to develop, according to Dr. Roe.

Ultimately, Dr. Roe labeled A.C.'s cause of death as "undetermined." She testified at trial that four other physicians who reviewed the case came to the same conclusion.

The State also presented evidence that Appellant had discussed her pregnancy with one of her teachers and with a school nurse. Appellant was enrolled in special education classes at Cooper High School, and at the time of the alleged offense, she was a senior in high school who was performing work at the level of a fifth or sixth grader. Jillian Carrion, a teacher at Cooper High School, testified that Appellant told

her about the pregnancy about a month prior to the date Appellant gave birth. Carrion testified that, in a separate conversation, she discussed the possibility of adoption with Appellant; she said that Appellant "seemed overwhelmed and upset" at that possibility. On cross-examination, Carrion agreed that Appellant had told her that she had a due date of June 14; Carrion thought this seemed very unlikely since Appellant "seemed much further along than at that time."

Rebecca King, a nurse at Cooper High School, testified that she visited with Appellant at the request of Carrion. King testified that, when she asked Appellant if there was anything Appellant needed to discuss, Appellant initially stated: "[N]o." Appellant "was kind of giggling and blowing it off." King asked whether Appellant was pregnant, and Appellant replied: "Oh, yes that." King asked Appellant whether she had any paperwork to confirm the pregnancy so that King could get her signed up for pregnancy-related services. Appellant told King that she did not but that she could get it to King. King saw Appellant again on a later occasion, and Appellant told her that she had forgotten the paperwork. On cross-examination, King confirmed that Appellant told her that the due date was in June.

The State presented evidence of Appellant's mental capacity through the testimony of Jo Ann Campbell, a licensed specialist in school psychology for the Abilene Independent School District. Campbell testified at trial that she conducted psychological assessments of Appellant in October 2012 and again in October 2015. In the 2012 assessment, Campbell found that Appellant had an emotional disturbance. However, Appellant's subsequent October 2015 assessment showed that she had made considerable progress. Campbell testified that Appellant's emotional-disturbance qualification was removed after the 2015 assessment and that Appellant was placed in a learning disability category, which, according to Campbell, is not the same as intellectual disability. Campbell agreed that Appellant

was able to follow rules and structure at school, and Campbell found nothing to indicate that Appellant did not know right from wrong.

In this appeal, Appellant does not dispute that she intentionally stabbed A.C. Instead, Appellant disputes whether A.C. was alive at the time Appellant stabbed her. Appellant argues that a rational trier of fact could not determine beyond a reasonable doubt that A.C. was born alive and remained alive up to the point that Appellant stabbed her. As such, Appellant argues that there is no evidence that she caused A.C.'s death.

As charged in this case, a person commits the offense of capital murder if she intentionally or knowingly causes the death of an individual under ten years of age. TEX. PENAL CODE ANN. § 19.03(a)(8) (West 2019). An "individual" is a human being who has been born and is alive at the time of the alleged conduct of the defendant. *Id.* § 1.07(a)(26). To convict a defendant of murder, but-for causation must be established between the defendant's conduct and the individual's death. *See id.* § 6.04(a); *Wooten v. State*, 267 S.W.3d 289, 296 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Thus, under the murder statute and the indictment, the State was required to prove not only live birth but life at the time of Appellant's conduct toward A.C.

The El Paso Court of Appeals has addressed this issue before. In *Showery v. State*, 690 S.W.2d 689 (Tex. App.—El Paso 1985, pet. ref'd), the defendant, a physician, was convicted of the murder of a newborn baby arising out of an abortion by "hysterotomy." *Id.* at 691. The State presented evidence at trial that, after the defendant delivered the baby, the defendant suffocated the baby. *Id.* Consequently, a jury convicted the defendant of murder under Section 19.02 of the Penal Code. *Id.* On appeal, the defendant argued that the evidence was insufficient to support his conviction for murder because the State failed to prove that the baby was alive at the time the defendant was alleged to have suffocated the baby. *Id.* at 694. The court

held that the evidence was sufficient to support the defendant's conviction. *Id.* at 696.

The *Showery* court held that two categories of evidence primarily supported an inference of live birth and continued life. *Id.* First, witnesses to the abortion observed movement in the baby that a medical doctor testified were movements that could be consistent with life. *Id.* at 695–96. The second category of evidence was the defendant's own conduct during the abortion. *Id.* at 696. The defendant, after he delivered the baby, placed the placenta over the baby's face and placed the baby in a bucket filled with water, practices that were unusual. *Id.*

Here, the jury could have considered Appellant's conduct at the time of A.C.'s birth as evidence of life and continued life. *See id.* After Appellant gave birth to A.C., Appellant stabbed her and placed her in the trash can. If A.C. was not born alive, as Appellant claims, a reasonable factfinder could question why Appellant would stab her. Actual observation of signs of life in A.C. would reasonably explain Appellant's behavior.

The jury also could have considered Appellant's statements to police as evidence of life and continued life. *See Nisbett v. State*, 552 S.W.3d 244, 265 (Tex. Crim. App. 2018) (inconsistencies in a defendant's story can provide evidentiary support for a conviction). Appellant told detectives that she did not know that she was pregnant, and she impliedly denied giving birth to a baby. When Appellant finally admitted that she had given birth to a baby, she concealed crucial facts. Appellant did not initially tell detectives that she had stabbed A.C. It was only after detectives showed her a picture of A.C.'s dead body that she admitted that she had stabbed A.C. Furthermore, she gave inconsistent explanations for why she stabbed A.C. She also said that she killed her child and that A.C. tried to take a breath. A jury could have reasonably inferred from Appellant's omissions and inconsistent statements that Appellant was attempting to conceal the true facts.

The jury also could have considered the medical evidence as evidence of life and continued life. Importantly, Dr. Roe did not observe any signs that A.C. was stillborn. While this is not direct evidence that A.C. was born alive, it is evidence that A.C. was not stillborn. Furthermore, Dr. Roe observed a small amount of "blood-tinged mucoid material" in A.C.'s stomach; the material contained "tiny gas bubbles." Dr. Roe testified that air can enter an infant's stomach "[i]f a baby cries," if "a baby has lived for a long enough period of time," or if a baby is gasping or swallowing as they are leaving the birth canal. Dr. Roe also testified that, from an X-ray of A.C.'s body, she observed air in A.C.'s chest cavity and possibly within her upper abdominal area. Dr. Roe testified that the presence of air can be important for determining whether an infant was born alive. Lastly, Dr. Roe did not find any health defects or abnormalities that contributed to A.C.'s death.

Considering all the evidence, a rational juror could have found that A.C. was born alive and remained alive up to the point that Appellant stabbed A.C. The jury, as the exclusive judge of the credibility of the evidence, was entitled to disbelieve Appellant's claim that A.C. was not born alive. Moreover, even if Appellant's statements were to be believed—that A.C. was "pretty much dead," that she was not moving or breathing, and that she was "dead blue,"—these facts, even if true, do not establish that A.C. was not born alive. Dr. Roe testified that it is not uncommon for a child born alive to display little or no motion, have a blue tint, and require resuscitation. Dr. Alexander testified that, in his experience delivering babies, he has seen children at birth who are relatively lifeless and blue, but still alive.

The evidence supports the jury's finding that Appellant caused A.C.'s death. The premise of Appellant's claim on appeal is that the State failed to prove by medical certainty that A.C. was born alive; however, the standard we must apply to determine whether A.C. was born alive and remained alive is the *Jackson* standard. See *Jackson*, 443 U.S. at 319. When the evidence is viewed in the light most

Favorable to the verdict, a rational jury could have concluded beyond a reasonable doubt that Appellant committed capital murder. We overrule Appellant's sole issue on appeal.

We affirm the judgments of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

September 19, 2019
Do not publish. *See* TEX. R. APP. P. 47.2(b).
Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.¹
Willson, J., not participating.

¹Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

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COURT OF CRIMINAL APPEALS OF TEXAS

AMBER RENEE CRAKER

Appellant

v.

THE STATE OF TEXAS,

Appellee

On Appeal from the 42nd District Court
of Taylor County, Texas
Cause No. 27346A
(Hon. James Eidson)

and

Cause No. 11-17-00299-CR
from the

THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF TRIAL COURT, PARTIES AND COUNSEL

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of the trial court, parties and counsel:

Trial Court:

Hon. James Eidson
42nd Judicial District
Taylor County, Texas
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Issue One

The Court of Appeals erred in holding the evidence was sufficient Craker committed capital murder when there was insufficient evidence her child was born alive, or living when she committed the stabbing.

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THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL
APPEALS:

Amber Renee Craker, (hereinafter sometimes referred to as "Appellant,")

submits this Petition for Discretionary Review, and would respectfully show unto
the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested as this case involves the important application of

legal sufficiency principals. This case affords this Court a valuable opportunity to further define what constitutes sufficient evidence of but for causation. There are multiple cases delineating what constitutes sufficient proof of murder when a person once known to be living but has disappeared. This is a case exploring causation on the other end of life, tasking the State to prove the baby ever lived, and was in fact living when Craker committed the stabbing.

STATEMENT OF THE CASE

Craker was charged by indictment with capital murder of her infant daughter A.C., causing seriously bodily injury to her child A.C., injury to A.C. by failing to get medical attention to facilitate her birth, tampering with evidence, and abuse of a human corpse. (CR: 4,5). The offenses were alleged to have been committed on January 18, 2016. (CR: 5,6). On October 4, 2017, the jury found Craker guilty of capital murder and tampering with evidence. (CR: 37, 39). Punishment, assessed by the Court on October 5, 2017, was confinement for life without parole in the Texas Department of Criminal Justice-Institutional Division on the capital murder conviction and nineteen (19) years on the tampering of evidence conviction. (CR 49, 51).

STATEMENT OF PROCEDURAL HISTORY

Craker appealed to the Eleventh Court of Appeals at Eastland, Texas. In an opinion authored by the Honorable Senior Chief Justice Jim Wright, released on September 19, 2019, the Court affirmed Craker's conviction. (Apx. A).

GROUND FOR REVIEW

Issue One

The Court of Appeals erred in holding the evidence was sufficient Craker committed capital murder when there was insufficient evidence her child was born alive, or living when she committed the stabbing.

ARGUMENT AND AUTHORITIES

When reviewing the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 902 n. 19 (Tex. Crim. App. 2010). The jury is the sole judge of the credibility of witnesses and the weight to be given to their testimonies, and the reviewing court must not usurp this role by substituting its own judgment for that of the jury. *Id.* at 899.

The duty of the reviewing court is simply to ensure that the evidence presented supports the jury's verdict and that the state has presented a legally sufficient case of the offense charged. *Williams v. State*, 235 S.W.3d 742, 750, 753-754 (Tex.Crim.App.2007). When the reviewing court is faced with a record

supporting contradicting inferences, the court must presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record.

Brooks, 323 S.W.3d at 900 n. 13.

In deciding the sufficiency of the evidence in this case it is important to remember the Court of Criminal Appeals approved of the hypothetical from the dissenting opinion of Presiding Judge McCormick from *Johnson v. State*, 23 3d 1, 15 (Tex. Crim. App. 2000), in which the following hypothetical was outlined regarding a store robbery:

The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Brooks, 323 S.W.3d at 307.

From the foregoing authorities we can derive two things regarding legal sufficiency. First, the sufficiency standard does not allow the Court to weigh evidence and substitute its judgment for that of the jury. However, legal sufficiency, as made clear by the hypothetical from *Brooks*, is not a no-evidence standard, as it effectively is in the civil context. Although this Court cannot decide

the relevant weight of evidence it must consider the exculpatory evidence and the weaknesses of the inculpatory evidence in deciding whether a rational trier of fact could conclude the State's high burden has been met.

Review of the statutes relevant to this case reveal there is insufficient evidence to support Craker's conviction for capital murder.

Tex. Pen. Code Sec. 19.02(b)(1) provides:

(b) A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual;

Tex. Pen. Code Sec. 19.03, in turn provides, in relevant part:

CAPITAL MURDER. (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(8) the person murders an individual under 10 years of age;

Under the Texas Penal Code, "[a] person is criminally responsible" for a particular result "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." Tex. Penal Code Ann. § 6.04(a); *Garcia v. State*, 112 S.W.3d 839, 852-54 (Tex.App. - Houston [14th Dist.] 2003, no pet.)

This "but for" causation must be established by providing evidence of a connection between an accused's conduct and the resulting harm. See *Robbins v.*

Dr. Roe and her peers concluded the cause of death was inconclusive. (RR7: 109-112). The lungs did not show signs of aeration, meaning A.C. had not breathed. (RR7: 101-2). This is consistent with the testimony of Detective Cisneros that despite multiple inquiries, Craker never said that the baby ever moved or made a noise. (RR7: 32).

Craker is not arguing that one can never be convicted of murder absent conclusive forensics regarding causation. The acts of the accused and admissions could upon occasion establish guilt absent conclusive forensics. Admittedly, Craker did intentionally stab the child (RR7: 76, 83), lie to police, (RR7:10) hid evidence (RR6: 98), and said she killed her baby. (RR7: 38).

No rational trier of fact could conclude that Craker would possibly know whether or not cutting the child kept the child from having a chance at life. The only concrete facts to which she stated, despite hours of grilling, are that the child did not move and that she never made a noise. Again, Dr. Roe corroborates that the lungs show no sign aeration. (RR7: 101-2). At most, the State has adduced sufficient evidence that she thought she had killed her baby. She is not qualified to say whether or not a quiet, not-yet-breathing baby would have lived but for her stabbing it.

As for hiding evidence and lying to police, these are expressions of

consciousness of guilt, but again, they do not constitute evidence of but for

causation of death.

Dr. Roe did testify the traumatic sharp-force injuries that she spoke of would have been fatal in a live baby. (RR7: 105). However, for sufficient evidence of but for causation to exist, the baby had to be alive at the time of said stabbing.

As Dr. Roe's testimony made clear, an in utero baby is a fragile creature, and many never breathe due to natural causes. The evidence is strong that Craker feels guilty about her actions, but the evidence indicates that the child never breathed, and Craker could not possibly know whether or not her actions were the but for cause of death. Her admission that she killed her baby is too vague to satisfy proof beyond a reasonable doubt. Had she stated specific things about the baby's

appearance or condition that would allow Dr. Roe or a juror's common sense to conclude the baby was alive at the time of stabbing that would be one thing. We don't have that. A jury has broad latitude to examine and weigh the evidence. It is not at liberty to speculate.

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causation as to death.

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for causation to exist, the baby had to be alive at the time of said stabbing.

Her admission that she killed her baby is too vague to satisfy proof beyond a

reasonable doubt.

The Court of Appeals predicated its ruling on three considerations. First, it

opined that Craker's actions in stabbing A.C. would be some evidence that she was

born alive. (Apx. A, p. 11).

Second, the Court of Appeals opined that Craker's inconsistent statements to

police, her statement that the baby "tried" to breathe, and that she killed her baby

would support the verdict. (Apx. A, p. 11).

Third, the Court of Appeals opined:

The jury also could have considered the medical evidence as evidence of life and continued life. Importantly, Dr. Roe did not observe any signs that A.C. was stillborn. While this is not direct evidence that A.C. was born alive, it is evidence that A.C. was not stillborn. Furthermore, Dr. Roe observed a small amount of "blood-tinged mucoid material" in A.C.'s stomach; the material contained "tiny gas bubbles." Dr. Roe testified that air can enter an infant's stomach "[i]f a baby cries," if "a baby has lived for a long enough period of time," or if a baby is gasping or swallowing as they are leaving the birth canal. Dr. Roe also testified that, from an X-ray of A.C.'s body, she observed air in A.C.'s chest cavity and possibly within her upper abdominal area. Dr. Roe testified that the presence of air can be important for determining whether an infant was born alive. Lastly, Dr. Roe did not find any health defects or abnormalities that contributed to A.C.'s death.

(Apex. A, p. 12).

The Court of Appeals went on further:

Considering all the evidence, a rational juror could have found that A.C. was born alive and remained alive up to the point that Appellant stabbed A.C. The jury, as the exclusive judge of the credibility of the evidence, was entitled to disbelieve Appellant's claim that A.C. was not born alive. Moreover, even if Appellant's statements were to be believed—that A.C. was "pretty much dead," that she was not moving or breathing, and that she was "dead blue,"—these facts, even if true, do not establish that A.C. was not born alive. Dr. Roe testified that it is not uncommon for a child born alive to display little or no motion, have a blue tint, and require resuscitation. Dr. Alexander testified that, in his experience delivering babies, he has seen children at birth who are relatively lifeless and blue, but still alive.

(Apex. A, p. 12).

The Court of Appeals cites *Showery v. State*, 690 S.W.2d 689, 695-6 (Tex.

App. —El Paso 1985, pet. ref'd.), where the Court found the evidence of life to be

legally sufficient to uphold Dr. Showery's murder conviction. (Apex. A, p. 10).

Juxtaposition of Showery and the instant case reveals a stark contrast and highlights the weakness of the case against Ms. Craker.

In *Showery*, there was evidence that the child's chest moved as one's would move when breathing. *Id.* Further, the doctor placed the child in a bucket of water, and air bubbles consistent with respiration came to the surface. Hence, there was legally sufficient, even ample, evidence of life. *Id.* There simply is not in this case. The Court of Appeals also cited *Nisbett v. State*, 552 S.W.3d 244, 265 (Tex. Crim. App. 2018), for the proposition that inconsistencies in a defendant's story can provide evidentiary support for a conviction. (Apex. A, p. 11).

The Court of Appeals is correct that the jury's credibility determinations are sacrosanct and that after-the-fact evidence betraying consciousness of guilt may make otherwise insufficient evidence of guilt sufficient. However, in a case like this, evidence betraying a general consciousness of guilt should be analyzed differently and with extreme caution. In *Showery*, as noted above, there was objective evidence the child was born alive, and Showery was an obstetrician with sufficient sophistication to interpret signs of life in a newborn. In *Nisbett*, there was no doubt the adult-woman victim had been alive for decades, and there was overwhelming circumstantial evidence she no longer was.

Here, the State had no scientific evidence this child actually breathed, no admissions by the unsophisticated accused after hours of grilling that she did

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Respectfully Submitted,

Craker acknowledges that a jury's finding must be afforded substantial deference. However, whether the baby was born alive and was alive at the time of the stabbing is too speculative based on all the evidence in this case.

PRAYER FOR RELIEF

this case.

education regarding legal sufficiency analysis by opining as to its inadequacy in discount, and the Court of Criminal Appeals could provide much insight and

Thus, the value of coverup evidence in a case such as this comes at a huge

necessarily alive or dead, or could be revived with proper methods.

would not have the sophistication to know whether a non-breathing child was

guilt is borne out of actually causing the child's death, as, unlike Dr. Showery, she

many different sources, and would require the jury to speculate as to whether the

breathe, and a general consciousness of guilt that could be interpreted as having

CERTIFICATE OF COMPLIANCE

Appellant's Petition, according to the word count function of counsel for Appellant's word-processing software, contains 2955 words, even including those items permitted to be excluded, save for the appendix. As this is within the limits established excluding these items, Appellant respectfully certifies compliance.

/s/Rick Dunbar
Rick Dunbar

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2019, a true and correct copy of the above and foregoing was forwarded upon Britt Lindsey and the State Prosecuting Attorney by e-service.

/s/Rick Dunbar
Rick Dunbar

APPENDIX

A. Opinion of the Eleventh Court of Appeals at Eastland, Texas



In The

Eleventh Court of Appeals

No. 11-17-00299-CR

AMBER RENEE CRAKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court
Taylor County, Texas
Trial Court Cause No. 27346A

MEMORANDUM OPINION

The jury convicted Amber Renee Craker of the first-degree felony offense of capital murder and the second-degree felony offense of tampering with evidence. The trial court assessed Appellant's punishment at confinement for life for the capital murder conviction and nineteen years for the tampering-with-evidence conviction. In a single issue on appeal, Appellant argues that the evidence is

insufficient to support her capital murder conviction because there is no evidence that she caused her infant daughter's death. We affirm.

We review a challenge to the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). When we conduct a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the defendant. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004).

In the early morning hours of January 18, 2016, Appellant was admitted to the emergency room at Hendrick Medical Center in Abilene for profuse vaginal bleeding. The medical staff administered a blood test and determined that Appellant was pregnant; Appellant told medical staff that she was not aware that she was

pregnant. Dr. Preston Clay Alexander, a hospitalist who performs GYN surgeries and was on call at the time, treated Appellant and observed that she was "pale, alert, conversant, [and] in quite a bit of distress."

Dr. Alexander eventually performed emergency surgery on Appellant. Appellant was anesthetized for the surgery; Dr. Alexander testified that "it didn't take more than 20 minutes from the time [Appellant] was put to sleep until the time she was awakened." After the surgery, Dr. Alexander confronted Appellant and asked her to explain to him what had happened. Dr. Alexander testified at trial that Appellant did not answer him. In Dr. Alexander's opinion, Appellant was "fully awake" from the anesthesia, could hear his questions, and could speak. Dr. Alexander informed medical staff in the emergency room that he thought that Appellant had abandoned her baby somewhere.

Nurse Buffi Lake contacted personnel at the Abilene Police Department and informed them that there was a baby somewhere in the community that needed to be found. Jerame Shawn Montgomery, a detective with the Abilene Police Department, and other members of law enforcement were dispatched to Appellant's home in Abilene.

Around that same time, Detectives Stacey Cisneros and Jonathan Merrick with the Abilene Police Department interviewed Appellant about the events surrounding her visit to the emergency room. The first interview lasted about three hours. In this interview, Appellant initially denied knowing that she was pregnant and impliedly denied that she had given birth. Appellant variously told the detectives that she was bleeding that day because she passed a "blood clot," because she had cut herself shaving with a broken razor and a serrated knife, and because she had used the serrated knife to engage in self-mutilation of her vagina. After the detectives questioned Appellant for two hours, Appellant finally admitted that she had given birth. Appellant explained that she had given birth to

the baby while she was alone in her bedroom and while her boyfriend and family were in another room. Appellant said that she cut the baby's umbilical cord and then "flushed it." Detective Cisneros asked her whether it was possible that the baby was "cut," and Appellant responded, "I don't know."

Detective Cisneros asked whether the baby had moved at all or was breathing; Appellant said "no" and the baby "was not moving at all." She described the baby as "blue." She also said that the baby did not move when she hit the baby on the "butt." Yet, Appellant said that the baby "tried" to take a breath and that Appellant used her own pinky to remove fluid from the baby's mouth. However, Appellant then reiterated that the baby did not move; the baby "didn't even start breathing at all" and was "pretty much dead." Because the baby was "dead blue" and because Appellant was scared that her parents would find out, Appellant flushed the baby.

The detectives interviewed Appellant a second time. During this second interview, Appellant stated that, after she had given birth to the baby, she passed out. She explained that the baby was "still attached" to her while she was passed out, although she also stated that she could not remember. She said that, when she woke up at one point, the baby did not make any noise and "wasn't even moving."

While the interviews were taking place, Detective Montgomery, Abilene Police Criminalist Wallace McDaniell, and other Abilene police officers searched Appellant's home. Officer McDaniell and Detective Montgomery observed blood in several locations throughout the home. Specifically, they observed blood throughout Appellant's bedroom and the bathroom next to Appellant's bedroom. Detective Montgomery also saw bloodstained sheets in the washing machine. Officer McDaniell and Detective Montgomery found a bloody knife and a pair of scissors on the bedroom floor. There were also bloodstains on the underside of the mattress in Appellant's bedroom; Officer McDaniell and Detective Montgomery believed that the mattress had been flipped. In the bathroom, Officer McDaniell and

Detective Montgomery found a pair of pliers with blood on them and also a trash can that had blood on it; Officer McDaniel took the trash can and placed it in the trunk of his vehicle for later examination.

Detective Montgomery received information from Detective Cisneros that "the baby was possibly flushed down the toilet." Detective Lynn Beard of the Abilene Police Department called master plumber Brian Sweat to Appellant's home to look inside the sewer line for a missing baby. When Sweat accessed the sewer lines from outside the home, he found a human placenta inside the lines. Thereafter, Officer McDaniel and Detective Montgomery searched the trash can that Officer McDaniel had placed in his trunk. They recovered the body of a newborn infant approximately halfway down the trash can; the infant was later identified to be the victim in this case, A.C., Appellant's daughter. Officer McDaniel saw "very obvious" injuries to A.C.'s body, specifically around her neck area.

Detective Cisneros acquired a picture of A.C.'s body and showed it to Appellant during her third interview. Appellant repeatedly and frantically explained that it was a "freak accident" and that she "did not mean to hurt [her] child" or "kill it." Detective Cisneros asked her what knife she had used, and Appellant explained: "That green one - I had a green one." Appellant explained: "It had fell" and "I went to get it and I had the knife in my hand" and "then I accidentally hit it." Appellant also said that her "hand slipped" when she tried to cut the umbilical cord; she said her hand was "wet and everything." Next, Appellant said that she tried to "save" the baby. Appellant reiterated her claim that the baby was not crying and was not moving. She said that, when she did cut the baby, she did not hear the baby make any noise.

Detective Cisneros accused Appellant of lying. Detective Cisneros said: "The reason you cut her throat was because she was moving and making noise and you didn't want . . . anybody to hear her." Appellant said: "I'm not lying."

Detective Cisneros asked why she would cut the baby's throat if the baby was not moving or breathing. Appellant responded: "Because she was not moving and so I thought it was something and I was [going to] see if she wasn't going to live or not; I didn't even know if she was dead. I thought she was already dead so I did what I did." At the end of the interview, Appellant said that she "killed [her] own freaking child." Throughout her interviews, Appellant repeatedly referred to A.C. as "it" and "the baby."

The next day, Dr. Susan Jean Roe, a deputy medical examiner with the Tarrant County Medical Examiner's Office, conducted an autopsy of A.C. During the autopsy, Dr. Roe looked for various things in an effort to determine whether A.C. was born alive or stillborn. Ultimately, Dr. Roe testified that she could not determine from the autopsy whether the baby was born alive or stillborn.

Dr. Roe first determined that A.C. had sustained a "sharp-force injury" to her neck that left a "gaping," "large" wound, severed her trachea, and punctured her left lung. After Dr. Roe cleaned the wound, she saw tissue inside the wound that indicated that A.C. had been stabbed at least three times in that area, possibly even more. Although Dr. Roe could not specify the exact type of instrument used to inflict A.C.'s injuries, she opined that the serrated blade that was found in Appellant's room was an instrument that could have caused A.C.'s wounds. Dr. Roe testified that the sharp force injuries to A.C. were intentional and not the result of a "freak accident." Dr. Roe determined A.C.'s gestational age to be thirty-nine to forty weeks based on A.C.'s weight and physical maturation. According to Dr. Roe, A.C. was 6.8 pounds, 20.47 inches, and a "term infant." Dr. Roe plotted A.C.'s height and weight on a growth chart, and she placed A.C.'s weight in the 25th percentile and length in the 75th percentile.

Dr. Roe did not observe signs that A.C. was born prematurely. Specifically, she did not observe that A.C. had translucent skin with visible blood vessels, a

characteristic that Dr. Roe testified is common in premature infants. Rather, Dr. Roe observed that A.C.'s skin was "pink with minimal visible vessels."

When Dr. Roe examined A.C.'s heart, she observed a small atrial septal defect. At trial, she testified that this abnormality, which she described as "tiny holes" in the heart, does not "cause an issue during infancy or childhood" but, if left untreated, could cause a problem in adulthood. Dr. Roe also testified that children are born with this defect every day and survive to adulthood. Dr. Roe did not find any other defects or abnormalities in A.C.'s heart.

Dr. Roe also examined Appellant's placenta. Dr. Roe testified that the placenta was still in adequate condition and that she specifically examined certain bumps located on the placenta, called "cotyledons." Cotyledons, according to Dr. Roe, can cause infections and bleeding in the mother, if abnormalities are present. Dr. Roe did not find any abnormalities in the cotyledons.

Dr. Roe did not find any birth irregularities in A.C.'s pulmonary system. With regard to A.C.'s lungs, Dr. Roe determined that A.C.'s lungs were both collapsed or "atelectatic." According to Dr. Roe, A.C.'s collapsed lungs could mean one of two things. First, her collapsed lungs could mean that A.C. did not breathe very much. Second, A.C.'s collapsed lungs could mean that air entered A.C.'s lungs when one of her lungs was punctured. In any event, Dr. Roe testified that sections of A.C.'s lungs showed no definite aeration; in other words, her lungs were not "fluffy and expanded." Dr. Roe testified that this meant that she could not "tell . . . if [A.C.'s lungs] looked like they were lungs in which a baby had been breathing." However, Dr. Roe testified that this finding was consistent with a child, such as A.C., needing resuscitation at birth. Dr. Roe testified that it was not uncommon to see a baby born alive who had fluid in the nasal cavities and mouth and required suctioning to assist the baby's breathing.

As part of the autopsy, Dr. Roe placed A.C.'s lungs in water to see if they floated. Dr. Roe testified that the "float test" has been used by pathologists to determine whether an infant was born alive. Dr. Roe testified that A.C.'s lungs floated. Yet, Dr. Roe testified that this test was unreliable and that she could not scientifically say with medical certainty whether A.C. had air in her lungs.

Dr. Roe also examined A.C.'s gastrointestinal tract. Dr. Roe observed a small amount of "blood-tinged mucoid material" in A.C.'s stomach; the material contained "tiny gas bubbles." According to Dr. Roe, air could enter the stomach "[i]f a baby cries," if "a baby has lived for a long enough period of time," or if a baby is gasping or swallowing as they are leaving the birth canal. Air, according to Dr. Roe, can enter the stomach even when there is fluid in the infant's lungs, nasal cavities, and mouth. Dr. Roe also determined that A.C.'s liver, pancreas, and thyroid were normal.

Dr. Roe did not see any signs that A.C. was stillborn. Dr. Roe testified that, if a baby dies in utero and there has been enough passage of time, usually the baby starts to exhibit certain signs, such as maceration of the skin. Specifically, Dr. Roe testified that, because of the mother's body temperature, the baby's skull begins to collapse and the baby starts "losing the outer layers of [its] skin"; this usually takes hours to develop, according to Dr. Roe.

Ultimately, Dr. Roe labeled A.C.'s cause of death as "undetermined." She testified at trial that four other physicians who reviewed the case came to the same conclusion.

The State also presented evidence that Appellant had discussed her pregnancy with one of her teachers and with a school nurse. Appellant was enrolled in special education classes at Cooper High School, and at the time of the alleged offense, she was a senior in high school who was performing work at the level of a fifth or sixth grader. Jillian Carrion, a teacher at Cooper High School, testified that Appellant told

her about the pregnancy about a month prior to the date Appellant gave birth. Carrion testified that, in a separate conversation, she discussed the possibility of adoption with Appellant; she said that Appellant "seemed overwhelmed and upset" at that possibility. On cross-examination, Carrion agreed that Appellant had told her that she had a due date of June 14; Carrion thought this seemed very unlikely since Appellant "seemed much further along than at that time."

Rebecca King, a nurse at Cooper High School, testified that she visited with Appellant at the request of Carrion. King testified that, when she asked Appellant if there was anything Appellant needed to discuss, Appellant initially stated: "[N]o." Appellant "was kind of giggling and blowing it off." King asked whether Appellant was pregnant, and Appellant replied: "Oh, yes that." King asked Appellant whether she had any paperwork to confirm the pregnancy so that King could get her signed up for pregnancy-related services. Appellant told King that she did not but that she could get it to King. King saw Appellant again on a later occasion, and Appellant told her that she had forgotten the paperwork. On cross-examination, King confirmed that Appellant told her that the due date was in June.

The State presented evidence of Appellant's mental capacity through the testimony of Jo Ann Campbell, a licensed specialist in school psychology for the Abilene Independent School District. Campbell testified at trial that she conducted psychological assessments of Appellant in October 2012 and again in October 2015. In the 2012 assessment, Campbell found that Appellant had an emotional disturbance. However, Appellant's subsequent October 2015 assessment showed that she had made considerable progress. Campbell testified that Appellant's emotional-disturbance qualification was removed after the 2015 assessment and that Appellant was placed in a learning disability category, which, according to Campbell, is not the same as intellectual disability. Campbell agreed that Appellant

was able to follow rules and structure at school, and Campbell found nothing to indicate that Appellant did not know right from wrong.

In this appeal, Appellant does not dispute that she intentionally stabbed A.C. Instead, Appellant disputes whether A.C. was alive at the time Appellant stabbed her. Appellant argues that a rational trier of fact could not determine beyond a reasonable doubt that A.C. was born alive and remained alive up to the point that Appellant stabbed her. As such, Appellant argues that there is no evidence that she caused A.C.'s death.

As charged in this case, a person commits the offense of capital murder if she intentionally or knowingly causes the death of an individual under ten years of age. TEX. PENAL CODE ANN. § 19.03(a)(8) (West 2019). An "individual" is a human being who has been born and is alive at the time of the alleged conduct of the defendant. *Id.* § 1.07(a)(26). To convict a defendant of murder, but-for causation must be established between the defendant's conduct and the individual's death. *See id.* § 6.04(a); *Wooten v. State*, 267 S.W.3d 289, 296 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Thus, under the murder statute and the indictment, the State was required to prove not only live birth but life at the time of Appellant's conduct toward A.C.

The El Paso Court of Appeals has addressed this issue before. In *Showery v. State*, 690 S.W.2d 689 (Tex. App.—El Paso 1985, pet. ref'd), the defendant, a physician, was convicted of the murder of a newborn baby arising out of an abortion by "hysterotomy." *Id.* at 691. The State presented evidence at trial that, after the defendant delivered the baby, the defendant suffocated the baby. *Id.* Consequently, a jury convicted the defendant of murder under Section 19.02 of the Penal Code. *Id.* On appeal, the defendant argued that the evidence was insufficient to support his conviction for murder because the State failed to prove that the baby was alive at the time the defendant was alleged to have suffocated the baby. *Id.* at 694. The court

held that the evidence was sufficient to support the defendant's conviction. *Id.* at 696.

The *Showery* court held that two categories of evidence primarily supported an inference of live birth and continued life. *Id.* First, witnesses to the abortion observed movement in the baby that a medical doctor testified were movements that could be consistent with life. *Id.* at 695–96. The second category of evidence was the defendant's own conduct during the abortion. *Id.* at 696. The defendant, after he delivered the baby, placed the placenta over the baby's face and placed the baby in a bucket filled with water, practices that were unusual. *Id.*

Here, the jury could have considered Appellant's conduct at the time of A.C.'s birth as evidence of life and continued life. *See id.* After Appellant gave birth to A.C., Appellant stabbed her and placed her in the trash can. If A.C. was not born alive, as Appellant claims, a reasonable factfinder could question why Appellant would stab her. Actual observation of signs of life in A.C. would reasonably explain Appellant's behavior.

The jury also could have considered Appellant's statements to police as evidence of life and continued life. *See Nisbett v. State*, 552 S.W.3d 244, 265 (Tex. Crim. App. 2018) (inconsistencies in a defendant's story can provide evidentiary support for a conviction). Appellant told detectives that she did not know that she was pregnant, and she impliedly denied giving birth to a baby. When Appellant finally admitted that she had given birth to a baby, she concealed crucial facts. Appellant did not initially tell detectives that she had stabbed A.C. It was only after detectives showed her a picture of A.C.'s dead body that she admitted that she had stabbed A.C. Furthermore, she gave inconsistent explanations for why she stabbed A.C. She also said that she killed her child and that A.C. tried to take a breath. A jury could have reasonably inferred from Appellant's omissions and inconsistent statements that Appellant was attempting to conceal the true facts.

The jury also could have considered the medical evidence as evidence of life and continued life. Importantly, Dr. Roe did not observe any signs that A.C. was stillborn. While this is not direct evidence that A.C. was born alive, it is evidence that A.C. was not stillborn. Furthermore, Dr. Roe observed a small amount of "blood-tinged mucoid material" in A.C.'s stomach; the material contained "tiny gas bubbles." Dr. Roe testified that air can enter an infant's stomach "[i]f a baby cries," if "a baby has lived for a long enough period of time," or if a baby is gasping or swallowing as they are leaving the birth canal. Dr. Roe also testified that, from an X-ray of A.C.'s body, she observed air in A.C.'s chest cavity and possibly within her upper abdominal area. Dr. Roe testified that the presence of air can be important for determining whether an infant was born alive. Lastly, Dr. Roe did not find any health defects or abnormalities that contributed to A.C.'s death.

Considering all the evidence, a rational juror could have found that A.C. was born alive and remained alive up to the point that Appellant stabbed A.C. The jury, as the exclusive judge of the credibility of the evidence, was entitled to disbelieve Appellant's claim that A.C. was not born alive. Moreover, even if Appellant's statements were to be believed—that A.C. was "pretty much dead," that she was not moving or breathing, and that she was "dead blue,"—these facts, even if true, do not establish that A.C. was not born alive. Dr. Roe testified that it is not uncommon for a child born alive to display little or no motion, have a blue tint, and require resuscitation. Dr. Alexander testified that, in his experience delivering babies, he has seen children at birth who are relatively lifeless and blue, but still alive.

The evidence supports the jury's finding that Appellant caused A.C.'s death. The premise of Appellant's claim on appeal is that the State failed to prove by medical certainty that A.C. was born alive; however, the standard we must apply to determine whether A.C. was born alive and remained alive is the *Jackson* standard. See *Jackson*, 443 U.S. at 319. When the evidence is viewed in the light most

favorable to the verdict, a rational jury could have concluded beyond a reasonable doubt that Appellant committed capital murder. We overrule Appellant's sole issue on appeal.

We affirm the judgments of the trial court.

JIM R. WRIGHT

SENIOR CHIEF JUSTICE

September 19, 2019

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,

Stretcher, J., and Wright, S.C.J.¹

Willson, J., not participating.

¹Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

C

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COA No. 11-17-00299-CR

PD-11111-19

On this day, the Appellant's petition for discretionary review has been refused.

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AMENDMENTS

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Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such a State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay

any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Cite as US. Const. art. AMENDMENTS § Amendment XIV



Texas Penal Code § 6.04. Causation: Conduct and

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(a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

(1) a different offense was committed; or

(2) a different person or property was injured, harmed, or otherwise affected.

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(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) 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.

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

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(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

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(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under 10 years of age;

(9) the person murders an individual 10 years of age or older but younger than 15 years of age; or

(10) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the

defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

« Prev (<https://codes.findlaw.com/tx/penal-code/penal-sect-19-02.html>)

Next » (<https://codes.findlaw.com/tx/penal-code/penal-sect-19-04.html>)

Read this complete Texas Penal Code § 19.03, Capital Murder on Westlaw ([https://1.next.westlaw.com/Document/142C348701B1C11EA81BB9350DACFF4DC/View/FullText.html?originatingContext=document&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/142C348701B1C11EA81BB9350DACFF4DC/View/FullText.html?originatingContext=document&transitionType=CategoryPageItem&contextData=(sc.Default)))

Findlaw Codes are provided courtesy of Thomson Reuters Westlaw, the industry-leading online legal research system (<https://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/>). For more detailed codes research information, including annotations and citations, please visit Westlaw (<https://www.westlaw.com/>).

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