

IN THE DISTRICT COURT OF NEBRASKA COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	CASE NO. CR 22-132
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER RE: MOTION TO</b>
	)	<b>QUASH (by Defendant)</b>
JESSICA A. BURGESS,	)	
	)	
Defendant.	)	

NOW ON THIS 7<sup>th</sup> DAY OF NOVEMBER, 2022, this matter came on for hearing upon the Defendant's Motion to Quash. Appearing on behalf of the State is Joseph Smith, Madison County Attorney. The Defendant appeared personally and with her attorney, Brad Ewalt.

Evidence was adduced and the parties rested. Each party is to submit written closing arguments on or before December 5, 2022, at which time the matter will be taken under advisement by this Court.

Defendant's arguments are broken down into two parts. The first challenges Count II of the Information under *N.R.R. §28-1302* "Concealing the Death of Another Person." The second challenges Count IV of the

Information under *N.R.R. §28-3,106 (also citing N.R.R. §28-3,108)*  
“Abortion.”

I. As to the first part of the Defendant’s argument under *N.R.R. §28-1302*, the Defendant contends she cannot be charged with this crime as a “fetus” is not a “person” as defined by Nebraska or Federal statute as to violate this Nebraska criminal statute.

*N.R.R. §28-1302* provides: “Any person who conceals the death of **another person** and thereby prevent a determination of the cause or circumstances of death commits a Class I Misdemeanor.” (emphasis)

Previously, in *Roe v. Wade, 410 U.S. 113 (1973)*, the United States Supreme Court wrote that. . . no case could be cited that holds that a fetus is a **person** within the meaning of the Fourteenth Amendment.” *Roe v. Wade, 410 U.S. 113, 157, 93 S. Ct. 705, 728-29 (1973)*(emphasis) In wrestling with the argument that a “fetus” is a “person” within the context of the Constitution, the Supreme Court found the use of the term “person” in nearly all circumstances had application only post-natally and not pre-natally. See *Id. at 157*. Since that time, however, *Roe v. Wade* and its logic used to render the opinion has been overturned by *Dobbs v. Jackson Women’s Health Org., 142 S.Ct. 2228 (June 24, 2022)*.

“In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.” *State v. De Wolfe, 67 Neb. 321, 322 (1903)*.

A “person” for purposes of *N.R.R. §28-1302* is not defined in article 13 of Chapter 28 of the Nebraska statutes as correctly pointed out by Defendant’s counsel.

A “person” is defined in article 1 of the criminal code found in *N.R.R. §28-109(17)* as follows: “Person shall mean any natural person and where relevant a corporation or an unincorporated association . . .”

Additionally, Section 29-3513 of the Nebraska criminal procedure statutes defines a “person” as: “Person shall mean any natural person, corporation, partnership, limited liability company, or association.”

A “person” is defined in article 3, chapter 28 (Homicide – terms, defined) §28-302(2): “Person, when referring to the victim of a homicide, shall mean a human being who had been born and was alive at the time of the homicidal act . . .” However, the statute in question does not fall under or within article 3.

A “natural person” is not defined as best as can be determined by this Court in the Nebraska criminal statutes. The Supreme Court of Nebraska made the following comment on the search for such a definition: “To the extent it might be argued that the definition of “person” as a “natural person” is not decisive, we note the dictionary definition of a “person” as “a human being regarded as an individual.” *State v. Covey*, 290 Neb. 257, 262 (2015).

“[I]n construing or interpreting provisions of criminal law it is to be remembered that if any doubts of the meaning exist in penal laws they ought to be construed in favor of the accused. While in no manner negating the necessity of reasonable construction, yet as between the government and the individual the benefit of the doubt, all other reasons being equal, ought in these cases to be given to the individual, not to authority; for the state makes the laws and authority has the power. Criminal laws are to be strictly construed, and a penalty must be imposed by clear words.” *Lane v. State*, 120 Neb. 302, 306 (1930).

The terms “unborn child” and “fetus” are contained throughout the Nebraska criminal statutes. For example:

“**Unborn child** means an individual member of the species *Homo sapiens*, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth.” *N.R.R. §28-389 (emphasis)*. This definition is contained within the *Homicide of the Unborn Child Act*.

“For purposes of the Assault of an Unborn Child Act, **unborn child** means an individual member of the species *Homo sapiens* at any stage of development in utero.” *N.R.R. §28-396 (emphasis)* This definition being contained within the *Assault of an Unborn Child Act*.

“**Unborn child** or **fetus** each mean an individual organism of the species *homo sapiens* from fertilization until live birth.” *N.R.R. §28-3,103 (emphasis)*. This definition being contained within the *Pain-Capable Unborn Child Protection Act*.

Interestingly, the legislature appears to acknowledge a distinction between a “person” and “unborn child” within the same criminal statute of driving under the influence resulting in serious bodily injury:

“Any person who, while operating a motor vehicle in violation of section 60-6,196 or 60-6,197, proximately causes serious bodily injury to **another person** or **an unborn child** of a pregnant woman shall be guilty of a Class IIIA felony and the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years from the date ordered by the court and shall order that the operator’s

license of such person be revoked for the same period.”  
*N.R.R. §60-6,198(1) (emphasis).*

“For purposes of this section, **unborn child** has the same meaning as in section 28-396.” *Id. at (3).*

In the case at bar the legislature could have included “unborn child” or “fetus” in its definition of “person” within article 13, of Chapter 28. It did not. The legislature could have added the term “unborn child” or “fetus” as an alternate to the term “person” within §13-1302. It did not.

The “intent” of the legislature is expressed as much by omission as by inclusion. The absence of the term “unborn child” or “fetus” within a definition of “person” and the absence of the term “unborn child” or “fetus” as an alternate reference in article 13 of the Nebraska statutes shows no legislative intent to include an “unborn child” or “fetus” within the prohibition of the statute.

Therefore, this Court FINDS the term “person” as is commonly used in the English language and for purposes of *N.R.R. §13-1302*, to be “a human being having been born alive.” No other intent of the legislature having been demonstrated otherwise to the Court.

This finding does not, however, automatically result in Defendant’s Motion to Quash being sustained. There is evidence having been presented to this Court that the deceased in question may have been born alive and remained alive, if only for a brief time, prior to death. This is a factual question that is properly left to a jury to determine upon proper instruction as to whether the deceased was a “person” for purposes of *N.R.R. §13-1302*.

Defendant’s Motion to Quash, based upon the argument that under *N.R.R. §28-1302*, the Defendant cannot be charged with this crime as a

“fetus” is not a “person” as defined by Nebraska or Federal statute as to violate this Nebraska criminal statute, is **overruled**. There exists a factual question as to whether the deceased was born alive and falls under the definition of “person” for purposes of the statute.

The Defendant will be entitled to an instruction as to the definition of “person” at time of trial that is consistent with this Court’s ruling herein.

II. The second argument of the Defendant challenges Count IV of the Information under *N.R.R. §28-3,106 (also citing N.R.R. §28-3,108)* “Abortion.”

The statute in question reads as follows:

“Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of section 28-3,106 is guilty of a Class IV felony. No penalty shall be assessed against the woman upon whom the abortion is performed or attempted to be performed.” *N.R.R. §28-3,108*.

Defendant’s argument is without merit.

Under *N.R.R. §28-206*, “a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.” The factual allegations presented against the Defendant state she ordered pills to induce abortion from an online source, then either delivered or had the pills delivered to her minor daughter for purposes of inducing an abortion; and, also instructed her daughter on how to use the pills to achieve an abortion. The Defendant is not a licensed physician.

The Nebraska legislature was free to define the criminal offense and to designate those persons exempt from such offense. The Defendant does not fall into the category exempted.

Defendant's second argument in her Motion to Quash is **overruled**.

IT IS SO ORDERED THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.

BY THE COURT:



A handwritten signature in black ink, appearing to read "Mark A. Johnson", is written over a solid horizontal line.

Mark A. Johnson, District Judge