IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
	)	
vs.	)	Case No. 19BA-CR04782
	)	
JOSEPH DUANE ELLEDGE	)	

SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT III OF THE INDICTMENT

COMES NOW, the State of Missouri, by and through, Daniel K. Knight, Prosecuting Attorney for the County of Boone, and in opposition to Defendant's Motion to Dismiss states as follows:

Defendant's Motion to Dismiss Count III of the Indictment is a request for a ruling – before the trial – on the sufficiency of evidence to prove Count III. Because such a ruling is improper in a criminal case and because the Superseding Indictment properly charges endangering the welfare of a child in the first degree, Defendant's motion should be denied.

The Superseding Indictment sufficiently charges endangering the welfare of a child in Count III. The Indictment is in compliance with the Missouri Approved Charges. *See* MACHR-2d 22.10 (the approved form for endangering the welfare of a child in the first degree). As such, the Indictment complies with the rules for the form and content of an indictment. *See* Rule 23.01(b) (stating that "indictments or informations that are substantially consistent" with the approved forms shall be deemed to comply with the requirements of the rule).

Defendant, in fact, does not argue that the Indictment is faulty. His Motion does not identify any defect in the Superseding Indictment or present an argument as to how the Indictment itself is insufficient. While he cites general standards for a proper charging document, his argument is an attack on the sufficiency of evidence and not a true motion to dismiss for a defective charge.

In his Motion, Defendant presents the evidence as he perceives it and then argues, based on *Carmons v. State*, 26 S.W.3d 382, 384 (Mo.App. W.D. 2000), that such evidence is insufficient to support a charge of endangering the welfare of a child.

Carmons, however, was a case addressing the factual basis for a plea and involved a different theory of endangering. In *Carmons*, the defendant had been charged with endangering the welfare of a child in the first degree by "by allowing . . . [Juan] to have contact with [her child] after [the child] informed defendant that [Juan] was sexually abusing him." During the plea hearing, the judge read the charges, and the defendant admitted she had learned Juan was sexually abusing the child but "didn't keep Juan from coming around the house." The Court of Appeals determined there was an insufficient factual basis for the plea. *Carmons*, 26 S.W.3d at 385–86. The Court noted that the factual basis did not include facts showing the defendant had created a risk to the child by knowingly allowing the abuse to continue. *Id.* at 385. The factual basis, for example, had not included that the defendant left the child alone with Juan. *Id.* The court ultimately concluded that the facts presented did not establish an actual risk to the child or ensure the defendant knew what she was pleading to. *Id.* The Court in *Carmon*, though, did not suggest the charge was insufficient or that the State would have been precluded from trying the offense as charged following reversal of the plea.

Defendant's argument based on *Carmens* is faulty in at least two respects. First, Defendant cannot challenge the facts of the case through a motion to dismiss. Trial is the method to determine the State's proof, and a pretrial motion to dismiss is not a proper way to challenge the facts supporting the charge. *See, e.g., State v. Wright*, 431 S.W.3d 526, 531-533 (Mo.App. W.D. 2014) (noting that the underlying facts were "largely irrelevant to a motion to dismiss" and that "unlike in civil cases, there is no currently recognized procedural mechanism in Missouri akin to summary judgment in the criminal context"); *State v. Halliburton*, 11 S.W.3d 602, 603 (Mo.App. E.D. 1999) (reversing dismissal of charges following a pretrial hearing where the trial court determined that methamphetamine charged was residue and could not support a finding of knowing and intentional possession); *City of Raymore v. O'Malley*, 527 S.W.3d 857, 861-863 (Mo.App. W.D. 2017) (noting that whether the charging document states an offense is determined from the four corners of the document and reversing where the court had dismissed pre-trial based on defendant's claim of an affirmative defense, which would require evidence). Because Defendant's Motion to Dismiss is an attack on the sufficiency of evidence to support the State's case, it is not a proper pretrial motion and should be dismissed.

Second, even if an attack on sufficiency could be raised, the charge in *Carmons* was different from the charge in this case. In *Carmons*, the defendant had been charged with "allowing . . . [a third party] to have contact with [her child] after [the child] informed defendant that [the third party] was sexually abusing him." In this case, by contrast, Defendant is charged with acting "in a manner that created a substantial risk to the life and body and health of [the victim], a child less than seventeen years old, by separating Mengqi Ji from [the victim]. Even if the Court in *Carmons* had suggested the Defendant could not be tried for endangering as charged (which it did not), the State's charge in this case is different. The State anticipates it will be able

to prove that Defendant's actions in separating the child victim from Mengqi Ji created actual risk to the alleged victim.

Finally, the Court should ignore Defendant's ad hominem attacks on the State's motives. The State's motives do not determine whether the Indictment is legally valid. More importantly, the State is acting in good faith. The State believes it can prove Defendant's guilt on Count III beyond a reasonable doubt, and it intends to do so at trial.

WHEREFORE, the State respectfully requests that Defendant's Motion to Dismiss be denied.

Respectfully submitted,

Daniel K. Knight

Daniel K. Knight
Prosecuting Attorney
Bar No. 40443

CERTIFICATE OF SERVICE

I hereby certify on this 5th of February, 2020, an electronic copy of the foregoing was sent through the Missouri e-Filing System to: John P. O'Connor

/s/

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 19BA-CR04782-01
	)	
JOSEPH DUANE ELLEDGE,	)	
	)	
Defendant.	)	

REPLY TO THE STATE OF MISSOURI'S SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT III OF THE INDICTMENT

COMES NOW defendant Joseph Duane Elledge, through undersigned counsel, to provide this Honorable Court the following suggestions in reply to the State's suggestions in opposition to Mr. Elledge's motion to dismiss Count III of the indictment:

> **"I'm not aware of cases—any cases—where someone's been charged with a crime such as endangering the welfare of a child in the first degree by separating a mother from a child."**
>
> - Boone County Prosecuting Attorney Dan Knight[1]

At a hearing on February 3, 2020, the prosecuting attorney assured the Court that he could provide it with case law supporting the proposition that Count III of the indictment states a claim. The State's suggestions in opposition to Mr. Elledge's motion to dismiss Count III failed to deliver on that assurance. Instead, the State reverted to the position that Mr. Elledge's motion is more aptly described as a sufficiency of the evidence argument.

Missouri Rule of Criminal Procedure 23.01 requires an indictment to "[s]tate plainly, concisely, and definitely the essential facts constituting the elements of the offense charged." Mo. R. Crim. P. 23.01(b)(2). As charged, Count III of the indictment fails to state an element of

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[1] https://abc17news.com/news/2019/12/20/husband-of-missing-woman-indicted-on-charge-related-to-disappearance/; https://www.columbiamissourian.com/news/local/grand-jury-indicts-joseph-elledge-charge-added/article_ef0e5542-234c-11ea-b94a-dbef38d082b8.html

the offense of first degree endangering, in that it fails to state any facts that, if proved, constitute the element of actual risk to the life, body, and health of Mr. Elledge's daughter. This is not a sufficiency of the evidence argument, as claimed by the State. Rather, this is an argument that even if the State overcomes its gross lack of evidence that Mr. Elledge did anything to separate his wife from his daughter, the indictment still fails to state an offense under Missouri law. More simply stated, the prosecuting attorney believes Mr. Elledge is responsible for his wife's disappearance. (https://www.komu.com/news/breaking-joseph-elledge-named-prime-suspect-in-wife-s-disappearance) Even if his theory is true, Count III still does not state a charge of child endangerment, because separating Mrs. Elledge from her daughter, resulting in Mr. Elledge having sole custody of the child, does not place the child in real and instant risk of harm.

Put most plainly, it is the State's position that Mr. Elledge is a danger to his daughter because he allegedly caused bruising to her buttocks on a single occasion eight months prior to his arrest in this case; therefore, actions taken that would cause her to be in the care and custody of Mr. Elledge support a charge of endangering in the first degree. This premise underlying the charge in Count III of the indictment is faulty. The law in Missouri requires more than speculative risk of harm to a child. It requires that a person create "an actual risk to the life, body, and health of a child." *Carmons v. State,* 26 S.W.3d 382, 385 (Mo.App. W.D. 2000). In other words, the alleged act charged in the indictment must itself pose a real and instant risk of danger to the child. "While . . . the potential risk for harm exists when a victim comes into 'contact' with the person who abused them," it cannot be said "that harm would occur or would be practically certain to occur by the contact alone." *Id.*

The State counters that its use of form charging language absolves it of its responsibility to file a proper charge. However, where, as here, the underlying criminal statute uses generic

terms in defining an offense, "it is necessary to recite sufficiently the conduct constituting the offense in order to accomplish the purpose of the indictment or information." *State v. O'Connell,* 726 S.W.2d 742, 746 (Mo. banc 1987). Moreover, "even where an [indictment] tracks the MACH-CR and/or relevant statute and adequately informs a defendant of the charges against him, a defendant may properly raise legal, constitutional, and other issues," and a court must dismiss an indictment if it concludes that the indictment fails to state an offense. *State v. Metzinger,* 456 S.W.3d 84, 92 (Mo. App. E.D. 2015).

To better demonstrate the State's failure to state a charge, let's look at other scenarios that would result in Mr. Elledge having unsupervised custody of his daughter. Again, under the State's premise, Mr. Elledge is a danger to his daughter because he allegedly bruised her buttocks several months prior to the disappearance of his wife, so actions that leave him in charge of his daughter are criminal. Under such a premise, Mrs. Elledge should have been charged every time she let Mr. Elledge care for their daughter outside her presence. Is it really the State's position the Mrs. Elledge was a bad mother and was guilty of first degree child endangerment each time she ran to the grocery store, took a nap, or otherwise left her daughter in Mr. Elledge's care? Likewise, discovery in this case shows that the Elledges discussed getting a divorce. Had they gone through with this process, would it be criminal conduct for the judge to approve a parenting plan that allowed Mr. Elledge to have his daughter every other weekend and for two weeks during the summer? Of course, viewing as criminal these actions by Mrs. Elledge or a judge is absurd, but they are consistent with the charge made in Count III and demonstrate the deficiency of the indictment.

Finally, as discussed in the underlying motion to dismiss, if this Court allows the State to prosecute the defective charge found in Count III, it would countenance the admission of

scandalous allegations, the prejudice of which would significantly outweigh any probative value. It is admittedly the State's plan to prosecute a murder case under the guise of the Class D felony charged in Count III, even if a directed verdict is the end result. This would taint the trial of the first two counts of the indictment, depriving Mr. Elledge of the fair trial guaranteed him by the United States and Missouri constitutions.

WHEREFORE, for each of these compelling reasons, this Honorable Court should enter an order dismissing Count III of the indictment and grant such other relief it deems reasonable and just.

Respectfully Submitted,

/s/ John P. O'Connor
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ATTORNEYS FOR MR. ELLEDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served via the Court's electronic filing system, this 6th day of February, 2020, upon the following:

Daniel K. Knight
Boone County Prosecuting Attorney
ATTORNEY FOR THE STATE OF MISSOURI

/s/ John P. O'Connor
John P. O'Connor, Attorney