

Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas

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I. INTRODUCTION

For several years, our Kansas Court of Appeals and Supreme Court have struggled with claims that various criminal defendants were not assured the unanimous jury verdicts of guilt to which they are entitled. These litigants have asserted that, because the State sought to convict of only one charge, despite admitting evidence of more than one act constituting the crime, jurors may not have agreed unanimously on the underlying act meriting sanction. Reversal, they have further asserted, is required.

The Kansas courts have distinguished these situations from those in which the State is free to prove that a crime occurred by one or the other of several available methods. The unanimity of a jury verdict in such a case—termed “alternative means” rather than “multiple acts”—is not open to the same question about unanimity on the crime of conviction. For a time, our courts were able to clearly define the difference between a multiple acts and an alternative means case; and clearly different outcomes occurred in one as opposed to the other. More recent decisions have blurred the definitions and contours of these cases, and their outcomes have become far less predictable. Following one pattern of analysis and then another, our courts now find themselves unable to lie quietly in the ruffled bed they have made.

This article reviews the historical origins of multiple acts and alternative means law in Kansas, examines the early doctrinal patterns established by the cases, critiques the courts’ shifting approaches, and offers suggestions for future actions to standardize our analysis and reintroduce predictability and manageability in these areas of the law.

II. EARLY DOCTRINAL DEVELOPMENT

A. *Detecting a Pulse in the Primordial Soup*

1. The Criminal Defendant’s Right to Trial by Jury

Multiple acts and alternative means law evolved out of our nation’s abiding affection for, and trust in, the ability of juries to decide criminal cases. Both the Framers of the Constitution and those suspi-

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scious of their leanings toward centralized power regarded trial by jury as so essential a right that they enshrined it in the Bill of Rights as well as the text of the United States Constitution. Article III provides that the trial of all crimes, “except in Cases of Impeachment, shall be by Jury”¹ The Sixth Amendment, for its part, states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”²

This basic right to jury trial in most criminal cases was incorporated into state law in *Duncan v. Louisiana*.³ In that case, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment guaranteed a right to jury trial in all state criminal cases comparable to those that would come within the Sixth Amendment if tried in federal court.⁴

The drafters of the Kansas Constitution also had doubled up on the protection of a criminal defendant’s right to jury trial. Section 5 of the state Bill of Rights provides that the “right of trial by jury shall be inviolate,”⁵ and section 10 states an accused shall receive “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”⁶ Early Kansas case law and statutes did not even permit waiver of jury trial in felony cases. The right was considered too precious and too intertwined with vital public policy to allow a defendant to merely discard it. As our supreme court put it at the turn of the last century:

Nor is the trial by jury thus guaranteed a mere right of the accused, a something in the nature of privilege which he may demand, and which, if demanded, must be accorded. It is, in the full sense, an obligation resting on the state, not because of a demand for it by the accused, but because from motives of public policy it is to the interest of the state to accord it. There are many rights secured even by constitutional guaranty which an interested party may waive, but in all such cases the right is a thing personal to the individual. In such cases the right waived is in the nature of a personal favor, and not in the nature of an institution of public or legal policy. Trial by jury in cases of felony is in the highest sense an institution of public policy. It was not ordained solely, nor even in its largest purpose, for the advantage of the accused. The state is interested in the lives and liberties of its citizens. To protect and defend from unjust accusa-

1. U.S. CONST. art. III, § 2.

2. U.S. CONST. amend. VI.

3. 391 U.S. 145, *reh'g denied*, 392 U.S. 947 (1968). *See also Bloom v. Illinois*, 391 U.S. 194, 199-200 (1968) (constitution guarantees right to state court jury trial for criminal contempt); III AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE Standard 15-1.1 n.23a (2d ed. Supp. 1986) (defendant constitutionally entitled to jury trial for “serious crimes,” not “petty crimes”); line between defined by past, contemporary standards).

4. *Duncan*, 391 U.S. at 149.

5. KAN. CONST. Bill of Rights, § 5.

6. *Id.* § 10.

tions is as much, if not more, the care of the state as to punish the guilty for infractions of its laws. . . .

. . . .

Independently of the considerations of social policy involved, and of the constitutional ordinance declarative of that policy, the waiver of a jury trial in felony cases is prohibited by statute. The criminal code, section 199 (Gen. Stat. 1897, ch. 102, § 199; Gen. Stat. 1899, § 5477), declares: “The defendant and prosecuting attorney, with the assent of the court, may submit to trial to the court *except in cases of felonies*. All other trials *must be by jury*, to be selected, summoned and returned as prescribed by law.” Elsewhere in the statute the panel of petit jurors is stated to be twelve. These statutes are not cited as of themselves determinative of the question, but only as expressive of the fundamental principle underlying them and the constitutional provisions before quoted.⁷

Kansas now permits a defendant to waive jury trial.⁸ But a waiver of jury trial—or of any trial on the way to a guilty plea—must be knowing and voluntary.⁹

2. The Requirement of Jury Unanimity

In contrast to the right to trial by jury, Kansas’ rule that criminal jury verdicts be unanimous is a state statutory provision rather than a federal or state constitutional requirement. Verdicts must be

written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is the jury’s verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury is discharged from the case.¹⁰

Kansas criminal juries must consist of twelve members unless “the parties . . . agree in writing, at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than twelve.”¹¹ “Questions of law shall be decided by the court and issues of fact shall be determined by the jury.”¹² The current constitutional silence on the unanimity rule conceals the requirement’s advanced age and its earlier federal constitutional gloss.

The first record of a jury unanimity requirement dates back to the fourteenth century, when jury unanimity became a requirement in

7. *State v. Simons*, 60 P. 1052, 1052-53 (Kan. 1900), *overruled in part by Leathers v. Dillon*, 131 P.2d 668 (Kan. 1942).

8. KAN. STAT. ANN. § 22-3403(1) (1995).

9. *State v. Irving*, 533 P.2d 1225, 1228 (Kan. 1975) (“[I]n order for a criminal defendant to effectively waive his right to trial by jury, the defendant must first be advised by the court of his right to a jury trial, and he must personally waive this right in writing or in open court for the record.”).

10. KAN. STAT. ANN. § 22-3421 (1995).

11. *Id.* § 22-3403(2).

12. *Id.* § 22-3402(3).

criminal trials.¹³ In *Apodaca v. Oregon*,¹⁴ the United States Supreme Court listed several possible explanations for this historical development: (1) compensation for the lack of other procedural protections for defendants; (2) retention of a relic of trial by compurgation, which involved “adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position”; (3) personal knowledge of the facts by members of the jury, which meant there could be only one correct view of those facts; and (4) the requirement that consent bind the medieval community and the belief that a majority vote was insufficient evidence of such consent.¹⁵

The American colonists brought the unanimity requirement with them, and it soon became the accepted procedure for criminal trials in the “New World.” Four young states installed the requirement in their constitutions while others “provided for trial by jury according to the course of the common law”¹⁶ Although neither Article III nor the Sixth Amendment of the United States Constitution ultimately included a reference to unanimity, the United States Supreme Court nevertheless treated the requirement as a constitutional requirement in federal cases for many years.¹⁷ *Apodaca*¹⁸ and its companion case, *Johnson v. Louisiana*,¹⁹ made it clear in 1972, however, that the federal constitution did not command its application in state criminal cases.²⁰ As of that year, if a criminal defendant had the protection of a jury unanimity requirement in state court, he or she had only state constitutional or statutory law to thank.

In the last few years, one could argue that the pendulum marking the federal constitutional status of the jury unanimity requirement is swinging back. In *Apprendi v. New Jersey*,²¹ the United States Supreme Court vacated a sentence imposed under a New Jersey hate crime statute because the state court jury had not been given the opportunity to find the facts supporting the statute’s application beyond a reasonable doubt.²² In the Court’s view, any fact used to enhance a

13. Jere W. Morehead, *A “Modest” Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 KAN. L. REV. 933, 937 n.26-28 (1998) (citing JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 179 (1994)).

14. 406 U.S. 404 (1972).

15. *Id.* at 407 n.2.

16. *Id.* at 408 n.3.

17. See Morehead, *supra* note 13, at 938 n.38 (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, J. concurring); *Andres v. United States*, 333 U.S. 740, 748-49 (1948); *Patton v. United States*, 281 U.S. 276, 288-90 (1930); *Thompson v. Utah*, 170 U.S. 343, 355 (1898); *Am. Publ’g Co. v. Fisher*, 166 U.S. 464, 468 (1897)).

18. *Apodaca*, 406 U.S. at 404.

19. 406 U.S. 356 (1972).

20. *Apodaca*, 406 U.S. at 406 (nonunanimous state verdicts do not violate Sixth Amendment, made applicable to states through Fourteenth Amendment; ten-to-one and eleven-to-one votes permissible); *Johnson*, 406 U.S. at 362 (nonunanimous state verdict does not violate Due Process or Equal Protection Clauses of Fourteenth Amendment; nine-to-three vote permissible).

21. 530 U.S. 466 (2000).

22. *Id.* at 477.

defendant's sentence beyond a statutory maximum must pass through the crucible of jury consideration, because the right to a jury determination of the facts is "the great bulwark of [our] civil and political liberties" and the "*truth of every accusation*" must be "confirmed by the unanimous suffrage of twelve of [the defendant's] equals" ²³ Our Kansas Supreme Court has enthusiastically embraced the holding and rationale of *Apprendi* to declare upward durational departures under the state's Sentencing Guidelines unconstitutional. ²⁴ This language could be invoked in support of arguments that the "unanimous suffrage" of even state court criminal juries should enjoy federal constitutional protection.

3. Kansas' First Cases

The first Kansas case to discuss what would become part of the alternative means rule was filed in 1926—fifty years before the second such case explicitly recognized the concept and nearly seventy years before our supreme court gave the concept a name and differentiated it from multiple acts. In that first case, *State v. Bryan*, ²⁵ the defendant was charged with robbery in the third degree. The State alleged he had attempted to extort money and property by intimidating the victim with accusations and threats. The trial court granted defendant's motion to quash the information, holding that it charged several offenses of a distinct nature and that, if the case were submitted to a jury, the court would feel compelled to instruct that all jurors must agree on the particular method or means of extortion employed by the defendant. Otherwise, "essential unanimity" would be sacrificed and the defendant prejudiced because four jurors could agree the extortion was accomplished by one threat, four others by a second threat, and the remaining four by a third threat. ²⁶

Our supreme court reversed the trial court's decision. It held that the charging of one offense in one count of an information, even if the count described more than one of the means possible for commission of the offense, would be permitted, as long as the means were "not repugnant to each other, and were done at the same time by the same persons upon the same victim." ²⁷ This rule, the court said, was one of

23. *Id.* (citations omitted).

24. *See State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).

25. 245 P. 102 (Kan. 1926).

26. *Id.* at 103.

27. *Id.*

long standing,²⁸ and such an information did not need to be quashed as “multifarious.”²⁹

Most important in this context, the court went on in dicta to address the particularized unanimity instruction whose mere possibility had so concerned the trial court. Such an instruction would not be necessary, the court said.

In this case it would be enough that the jurors concurred in finding the single offense was committed or attempted to be committed by intimidation through any or all of the means alleged. If the accused intimidated [the victim] by accusations, that he had committed a crime or threats of bodily injury with the intent of extorting money or property from him, a crime was committed regardless of whether the intimidation was effected by one or more of the alleged means. There must be unanimity that extortion was committed or attempted through intimidation and that is as far as the court is required to go in the instructions as to unanimity in the mental operations of the jurors in reaching a verdict.³⁰

Thus *State v. Bryan* foreshadowed the decision that would be made in the next Kansas alternative means case, the first to address a jury verdict already rendered on a charge and instruction alleging alternative means of committing the crime: *State v. Wilson*.³¹ *Wilson* involved a Wichita murder. The defendant had confessed to killing the victim after a money-for-sex deal went bad, and the evidence could have supported either a premeditated killing or a felony murder based

28. *Id.* at 103-04 (citing *State v. Fleeman*, 171 P. 618, 621 (Kan. 1918) (prosecution for maintaining place where prostitution, fornication, concubinage practiced; motion to quash from defendant “bewildered by uncertainty” rejected); *State v. Johnson*, 116 P. 210, 210-11 (Kan. 1911) (prosecution for enticing, decoying, taking, receiving female child under eighteen years old into house of ill fame for purpose of prostitution permitted); *State v. Dunn*, 71 P. 811, 811 (Kan. 1903) (defendant charged with single count of larceny; thief stole from victim’s person and pocket; information not duplicitous); *State v. Meade*, 44 P. 619, 620 (Kan. 1896) (defendant charged with fraudulently obtaining signature to written instrument and with obtaining money by false pretenses; acts committed by same person at same time may be charged together in single count as single offense; each act considered step or stage in same offense); *State v. O’Neil*, 33 P. 287, 288 (Kan. 1893) (defendant charged in one count with killing wife by assaulting her with blunt instrument; kicking, beating, choking her; inflicting other mortal wounds; throwing her on ground, against wall; information not duplicitous)).

29. The 1926 label of “multifarious” apparently was equivalent to the contemporaneous label of “duplicitous.” Both terms refer to the impermissible practice of charging more than one offense in a single count, which implicates unanimity concerns. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 19.3(c) (4th ed. Supp. 2004); Brian Rayback & René E. Browne, *Twenty-Sixth Annual Review of Criminal Procedure, Indictments*, 85 GEO. L.J. 1025, 1042-44 (1997) (listing issues raised by duplicity; duplicity may be cured by early election, corrective instruction). “Multifarious” and “duplicitous” should be distinguished from today’s label of “multiplicitous,” the charging of a single wrongful act or offense in more than one count, which implicates double jeopardy concerns. See LAFAYE, *supra* at 19.3(c); *State v. Dorsey*, 578 P.2d 261, 264 (Kan. 1978) (distinguishing duplicity, multiplicity). In Kansas, multiplicity had both a common law aspect and a statutory aspect; now both aspects have been subsumed into a statutory elements test. See *State v. Schuette*, 44 P.3d 459, 464-65 (Kan. 2002); *State v. Campbell*, 78 P.3d 1178, 1184 (Kan. Ct. App. 2003), *aff’d on other grounds*, 101 P.3d 1179 (Kan. 2004); *cf.* *State v. Winters*, 72 P.3d 564, 569 (2003) (two charges merge; defendant sentenced on more severe offense).

30. *Bryan*, 245 P. 102 at 104.

31. 552 P.2d 931 (Kan. 1976).

on robbery.³² After the jury found the defendant guilty, the defendant argued on appeal to our supreme court that the information and the jury instructions impermissibly allowed the State to proceed on duplicate theories of a “willful, deliberate and premeditated killing” and a “killing in the perpetration or attempt to perpetrate a robbery.”³³ The defendant insisted “that some members of the jury may have found appellant guilty of a premeditated killing and others a felony murder, and that this would not be a unanimous verdict as required by our law.”³⁴

The court was unsympathetic. “[W]e do find authority in our cases which indicates the duplicate charge of both premeditated and felony murder may be proper.”³⁵ It continued:

When an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killer’s malignant purpose. In such case the verdict is unanimous and guilt of murder in the first degree has been satisfactorily established.³⁶

B. *Kansas Distinguishes Alternative Means from Multiple Acts*

1. The *State v. Timley* Decision

*State v. Timley*³⁷ marked the beginning of Kansas’ more systematic approach to the distinction between alternative means and multiple acts cases. In *Timley*, defendant Irvin Timley was charged with three counts of aggravated criminal sodomy, each crime perpetrated on a different victim at a different time and place. The jury was instructed to find him guilty on each count if the sodomy was accomplished by force or fear. The defendant had raised a consent defense, asserting that each of the three complaining witnesses had approached him and agreed to engage in sexual activity in exchange for drugs. Under the defendant’s version of the facts, the simultaneous acts of choking and threats alleged by the prosecution had been mere sex play designed only to enhance the consensual experience for both parties.³⁸

32. *Id.* at 934-35.

33. *Id.* at 935.

34. *Id.*

35. *Id.*

36. *Id.* at 935-36. Our court bolstered its holding with citations to California, Oregon, South Dakota, and New York cases. *See id.* at 936 (citing *People v. Milan*, 507 P.2d 956, 961-62 (Cal. 1973); *State v. Hazlett*, 492 P.2d 501, 502-03 (Or. Ct. App. 1972); *State v. Flathers*, 232 N.W. 51, 52-53 (S.D. 1930); *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903)).

37. 875 P.2d 242 (Kan. 1994).

38. *Id.* at 245.

After conviction on all three counts, the defendant contended on appeal that the trial court's instructions were insufficient to assure him a unanimous verdict, citing *State v. Kitchen*³⁹ from the state of Washington. Under *Kitchen*, he argued, he was entitled to a specific unanimity instruction telling jurors that in order to convict, they must agree on the method—either force or fear—the defendant used in each crime.⁴⁰ In *Kitchen*, the Supreme Court of Washington worked to clarify its standard of review in multiple acts cases.⁴¹ An earlier Washington Supreme Court ruling in a multiple acts case had required either a prosecution election or an instruction telling the jury it must agree on the underlying act supporting each conviction to prevent constitutional error.⁴²

Our supreme court distinguished the alternative means situation before it in *Timley* from the *Kitchen* multiple acts situation, acknowledging previous use of what it now termed “alternative means” analysis.⁴³ It quoted approvingly from the *Kitchen* decision on the distinction between the two types of cases.

In the alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to *guilt* for the single crime charged. Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means. . . . In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt.

In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.⁴⁴

Our court then moved to an evaluation of the sufficiency of the evidence before it in *Timley*.

In his appellate brief, Timley's counsel readily points out that there was evidence from which the jury could determine that each sexual act was the result either of force, based on Timley's choking the victims, or of fear, based on the threats Timley made to the victims. There was sufficient evidence, viewed in the light most favorable to the prosecution, that a rational factfinder could have found Timley guilty beyond a reasonable doubt of the crimes of rape and aggra-

39. 756 P.2d 105 (Wash. 1988).

40. See *Timley*, 875 P.2d at 246.

41. *Kitchen*, 756 P.2d at 108-09.

42. See *State v. Petrich*, 683 P.2d 173 (Wash. 1984), modified by *Kitchen*, 756 P.2d 105.

43. *Timley*, 875 P.2d at 246 (citing *State v. Grissom*, 840 P.2d 1142 (Kan. 1992)).

44. *Id.* at 246 (quoting *Kitchen*, 756 P.2d at 109) (citations omitted in *Timley*).

vated criminal sodomy either by the means of force or by the means of fear. There was no error in including both alternative means in one instruction to the jury.⁴⁵

Thus, in *Timley*, the elect-or-instruct rule of *Kitchen* did not apply, because the jury's only possible lack of unanimity would bear on the means rather than the end. In addition, although the text of the *Timley* opinion did not say so explicitly, the language and logic of the opinion and the court syllabus⁴⁶ set up a condition for application of the alternative means rule to future cases: To avoid reversal, the evidence of each means had to be sufficient to support the conviction.⁴⁷ According to the language and logic of *Timley*, this "super-sufficiency" of the evidence would equal affirmability in alternative means cases.

2. The Alternative Means Cases Fall in Line Behind *Timley*

The vast majority of Kansas alternative means cases since *Timley* have dutifully fallen in step behind it.⁴⁸ The first among them, *State v. Alford*,⁴⁹ required our supreme court to pick up and run with the super-sufficiency condition *Timley* had imposed.

Defendant Brent Alford argued that the evidence at his trial was insufficient to support one of the alternative means by which he was alleged to have committed aggravated kidnapping. He had been charged and was convicted of kidnapping to facilitate flight or the commission of a crime, and he argued on appeal that trial evidence that he dragged his victim toward a back door before firing the final shots could support the facilitation of flight but not a crime.⁵⁰

45. *Id.*

46. *Id.* Kansas law provides that the court syllabus contains the "points of law decided" or holdings of the case. See KAN. STAT. ANN. § 20-111; *id.* § 60-2106(b); *Umbehf v. Bd. of Wabaunsee County Comm'rs*, 843 P.2d 176, 181 (Kan. 1992).

47. *Timley*, 875 P.2d at 246.

48. Compare *State v. Moore*, 23 P.3d 815, 819 (Kan. 2001) (evidence sufficient of each alternative means of committing aggravated battery; great bodily harm, disfigurement shown), and *State v. Hooker*, 21 P.3d 964, 969 (Kan. 2001) (evidence sufficient of each alternative means of committing felony murder; aggravated burglary, aggravated robbery shown), and *Kansas v. Davis*, 998 P.2d 1127, 1140 *cert. denied*, 531 U.S. 855 (2000) (evidence sufficient of each alternative means of committing first degree murder; felony murder, aiding and abetting premeditated murder shown), and *State v. Carr*, 963 P.2d 421, 430 (Kan. 1998) (evidence sufficient of each of alternative means of committing felony murder based on child abuse; cruel beating, infliction of cruel, inhuman bodily punishment, shaking shown), and *State v. Higgenbotham*, 957 P.2d 416, 425-26 (Kan. 1998) (evidence sufficient on each of alternative means of committing kidnapping; force, threat, deception shown), and *State v. Kelly*, 942 P.2d 579, 584 (Kan. 1997) (evidence sufficient of each of alternative means of committing aggravated battery; great bodily harm, disfigurement, dangerous weapon shown), with *State v. Crane*, 918 P.2d 1256, 1271-72 (Kan. 1996) (evidence insufficient to show each alternative means of committing kidnapping; evidence of victim's movement to facilitate commission of crime lacking; movement did not substantially lessen risk of detection, make sodomy, rape easier to accomplish).

49. 896 P.2d 1059 (Kan. 1995).

50. *Id.* at 1068.

Our supreme court disagreed, noting that the evidence showed the kidnapping, *i.e.*, the dragging of the victim, not only put the defendant closer to a back door to facilitate flight; in addition, movement of the victim enabled the defendant to clear his jammed gun. "Under these circumstances, there is sufficient evidence for a reasonable jury to conclude that he committed the aggravated kidnapping to facilitate his commission of the crime of murder in the first degree."⁵¹

All but one of the Kansas cases following *Timley* have affirmed convictions rather than reversed them. The lone reversal came in 1996 in *State v. Crane*,⁵² perhaps before our courts had fully settled into what a blues man might call the *Timley* groove.

In *Crane*, defendant Michael T. Crane was charged with attempted rape, attempted aggravated sodomy, kidnapping, and lewd and lascivious behavior after two incidents at two different locations in one night. The second of the incidents occurred at a video store, where, in the course of his crimes, he picked the store clerk up in the front of the store and carried her in the direction of a children's room at the back of the store.⁵³ The kidnapping charge focused on this movement of the victim and alleged in the alternative that Crane had taken or confined the victim "[t]o facilitate flight or the commission of any crime" or "to inflict bodily injury or to terrorize the victim or another."⁵⁴ Crane argued on appeal that the evidence that he kidnapped the store clerk to facilitate commission of any crime was insufficient.⁵⁵ Citing *Timley*, our supreme court agreed that the kidnapping conviction must be reversed for insufficient evidence.

In this case, evidence which might support the kidnapping conviction is very thin

The evidence . . . suggests that Crane's moving [the victim] was inconsequential. . . . Even if the jurors reasonably could have inferred from the evidence . . . that Crane was trying to remove her from the main room of the store, he did not succeed. The movement did not make the alleged offenses of attempted aggravated sodomy or attempted rape substantially easier. In fact, the alleged acts constituting those crimes occurred while Crane was moving [the victim] toward the rear of the store. Nor did the movement lessen the risk of detection since, at all times, [the victim] was not concealed from view.⁵⁶

In view of the nearly uniform outcomes of the cases that have followed *Timley*, it is safe to characterize it as a prosecution-friendly

51. *Id.* at 1068-69.

52. *Crane*, 918 P.2d at 1256.

53. *Id.* at 1259.

54. *Id.* at 1271 (quoting KAN. STAT. ANN. § 21-3420 (1988)).

55. *Id.* at 1271-72.

56. *Id.* at 1273.

decision, one that all but cuts off one of criminal defendants' potential avenues of appellate attack.

3. The *State v. Barber* Decision and Automatic Reversal

*State v. Barber*⁵⁷ was the first published⁵⁸ Kansas case to apply the elect-or-instruct rule for multiple acts cases. In it, a court of appeals' panel reversed the defendant's conviction for criminal possession of a firearm because "no amount of analysis" would enable the panel to conclude that the jury agreed unanimously on the wrongful act supporting its verdict.⁵⁹ The evidence showed that defendant Robert E. Barber possessed Gun A during a disturbance, left the scene, threw Gun A away, and, "apparently not satisfied enough violence had been encountered for one day,"⁶⁰ obtained Gun B, and returned to the scene. The State charged Barber with only one count of criminal possession and did not elect whether it was relying on Barber's possession of Gun A or Gun B to convict. The trial court also gave no specific unanimity instruction to ensure jury agreement on one or the other underlying act.⁶¹

Under these circumstances, the panel stated:

Clearly, the jurors were not instructed that they must all agree that the same criminal act must be proved beyond a reasonable doubt before finding Barber guilty of the crime. In *State v. Timley*, . . . the Supreme Court implicitly acknowledged such an instruction is necessary to insure jury unanimity in multiple acts cases.

The State appears to concede a specific multiple acts instruction should have been given but contends that Barber is precluded from raising this issue because no timely objection was made before submission to the jury. K.S.A. 22-3414(3) states, in material part: 'No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection unless the instruction is clearly erroneous.'

We do not agree that the failure to give a multiple acts instruction, when the giving of such instruction is required by the evidence, permits review under a clearly erroneous standard. The trial court's failure to so instruct the jury prevents an objective analysis as to whether the jury unanimously agreed Barber was guilty of commit-

57. 988 P.2d 250 (Kan. Ct. App. 1999).

58. *State v. Kinmon*, 995 P.2d 876 (Kan. Ct. App. 1991), handed down as an unpublished decision on February 19, actually preceded *Barber* in time by about five months. However, it was not ordered published until November 10. The *Kinmon* panel was composed of Chief Judge Brazil, Judge Lewis, and Senior District Judge Ron Rogg, who wrote the unanimous opinion. The usual practice of the court of appeals would have been to circulate even unpublished decisions to all of the regular members of the court before they were handed down. Thus the authoring judge for the *Barber* panel, Judge Knudson writing for himself, Chief Judge Brazil, and Senior District Judge Fred Jackson, probably would have been aware of the analysis and outcome in *Kinmon* before writing *Barber*.

59. *Barber*, 995 P.2d at 251.

60. *Id.*

61. *Id.*

ting a specific criminal act. And to quantify the evidence does not solve this Sixth Amendment problem—no amount of analysis would ever permit us to say the jury unanimously agreed to the underlying act supporting the conviction. Under such circumstances, the trial court's failure to give a multiple acts instruction constitutes structural error, requiring that Barber's conviction be set aside.⁶²

The *Barber* panel cited *Sullivan v. Louisiana*,⁶³ a United States Supreme Court case concerning a faulty reasonable doubt instruction, to support its "structural" label for the error it had detected;⁶⁴ this citation with the previous mention of the Sixth Amendment implied a federal constitutional rather than state statutory basis for the ruling. Still, the next analytical step the *Barber* panel took—labeling a failure to ensure jury unanimity in a multiple acts case through an election or instruction automatically reversible—was not necessarily unsupported. Once it was obvious that Barber's jury had heard evidence of separate criminal acts when only one was charged and instructed upon, and that jurors were not told they must agree on the one act underlying any guilty verdict, there was no objective basis on which the panel could affirm the criminal possession conviction if unanimity was a requirement.

So what's in a name? It appears the *Barber* panel chose to invoke "structural error" rather than "clear error" under K.S.A. 2003 Supp. 22-3414(3) not only because that was the phrase used in *Sullivan* but because it wanted future litigants, lawyers, and trial judges to make no mistake about its message: *Regardless* of whether a defendant requested a specific unanimity instruction or objected to its omission in a multiple acts case, the instruction must be given in the absence of a State election. The error was regarded as so fundamental that it deserved such treatment.

In addition, the *Barber* panel may have been motivated by a procedural concern. Without the strict standard, for a defendant who requested the instruction or objected unsuccessfully at trial, the instruction's omission would be viewed on appeal as mere ordinary error subject to harmlessness analysis. For a defendant who did not request or object, the instruction's omission would be viewed on appeal as clear error under K.S.A. 2003 Supp. 22-3414(3). Because clear error normally serves a dual capacity—permitting appellate review of an unpreserved instruction error and serving as a basis for reversal on the merits⁶⁵—there was a danger that a defendant who slept on his or

62. *Id.* (citations omitted).

63. 508 U.S. 275 (1993).

64. *Id.* at 280-82.

65. The vast majority of Kansas cases in which an instruction error is not preserved use the "clearly erroneous" standard of K.S.A. Supp. 2003 22-3414(3) both as a ticket to review and as a standard of review on the merits, meaning any issue that receives review also mandates reversal. *See, e.g., State v. Graham*, 69 P.3d 563, 565-66 (Kan. 2003); *State v. Sharp*, 13 P.3d 29, 33 (Kan.

her rights would obtain a reversal more easily than a defendant who brought the issue to the attention of the trial court. The *Barber* panel would not have wanted to provide an incentive to slip one past the trial court.

An example of such was provided in a previous unpublished case.⁶⁶ In that case, *State v. Kinmon*,⁶⁷ the jury had heard evidence that cocaine was found in a cigarette case in defendant Aaron Kinmon's pocket and in a magnetic key holder under a nearby couch. At trial, a codefendant who had already been convicted of possession of drug paraphernalia testified that the cocaine in the key holder belonged to him. However, a police officer testified that he saw Kinmon place the key holder under the couch. Kinmon did not request a specific unanimity instruction and did not object to its omission. He was convicted of possession of cocaine and possession of paraphernalia.⁶⁸

The panel correctly identified the evidence against Kinmon as descriptive of multiple acts rather than alternative means. It stated simply: "In voting to convict Kinmon, different jurors could have relied on different acts. Kinmon did not request the appropriate instruction, but the language in *Timley* makes clear that this is clear error and the conviction cannot stand when there is no assurance that the verdict was unanimous."⁶⁹ The panel followed the usual practice of Kansas courts, allowing the "clearly erroneous" standard from K.S.A. 2003 Supp. 22-3414(3) to dictate review despite the procedural default *and* to direct reversal on the merits.

4. Barber-Induced Reversals and Publication of a Pattern Instruction

In the wake of *Barber* and *Kinmon*, the defense bar had a new issue *du jour*. Any appellate brief that could conceivably contain a multiple acts argument did so. The appellate courts witnessed a veritable stampede toward *Barber*'s automatic reversal. Several claims succeeded,⁷⁰ encouraging others. Still, some of the reversals were especially wrenching, because of allegations of admitted long term child

Ct. App. 2000). It is the rare case that permits review on clear error, and then conducts a harmless analysis and affirms. See *State v. Young*, 87 P.3d 308, 314 (Kan. 2004) (instruction describing felony murder as "lesser offense" of premeditated murder "literally but not legally" clearly erroneous); *State v. Alexander*, 1 P.3d 875, 881 (Kan. 2000) (despite labeling typographical error in instruction "clear," harmless error standard applied; no reversal necessary; jury undoubtedly understood instruction's meaning despite typo).

66. *State v. Kinmon*, 995 P.2d 876 (Kan. Ct. App. 1999).

67. *Id.*

68. *Id.* at 877.

69. *Id.*

70. *State v. Donham*, 24 P.3d 750, 756 (Kan. Ct. App. 2001), *petition for review denied*, 272 Kan. 1421 (2001); *State v. Wellborn*, 4 P.3d 1178, 1178-79 (Kan. Ct. App. 2000), *petition for review denied*, 269 Kan. 940 (2000); *Crutcher v. State*, 8 P.3d 1, 1-3 (Kan. Ct. App. 1999), *petition for review denied*, 268 Kan. 885 (1999).

sexual abuse.⁷¹ The judges and justices could not help but be aware that the age of the victims in such cases and the trauma inflicted by the abuse could result in vague testimony.

Meanwhile, the Kansas Judicial Council published a pattern instruction for multiple acts cases in which the State had made no election. The instruction read: “The State claims distinct multiple acts which each could separately constitute the crime of _____. In order for the defendant to be found guilty of _____, you must unanimously agree upon the same underlying act.”⁷²

The pattern instructions drafting committee advised in its accompanying “Notes on Use” that the instruction was to be employed when distinct incidents separated by time or space are alleged by the State in a single count of the charging document. In [other words, under] circumstances where the State could have proceeded under multiple counts but chose not to do so This form of charge presents a problem because the defendant is entitled to a unanimous jury verdict as to which incident constituted the crime.⁷³

The committee also did its part to help distinguish multiple acts cases from “multiple means” cases. In its Comment appended to the new multiple acts instruction, it cited *Timley* and stated: “Unanimity is not required as to the means by which a crime was committed so long as substantial evidence supports each alternative means.”⁷⁴

III. THE UNDERLYING PHILOSOPHY AND PRAGMATIC IMPLICATIONS

A. *Normalizing Jury Disagreement on Facts*

There is at least one philosophical way to view the alternative means and multiple acts analysis established by *Timley* and *Barber*, or for that matter, any succeeding theoretical regime. Criminal juries are our time-honored finders of fact. The appellate decisions refusing to invade jurors’ superior factfinding province are literally legion. Yet this analysis explicitly divides the universe of cases between those in which jury disagreement at one level of factual generality is acceptable and those in which jury disagreement at a different level of factual generality is unacceptable. Disagreement we classify as “specific enough,” *i.e.*, below a certain level of generality, is acceptable, and therefore we label it “alternative means.” Everything we classify as

71. See, e.g., *Wellborn*, 4 P.3d at 1179 (rape and aggravated indecent liberties of defendant’s daughter).

72. PATTERN INSTRUCTIONS FOR KANSAS—CRIMINAL 68.09-B (3d ed. Supp. 2003).

73. *Id.*, Notes on Use. Only one case in which the instruction was used has reached the appellate courts. See *State v. Maxon*, 79 P.3d 202, 211 (Kan. Ct. App. 2003), *petition for review denied* 2004 Kan. LEXIS 92 (Kan., Feb. 10, 2004) (conviction of mistreatment of dependent adult affirmed).

74. PATTERN INSTRUCTIONS FOR KANSAS—CRIMINAL 68.09-B, cmt. (3d ed. Supp. 2003).

“general enough,” *i.e.*, above a certain level of generality, is unacceptable, and therefore we label it “multiple acts.”⁷⁵

Take for example the defendant in *Alford*,⁷⁶ discussed *supra*. In his case, the alternative means or *purposes* at issue were the different motivations to commit *one type* of aggravated kidnapping: a taking or confining to facilitate flight *or* to facilitate commission of another crime. This posed a very specific factual question for the jury; the question existed at a very low level of generality. Our supreme court was comfortable with jury disagreement at that level and labeled the issue “alternative means.” The jury did not need to find this fact unanimously, as long as all members concluded that either flight or commission of another crime motivated the aggravated kidnapping.⁷⁷

In *Alford*, the supreme court could tell which *type* of aggravated kidnapping the jury relied upon but not which *purpose* underlay that type. What if that was not the case? What if the jury had been instructed on two *types* of aggravated kidnapping—both kidnapping to terrorize or inflict bodily harm on the victim *and* kidnapping to facilitate flight or the commission of another crime—and the verdict form had not made the jury choose one or the other *type*? Then we would be dealing with the next level of generality.⁷⁸ The question under *Timley* would become whether there was sufficient evidence of each *type*—(1) kidnapping to terrorize or inflict bodily harm, *and* (2) kidnapping to facilitate flight or crime. The courts’ reaction to the next step up the ladder of factual generality tells us that this level of jury disagreement would be tolerated.

The next step requires us to consider what would happen if the aggravated kidnapping was only one of two possible felonies underlying a felony murder charge. Imagine it is paired with an aggravated robbery. It would not be unusual for the jury to return a verdict silent on its choice between kidnapping and robbery as the underlying felony; often underlying felonies are not even charged separately from the felony murder. Again, we have moved up another level in generality. Are we still in “alternative means” territory? Our supreme

75. See Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1, 1-3 (1993); Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 MONT. L. REV. 1, 3 (2001) (“Courts struggle to determine the precise level of factual specificity that must be agreed upon by the jury in a criminal trial.”).

76. 896 P.2d 1059 (Kan. 1995).

77. Other components of crimes on which our courts have concluded unanimity is unnecessary include an overt act that triggers attempt liability (*see State v. Sweat*, 48 P.3d 8, 13 (Kan. Ct. App. 2002), *petition for review denied*, 274 Kan. 1118 (2002)), and an overt act in furtherance of a conspiracy (*see State v. Branning*, No. 84,798, 32 P.3d 1241 (Kan. Ct. App. Sept. 28, 2001), *petition for review denied*, 272 Kan. 1420 (2001)).

78. See Tim A. Thomas, Annotation, *Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense May be Committed*, 75 A.L.R. 4th 91 (1991) and cases cited therein.

court has said yes, as demonstrated by *State v. Hooker*.⁷⁹ In that case, the supreme court affirmed the defendant's conviction of felony murder because it was satisfied there was sufficient evidence to prove both of the possible underlying felonies, aggravated burglary and aggravated robbery.⁸⁰

Then there is the next level. What if the felony murder itself is only one of the ways the prosecution has available to demonstrate first-degree murder, the other being premeditation? Both our Kansas Supreme Court⁸¹ and the United States Supreme Court⁸² have addressed whether we should tolerate jury disagreement at this higher level of generality as well. Their conclusion is that we may. This too is a *Timley* alternative means situation; the jury need not be unanimous on either felony murder or premeditation to convict of first-degree murder as long as there is sufficient evidence of both. However, in Kansas, unless we can tell from the verdict form that the jury was unanimous on the premeditation alternative, only the felony murder sentence can be given.⁸³

Where does this progression stop? Under *Timley* and *Barber*, it stops only when we reach the highest level of generality, when we have two or more distinct crimes. If the prosecution charges only one first-degree murder and puts on evidence of two dead victims, then our discomfort with the potential for jury disagreement grows beyond our capacity to tolerate it. Only then do we have a "multiple acts" case requiring a State election or a specific unanimity instruction.⁸⁴

79. 21 P.3d 964 (Kan. 2001).

80. *Id.* at 969-70; *see also* *State v. Beach*, 67 P.3d 121, 135 (Kan. 2003) (two felonies constitute alternative means); *State v. Noriega*, 932 P.2d 940, 948 (Kan. 1997) (evidence of two alternative felonies sufficient). *But see* *State v. Dean*, 33 P.2d 225, 231-34 (Kan. 2001) (underlying attempted robberies of three different victims; multiple acts, alternative means standards invoked).

81. *See* *State v. Davis*, 998 P.2d 1127, 1138-41 (Kan.), *cert. denied*, 531 U.S. 855 (2000) (evidence sufficient of each alternative means of committing first-degree murder; felony murder, aiding and abetting premeditated murder shown).

82. *Schad v. Arizona*, 501 U.S. 624, 630-45 (1991), *reh'g denied*, 501 U.S. 1277 (1991) (alternative means treatment of premeditated murder, felony murder does not violate due process).

83. *State v. Vontress*, 970 P.2d 42, 53 (Kan. 1998); *see also* *State v. Wakefield*, 977 P.2d 941, 956-58 (Kan. 1999) and cases cited therein.

84. Although I have been careful to distinguish a Kansas criminal defendant's state statutory right to jury unanimity from a federal constitutional right, there is a point at which classification of jury disagreement at an ever-increasing level of generality as mere "alternative means" offends the Due Process Clause. In *Schad* and in *Richardson v. United States*, 526 U.S. 813 (1999), our United States Supreme Court justices:

agreed that the Due Process Clause would prevent legislatures from defining an element of an offense so that it could be satisfied by alternative means that had been treated historically as separate elements of offenses. This anticombination rule would protect against a guilty verdict accompanied by jury disagreement on a point that the Constitution would require to be treated as an element.

Nancy J. King, Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1513 (2001); *see also* Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 30-32 (2002) (alternative means rule expands legislature's, prosecutor's power; "obvious due process concern with vagueness," fairness; jury "gets a lot of leeway to determine how much unanimity on theories or facts that it wants to underlie its verdict.");

B. *Opening a New Route to Post-Conviction Relief*

One of the pragmatic consequences of *Barber* and its automatic reversal holding was a new route to post-conviction relief. It did not take long for filers of motions under K.S.A. 60-1507 to focus on this route. Their interest was understandable. For such litigants, any issue prompting automatic reversal held the promise of relief from generally routine rejection of such motions, typically limited to ineffective assistance of counsel claims made nearly unwinnable by *Strickland v. Washington*⁸⁵ and Kansas' adoption of its twin performance and prejudice burdens of proof.⁸⁶ To prevail on an ineffective assistance claim, a Kansas prisoner must demonstrate that counsel's perform-

Elizabeth R. Carty, *Schad v. Arizona: Jury Unanimity on Trial*, 42 CATH. U. L. REV. 355, 388 (1993) (due process in death-eligible cases should require unanimity on mens rea, actus reus).

As Justice Souter developed the test in his plurality opinion in *Schad*:

Even assuming a requirement of jury unanimity *arguendo*, that assumption would fail to address the issue of what the jury must be unanimous about. Petitioner's jury was unanimous in deciding that the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings. . . . In other words, petitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which he argues that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts. The issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity.

. . . .
We see no reason . . . why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*.

That is not to say, however, that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred.

. . . .
To say, however, that there are limits on a State's authority to decide what facts are indispensable to proof of a given offense is simply to raise the problem of describing the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses.

. . . .
We are convinced . . . of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness . . . and for the rationality that is an essential component of that fairness. In translating these demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, we look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the *mens rea* element of a single offense. The enquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.

501 U.S. at 630-39 (citations omitted).

85. 466 U.S. 668 (1984), *reh'g denied*, 467 U.S. 1267 (1984).

86. See *Chamberlain v. State*, 694 P.2d 468, 472-77 (Kan. 1985) (adopting and applying *Strickland* standards).

ance was substandard *and* that it prejudiced his or her case.⁸⁷ These burdens are fatal to all but the extraordinary claim, often because the evidence of the prisoner's guilt can be described as "overwhelming," thus rendering almost any error subject to harmless analysis an insufficient basis to overturn a conviction.⁸⁸

Crutcher v. State,⁸⁹ a court of appeals' decision handed down in 1999 but not published until 2000,⁹⁰ gave a hint of what *Barber* could mean for 60-1507 movants. In that case, Gerald Crutcher had been convicted of two identical counts of aggravated incest despite evidence of at least four incidents. After an unsuccessful direct appeal on other issues, he argued in his later 60-1507 motion that he had been denied a unanimous verdict.⁹¹

The panel reversed Crutcher's convictions. Judge Elliott relied on the structural error holding of *Barber*, writing on behalf of himself, then-Judge Rulon, and Judge Green:

In Kansas, aggravated incest is both a specific intent crime and a single act crime for which multiple acts can be charged.

We must ask ourselves, for which occasion of alleged criminal conduct was appellant convicted? Even if the jury believed that at least two incidents occurred and that they occurred between January 1, 1992, and November 1, 1992, there is no way to determine *which* incidents the jury utilized in convicting. When faced with allegations of multiple incidents of abuse, while the State may charge multiple counts, the State must elect at some point the incidents for which adequate proof has been presented or give a unanimity instruction

The State cannot treat aggravated incest as a single act crime for purposes of charging multiple counts and at the same time treat the crime as a continuous course of conduct crime for purposes of admitting evidence. To permit the State to both charge a defendant with multiple counts of a single act crime and present evidence as if it were a continuous course of conduct crime would circumvent constitutionally guaranteed protections. If appellant were again prosecuted for sexually abusing [the victim] during the same time frame, there is nothing in this record to determine *which* incidents provided the basis for his convictions.

87. *State v. Kirby*, 39 P.3d 1, 18 (Kan. 2002).

88. *See, e.g., State v. Thomas*, No. 89,014, 2003 Kan. App. LEXIS 1108 (Dec. 24, 2003) (counsel's failure to file notice of alibi did not deny defendant fair trial in light of overwhelming evidence of guilt). Kansas law also permits an appellate court to move directly to the *Strickland* prejudice determination rather than engaging first in a lengthy analysis of whether error existed. When it is obvious there was no prejudice, even a clearly deficient performance by defense counsel does not matter. *See, e.g., Cellier v. State*, 18 P.3d 259, 262 (Kan. Ct. App. 2001), *petition for review denied*, 271 Kan. 1035 (2001) ("We need not address the performance prong if the defendant fails to prove prejudice.").

89. 8 P.3d 1 (Kan. Ct. App. 1999), *petition for review denied*, 268 Kan. 885 (1999).

90. A large majority of Kansas' Court of Appeals decisions are unpublished. Although there is authority for discretionary publication of decisions when they discuss an issue of first impression, Rule 7.04(b) (2003 Kan. Ct. R. Annot. 47), the court of appeals sometimes allows an issue to "percolate" before filing a published opinion. This may have occurred in this case.

91. *Crutcher*, 8 P.3d at 2.

....

It is for the legislature to determine that aggravated incest is a continuing course of conduct crime, thus allowing a defendant to be charged without specific dates. This would presumably allow generic evidence and would not require the State to elect or require the court to give a unanimity instruction.⁹²

It is curious that the *Crutcher* opinion did not explicitly state the panel's reason for reaching the unanimity claim in the first place. There had to be one, because K.S.A. 60-1507 movants may not pursue "mere trial errors," as opposed to constitutional errors, without a showing of exceptional circumstances that prevented them from raising the errors on direct appeal.⁹³

There are three possibilities. First, the *Crutcher* panel, like the *Barber* panel, may have mistaken Kansas' statutory right to jury unanimity for a federal or state constitutional right. This appears unlikely, however, given the opinion's careful wording regarding secondary double jeopardy effects and its silence, but for a quotation from *Barber*, on the Sixth Amendment.⁹⁴ Second, the movant's unanimity concerns may have been viewed through the lens of a constitutional ineffective assistance of counsel claim. Ineffective assistance of counsel would have qualified as "exceptional circumstances" and thus provided an avenue to review. This also appears unlikely because there is no discussion of the *Strickland*⁹⁵ performance and prejudice burdens; and the *Crutcher* trial would have predated the *Barber* opinion, thus making counsel's failure to raise a unanimity issue excusable rather than proof of substandard performance.⁹⁶ The final possibility is that the panel addressed unanimity because a "dramatic change" in the law had occurred since trial. Such changes also are considered "exceptional circumstances" permitting review of a trial error raised for the first time on a K.S.A. 60-1507 motion. *Barber*'s automatic reversal holding certainly qualified as dramatic and would have permitted the direct review that the *Crutcher* panel engaged in. This is the most likely explanation of the panel's approach.

92. *Id.* at 2-3 (citations omitted).

93. KAN. CT. R. 183(c) (2003).

94. *Crutcher*, 8 P.3d at 2.

95. 466 U.S. 668, 687 (1984), *reh'g denied*, 467 U.S. 1267 (1984).

96. Ineffective assistance of counsel would later become a serviceable vehicle for K.S.A. 60-1507 movants with previously unraised unanimity issues as long as they were tried after *Barber* was handed down. See *Doile v. State*, No. 89,530, 2003 WL 21981951 (Kan. Ct. App. Aug. 15, 2003), *petition for review denied*, 2003 Kan. LEXIS 665 (Nov. 12, 2003) (K.S.A. 60-1507 movant argues counsel ineffective for failing to raise multiple acts issue; conviction stands because simultaneous constructive possession does not qualify for multiple acts treatment); *Garibaldi v. State*, No. 89,669, 2003 WL 22990161 (Kan. Ct. App. Dec. 19, 2003) (K.S.A. 60-1507 movant argues counsel ineffective for failing to raise multiple acts issue; conviction stands because short series of behaviors do not qualify as multiple acts).

C. Retrial Issues

Another pragmatic consequence of *Timley* and *Barber* was the fact that issues surrounding the propriety and contours of retrial would follow reversals. Those issues would differ depending on the categorization of the case.

In a *Timley* alternative means case, any reversal would be grounded on a failure of proof, a violation of the super-sufficiency condition. Thus retrial on that theory could not be permitted. It, like retrial on any theory held unsupported by sufficient evidence on appeal, would result in double jeopardy.⁹⁷ The defendant can only be retried on the theory for which evidence was sufficient the first time, without the pollution of evidence or argument supporting the alternative theory.

In a *Barber* multiple acts case, in contrast, reversal might come more easily but retrial could be more comprehensive and lead to greater punishment than the original trial. The cure after reversal is to retry on the same charging document with an election or instruction, or, if the statute of limitations allows, to dismiss and refile on a new charging document that separates the multiple acts into multiple counts for trial. This last option is the one that exposes the defendant to the possibility of greater sanction upon conviction.

D. Election and Instruction Timing and Other Crimes Evidence

Barber, although a defense-friendly decision, also failed to control for another set of pragmatic consequences growing out of the discretionary timing of any State election and the late-in-the-game nature of a specific unanimity instruction. This was illustrated in part by *State v. Price*.⁹⁸ In *Price*, the defendant sought a bill of particulars in a case based on several alleged acts of sexual abuse against the seven-year-old stepdaughter of his stepson. The trial court denied the defense request, reasoning that the complaint and preliminary hearing testimony were adequate to enable trial preparation.⁹⁹

The court of appeals held there was no abuse of discretion in the trial court's denial of the defendant's request.¹⁰⁰ Further, the defendant could not demand that the State make its multiple acts selection *before* trial.

Price notes that the State was in as good a position to select which acts it would rely upon before trial as it was during trial. Further, had the district court granted his motion for a bill of particulars, the

97. See *Banks v. United States*, 437 U.S. 1, 15-16 (1978); *State v. Pabst*, 996 P.2d 321, 329 (Kan. 2000).

98. 43 P.3d 870 (Kan. Ct. App. 2002), *rev'd on other grounds*, 61 P.3d 676 (Kan. 2003).

99. *Id.* at 873-74.

100. *Id.* at 874.

State would have been limited to presenting evidence of only those acts specified in the bill of particulars, and Price could have filed a motion in limine to exclude testimony of any other alleged acts. While this point has logical appeal, Kansas law does not require the State to make a pretrial election of the acts upon which it intends to rely. Rather, the State 'at some point' must elect the incidents for which adequate proof has been presented or the jury must be given a unanimity instruction.¹⁰¹

As the defendant in *Price* grasped, the fluid timing of a State election can mean that it comes too late to have an effect on the breadth of the evidence presented in a multiple acts case. Of course, the same is true of a specific unanimity instruction. This renders efforts to control admission of other crimes and wrongs evidence completely ineffectual. The volume and validity of our appellate cases wrestling with the limits on such evidence exceeds the scope of this paper. Suffice it to say, both our supreme court and our court of appeals have engaged in extended, varied, and painful gyrations to guard against propensity evidence, whether admitted with a limiting instruction under K.S.A. 60-455¹⁰² or admitted under an exception to that rule.¹⁰³ In multiple acts cases, it is as though these cases never existed. The State may admit evidence of two or more criminal acts to support only one conviction. Even an election, if it comes no earlier than the instructions conference or closing argument, or a specific unanimity instruction is no protection against the jury's misuse of all of the acts save one as evidence to demonstrate the defendant's propensity to commit the charged crime. No multiple acts case has imposed even a limiting instruction requirement to caution the jury about the propensity evidence problem.

IV. CHALLENGES TO THEORETICAL COHERENCE

It is not surprising that Kansas' new rules on alternative means and multiple acts soon attracted various efforts to limit and distinguish them. Some of the successful efforts led to useful corollaries to the basic holdings that did no violence to the theoretical framework. Unfortunately, as demonstrated *infra*, this was not always true, and others of the limits and distinctions have left our courts and our legislature considerable work for the future.

101. *Id.* at 875 (citing *Crutcher v. State*, 8 P.3d 1 at 2 (Kan. Ct. App. 1999), *petition for review denied* 268 Kan. 885 (1999)).

102. *See, e.g.*, *State v. Davidson*, 65 P.3d 1078, 1085-88 (Kan. Ct. App. 2003), *petition for review denied*, 2003 Kan. LEXIS 380 (June 26, 2003) and cases cited therein.

103. *See, e.g.*, *State v. Carr*, 963 P.2d 421 (Kan. 1998) (admission shows continuing course of conduct, relationship of parties); *see also* PATTERN INSTRUCTIONS FOR KANSAS—CRIMINAL 52.06, cmt. (3d ed. Supp. 2003) (detailing statutory rule, exceptions; listing cases).

A. *Alternative Means*

1. Dilution of *Timley's* Super-Sufficiency Condition

The most noteworthy of these challenges to the theoretical coherence of the *Timley*¹⁰⁴ rule and its application to alternative means cases came in the form of dilution of its super-sufficiency condition. *State v. Hemby*¹⁰⁵ and *State v. Ice*¹⁰⁶ foreshadowed this development, which was made official in *State v. Johnson*.¹⁰⁷

In *Hemby*, the defendant was charged with one count of rape and one count of aggravated criminal sodomy. The evidence of sodomy at trial included both fellatio and cunnilingus; it did not include evidence of anal intercourse. The jury was instructed on all three forms of sodomy, although the defendant had been accused only of oral copulation. Under *Timley*, our supreme court held that the evidence of the two types of oral copulation were merely alternative means, each supported by sufficient evidence.¹⁰⁸

The most significant aspect of the case, however, was its treatment of the anal intercourse part of the aggravated sodomy instruction. Evidently at the urging of the defendant, who focused on the disconnect between the charge limited to oral copulation and the instruction including anal intercourse, the court separately analyzed this issue. It did not focus on anal intercourse as another means to commit aggravated sodomy for which there was no evidence. Instead, it merely agreed that its absence from the charge meant the instruction should not have included it. Nevertheless, the error was harmless. The court believed the total lack of evidence and the jury's general instruction to base its verdict on evidence meant there was no real possibility the verdict would have been different if the error had not occurred.¹⁰⁹

In *Ice*,¹¹⁰ the next case leading to *Johnson*, Judge Pierron wrote for a court of appeals' panel composed of himself and Judges Elliott and Knudson. The language and reasoning of that decision give the strong impression that the panel had fully explored the possibility of avoiding a *Timley* reversal. Defendant Edward E. Ice was charged with rape of a young woman with an IQ of 65. His jury was instructed that it could find him guilty either because the victim (a) was overcome by force or fear or (b) was incapable of giving a valid consent because of mental deficiency or disease. The panel found the evi-

104. *State v. Timley*, 875 P.2d 242, 242 (Kan. 1994).

105. 957 P.2d 428 (Kan. 1998).

106. 997 P.2d 737 (Kan. Ct. App. 2000).

107. 11 P.3d 67 (Kan. Ct. App.), *petition for review denied*, 270 Kan. 901 (2000).

108. *Hemby*, 957 P.2d at 431-35 (citing *Timley*, 875 P.2d at 246).

109. *Id.* at 435.

110. *Ice*, 997 P.2d at 737.

dence of mental deficiency or disease inadequate because the victim understood the nature of sex and her ability to grant or withhold consent. Emphasizing that the prosecution relied heavily on that theory, the court reversed.¹¹¹ The emphasis strongly suggested that the panel would have arrived at the opposite outcome if one or the other of the alternative means had been completely factually unsupported, and it was this portion of the opinion that laid the groundwork for the later *Johnson*.

Judge Pierron first referenced the pre-*Timley* Kansas Supreme Court decision in *State v. Grissom*,¹¹² particularly its embrace of *Griffin v. United States*.¹¹³ In *Griffin*, the defendant had been charged with a single count of conspiracy, with the dual aims of hindering the Internal Revenue Service and the Drug Enforcement Agency in their official duties. At trial, the Government failed to produce any evidence to prove interference with the DEA. Yet the jury's general guilty verdict was upheld; the United States Supreme Court concluded that, where one of the possible bases of conviction was neither unconstitutional nor illegal but "merely" unsupported by sufficient evidence, there was no need to reverse. Had a jury instruction misstated the law, the jury might not have been able to discern the mistake and correct for it; but an instruction that presented a theory of conviction not supported by any evidence would be rejected by the jury.¹¹⁴ Judge Pierron also noted that the Tenth Circuit had relied upon *Griffin* to find a total lack of evidence in support of one of the alternative means instructed upon to be harmless error.¹¹⁵

The *Ice* decision concluded:

In the instant case, we have no idea whether the jury found Ice guilty of rape due to force and fear being used, or due to a lack of capacity of the victim to consent, or a combination of the two. This case differs from those where there was strong evidence supporting one theory and none on another, such as in *Griffin*. In a *Griffin* situation, one can reasonably assume the jury did not behave capriciously and convict on a theory in which there was no evidence, when there was strong evidence supporting another theory.

With so much testimony and prosecutorial effort invested in the "no capacity" theory, we cannot say there is no real possibility that the verdict here was based only on the force and fear theory. We must therefore reverse and remand for new trial.¹¹⁶

111. *Id.* at 739-41.

112. *Id.* at 741 (citing *State v. Grissom*, 840 P.2d 1142, 1171 (Kan.1992)).

113. *Id.* at 741 (citing *Griffin v. United States*, 502 U.S. 46, 47-48 (1991)).

114. *Griffin*, 502 U.S. at 59-60.

115. *Ice*, 997 P.2d at 741 (citing *United States v. Hanzlicek*, 187 F.3d 1228, 1236 (10th Cir. 1999)). The United States Supreme Court and the Tenth Circuit, as federal courts, would have applied a constitutional harmless error standard to jury unanimity problems rather than the more lenient Kansas "substantial justice" standard applied to error resulting from violation of a statute.

116. *Id.* at 741.

*Johnson*¹¹⁷ followed *Ice* exactly six months later. The evidence showed that defendant Mark Johnson abducted the victim from her apartment after shattering an exterior window to gain entry. Audio of the episode was captured in a recording of the victim's 911 telephone call, and it provided overwhelming evidence of Johnson's use of a threat. The jury also heard evidence of force, but there was no evidence to support kidnapping by deception, the third alternative means included in the jury's instructions.¹¹⁸

The panel acknowledged that *Timley*'s super-sufficiency condition meant the record "must contain substantial competent evidence proving all three means charged in order to uphold" the conviction.¹¹⁹ But, looking to *Ice*, *Grissom*, and *Griffin* for support, the decision continued:

Despite the language of *Timley*, courts of appeal have attained a degree of confidence in jury verdicts of guilt in cases where there is overwhelming evidence supporting the conviction under one of the alternative means. Those courts have concluded that it was harmless error in such cases for the trial court to instruct on all alternatives.

.....

"If the evidence is insufficient to support an alternative legal theory of liability it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction."

.....

The task before the jury in this case was to determine whether Johnson was guilty of kidnapping. One cannot tell from the verdict what the basis for that verdict is; however, under the cases cited above, this court can reasonably conclude the jury picked the basis of kidnapping by threat which is supported by overwhelming evidence, rather than by means of force or deception for which there is little or no evidence. K.S.A. 60-261 defines harmless error as any error by a court which is not inconsistent with substantial justice. We conclude, therefore, that including the term "deception" as a means of kidnapping in the jury instructions in this case constitutes harmless error. In light of the overwhelming evidence of Johnson's guilt on the kidnapping charge, we can see no injustice done by this verdict.¹²⁰

Thus the *Johnson* panel did what it had appeared the *Ice* panel wanted to do: By linking to cases decided before *Timley*, it diluted its super-sufficiency condition, holding that inadequate evidence in support of one means would be considered harmless if the evidence of another means was overwhelming. This holding had obvious prag-

117. *State v. Johnson*, 11 P.3d 67, 67 (Kan. Ct. App. 2000).

118. *Id.* at 68-69.

119. *Id.* at 69.

120. *Id.* at 69-70 (quoting *State v. Grissom*, 840 P.2d 1142, 1171(Kan. 1992)).

matic appeal, but it simply cannot coexist with *Timley* peacefully, providing a benign route to harmless error. As fully discussed *supra*, a reversal mandated by *Timley* is a reversal for *insufficient evidence*. An insufficiency error cannot be harmless because it means the State failed to meet its burden of proving the defendant guilty beyond a reasonable doubt. This is a most basic guarantee of due process in criminal cases.¹²¹

The *Timley* super-sufficiency condition evolved for a good reason. It evolved because we recognized that we were allowing uncertainty as to how the State persuaded each juror. We were comfortable with this uncertainty—at that particular level of generality in the jury’s factfinding—only because we insisted on assurance that each juror’s vote was supported by a means for which there was sufficient evidence. Without that assurance, we are back to where we were before *Timley*. We have no guarantee that the jury was unanimous at the level of factual generality that matters most of all: guilt v. innocence.

Now for the confession: I was one of the three members of the *Johnson* panel. Although I had misgivings about the holding, I refrained from writing a dissent and joined in the decision of my colleagues—then Judge Rulon and then District Judge Hill, the opinion’s author. The misgivings of a judge who had been on the bench for less than six months have now flowered into the strong disapproval of a somewhat more seasoned jurist.

Given my regrets, I have been relieved to observe that *Johnson*’s influence appears to remain weak. Among subsequent alternative means cases, only *State v. Ibarra*¹²² has followed in its footsteps. In this recent case, the panel cited *Ice*¹²³ citing *Griffin*,¹²⁴ “Where a possible basis of conviction is not unconstitutional or illegal, but merely unsupported by sufficient evidence, there is no constitutional problem,” and permitted the defendant’s conviction for possession of ephedrine or pseudoephedrine to stand despite a lack of evidence on one of the alternative means.¹²⁵ *Ibarra* did not cite *Johnson*, a curious omission.¹²⁶

2. The Expansion of First-Degree Murder Sentencing Options

Another challenge to the application of *Timley* has come from the defense bar rather than prosecutors. It grows out of the legisla-

121. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

122. *State v. Ibarra*, No. 89,011, 2003 WL 21981945 (Kan. Ct. App. Aug. 15, 2003).

123. *State v. Ice*, 997 P.2d 737 (Kan. Ct. App. 2000).

124. *Griffin v. United States*, 502 U.S. 46 (1991).

125. *Ibarra*, 2003 WL 21981945, at *5.

126. *Ibarra* is probably better known for reversing the defendant’s conviction for manufacturing or attempting to manufacture methamphetamine. Our supreme court has now granted a petition for review on that issue.

ture's amendments of Kansas' first-degree murder sentencing scheme, which made a harsher penalty available for premeditated murder but not for felony murder.¹²⁷

The potential disparity in sentence for premeditated murder as opposed to felony murder has prompted defendants to argue that first-degree murder verdicts that depend on evidence of both alternative means are not truly unanimous. Given the disparity, they say, premeditated murder and felony murder are not just different *means* to an end; they are different *ends* in themselves, *i.e.*, different *crimes*.¹²⁸

So far, our supreme court has rejected the ultimate point. First-degree murder is still the one crime at issue; and premeditation and felony murder are still merely means to commit it.¹²⁹ Our court still permits trial judges to instruct juries that they may rest their first-degree murder verdicts on either premeditated murder or felony murder or both.¹³⁰ It has, however, limited the sentences that can arise out of such proceedings. Unless it is clear from a verdict form that the jury was unanimous on premeditated murder alone or on premeditated murder *and* on felony murder, the defendant cannot be sentenced to the harsher penalty. An ambiguous verdict or a clearly blended verdict will subject the defendant only to the penalty for felony murder.¹³¹

These rules again reflect the underlying philosophy of alternative means and multiple acts law and our level of comfort with jury disagreement at varying levels of factual generality. Although we are still willing to let a first-degree murder jury cobble together its verdict, using the two means of commission to support a conviction, we are not willing to take a chance on enhancing the defendant's punishment if both means were taken into account. When the choice of means has an impact on punishment, lack of unanimity has bite.

B. *Multiple Acts*

1. Distinguishing Unified Conduct

a. *Short Series of Behaviors*

In the multiple acts realm, one of the early challenges to theoretical coherence came in *State v. Staggs*,¹³² in which the evidence in the

127. See *State v. Vontress*, 970 P.2d 42, 52-53 (Kan. 1998). The "Hard 40" sentence was later changed to the "Hard 50."

128. See *State v. Morton*, 86 P.3d 535, 539 (Kan. 2004); *State v. Hoge*, 80 P.3d 52, 57-59 (Kan. 2003).

129. See *Hoge*, 80 P.3d at 59.

130. *Id.* at 60-62.

131. See *Morton*, 86 P.3d at 540.

132. 9 P.3d 601 (Kan. Ct. App.), *petition for review denied*, 270 Kan. 903 (2000).

defendant's aggravated battery trial showed that he both kicked and punched the victim during a fight. On appeal, the defendant argued that he had been entitled to a special unanimity instruction because either the punch or the kick could constitute the offense and the jury may not have been in agreement.¹³³

Our court of appeals' panel rejected this argument, noting the brief time frame in which the punch and the kick occurred and their roles as subsidiary elements in the single fight between the defendant and victim.¹³⁴ Had the punch and the kick been charged and prosecuted separately, the panel said, the charges would have been subject to a successful challenge for multiplicity.¹³⁵

On the way to its conclusion, the panel also noted a Wisconsin multiple acts case, *State v. Giwosky*,¹³⁶ involving allegations that the defendant committed battery by throwing a log that hit the victim's head and then struggled with the victim, hitting and kicking him in the back. The Wisconsin Supreme Court did not regard this "short continuous incident" as requiring a multiple acts election or instruction.¹³⁷

Staggs' idea of a "short, continuous, single incident" comprising two or more criminal acts has caught on.¹³⁸ Several published and unpublished court of appeals' decisions have relied upon it to conclude that no election or instruction was necessary in the trial below.¹³⁹ This departure from strict application of the *Barber* elect-or-instruct rule made sense at the time and continues to make sense when the acts at issue occur in a series over a very short time and form parts of a whole.

133. *Id.* at 602.

134. *Id.* at 603.

135. *Id.* In this regard, the panel cited *State v. Perry*, 968 P.2d 674, 679 (Kan. 1998), in which the evidence established that the defendant beat and shot the victim. In that case, the supreme court held the defendant's aggravated battery conviction and attempted murder conviction multiplicitous as part of a single brief series of violent acts that constituted only one crime.

136. 326 N.W.2d 232 (Wis. 1982).

137. *Id.* at 238.

138. *Staggs*, 9 P.3d at 603.

139. See *State v. Villanueva*, 35 P.3d 936, 943 (Kan. Ct. App. 2001), *rev'd on other grounds*, 49 P.3d 481 (Kan. 2002) (continuous attack on old girlfriend includes two penetrations); *State v. Fulton*, 23 P.3d 167, 172-73 (Kan. Ct. App.), *petition for review denied*, 271 Kan. 1039 (2001) (cutting of victim's face not distinct from cutting of victim's chest); *State v. Hilson*, 20 P.3d 94, 96 (Kan. Ct. App.), *petition for review denied*, 271 Kan. 1039 (2001) (also relying in part on *State v. Crane*, 804 P.2d 10, 16 (Wash. 1991), for continuous conduct exception to elect-or-instruct rule; two threats during same thirty minute conversation); *Garibaldi v. State*, No. 89,669, 2003 WL 22990161, at *2 (Kan. Ct. App. Dec. 19, 2003) (acts part of "relentless, continuing attack"); *State v. Voth*, No. 85,046, 2001 Kan. App. LEXIS 187 (Mar. 2, 2001) (defendant committed burglary necessitating several trips into same house); *State v. Byrd*, No. 83,317, 2001 Kan. App. LEXIS 176 (Mar. 2, 2001), *petition for review denied*, 271 Kan. 1038 (2001) (in rapid succession, defendant physically strikes victims, retrieves rifle from truck, starts shooting into house).

b. *Simultaneous Possession of the Same Type*

A second workable exception to the *Barber* elect-or-instruct rule was carved out in *State v. Hazley*.¹⁴⁰ In that case, drugs and related items were seized simultaneously from various locations throughout defendant Emeline Hazley's house. I wrote for a court of appeals' panel composed of myself and Judges Gernon and Knudson, holding that no election or unanimity instruction was required on the possession of marijuana and methamphetamine charges brought against Hazley.¹⁴¹

Officers found cigarette papers in a bowl, rolling papers, and methamphetamine in containers in two locations in the living room; several syringes, cigarette filters, a corner from a plastic bag, marijuana, methamphetamine in a man's shirt, and methamphetamine residue on a mirror in a southeast room; methamphetamine on a hot water heater in a small room off the southeast room; marijuana in a glass bowl, three straws, metal tubing, and hemostats in the kitchen; a spoon with methamphetamine residue in the bathroom; and methamphetamine in the bedroom.

.....

Hazley urges us to hold that *State v. Kinmon* . . . controls this issue. In that case, . . . the State's evidence was that the defendant possessed cocaine in two places: in his pocket and under a couch. The first would constitute actual possession and the second constructive possession. Because either factually and legally distinct act could have supported the crime charged, we ruled that the trial judge committed error by failing to instruct the members of the jury that they must agree unanimously on which act was proved

We do not find *Kinmon* controlling. In this case, the State pursued convictions only on a constructive possession theory for drugs found simultaneously throughout the house in which Hazley lived. On the methamphetamine count, for example, Hazley was accused of constructively possessing *all* of the methamphetamine in her home. The same was true of the marijuana count. There were no truly multiple acts on which the prosecution relied and thus there was no need for a unanimity instruction.¹⁴²

Like *Staggs*, *Hazley* has attracted a following.¹⁴³ The theory behind the *Hazley* exception to the elect-or-instruct rule is equally appli-

140. 19 P.3d 800 (Kan. Ct. App. 2001).

141. *Id.* at 805.

142. *Id.* at 802-05 (citations omitted).

143. See *State v. Alvarez*, 28 P.3d 404, 406 (Kan. Ct. App.), *petition for review denied*, 272 Kan. 1419 (2001) (simultaneous constructive possession of all methamphetamine in car); *Doile v. State*, No. 89,530, 2003 WL 21981951, at *4 (Kan. Ct. App. Aug. 15, 2003), *petition for review denied*, 74 P.3d 594 (Kan. Ct. App. Nov. 12, 2003) (K.S.A. section 60-1507 case; simultaneous constructive possession of all drugs, paraphernalia in hotel room); *State v. Campbell*, No. 88,887, 2003 WL 22387746 (Kan. Ct. App. Oct. 17, 2003), *aff'd on other grounds*, 101 P.3d 1179 (Kan. 2004) (simultaneous constructive possession of all marijuana in house; confusion between "what is merely a multiple items of evidence case with what might truly be a multiple acts case").

cable when the simultaneous unlawful possession of items is actual rather than constructive.¹⁴⁴

c. *Recognizing Elections and Election Equivalents*

One does not have to read too many cases in this area before realizing that it could be difficult to identify an “election” under *Barber*’s elect-or-instruct rule. For example, in *Schuster v. State*,¹⁴⁵ an unpublished *per curiam* decision from the court of appeals, a K.S.A. 60-1507 movant attempted to bring his set of child abuse convictions under *Barber*’s protective umbrella. The panel correctly concluded that it was not dealing with a multiple acts case at all. Each of the movant’s convictions arose out of a single count tied to a specific, factually distinct wrongful act.¹⁴⁶

The next case to deal with the existence or nonexistence of an election softened this already very malleable aspect of *Barber*. In *State v. Fulton*,¹⁴⁷ the defendant allegedly (a) struck the victim on the head with a gun; (b) struck the victim on the ear with the gun; (c) cut the victim’s face with a knife; and (d) cut the victim on the chest with the knife.¹⁴⁸ The panel ruled:

[T]he State was clear on the testimony it relied upon for the aggravated battery charge. In closing argument, the State made what we regard as the functional equivalent of a formal election among the incidents by focusing only on the cutting or “carving” of Maurice’s face and chest and not the blows with the gun[.]. . . .

This focus and argument by the State was sufficient to ensure jury unanimity on the cutting versus the blows.¹⁴⁹

Thus, after *Fulton*, the State had the discretion whether to elect at all, and, if so, when. Its conviction of a defendant on multiple acts also would be salvageable on appeal even if its election rated only a “functional equivalent” label. This did not discourage some defendants, however, who continued to argue for multiple acts instructions even when the prosecution had clearly tied certain acts to certain individual counts in the charging document.¹⁵⁰ Such cases probably

144. See *State v. Phillips*, No. 83,790, 2001 Kan. App. LEXIS 178 (Mar. 2, 2001), *petition for review denied*, 271 Kan. 1041 (2001) (several items of drug paraphernalia on defendant’s person simultaneously; parallel to *Staggs* noted).

145. No. 85,496, 2000 Kan. App. LEXIS 1348 (Dec. 29, 2000).

146. *Id.*

147. 22 P.3d 167 (Kan. Ct. App.), *petition for review denied*, 271 Kan. 1039 (2001).

148. *Id.* at 172.

149. *Id.* at 173.

150. See *State v. Dickson*, 69 P.3d 549, 558 (Kan. 2003) (affirming Court of Appeals holding that State tied specific acts to specific charges; reversing on other grounds); *State v. McIntosh*, 43 P.3d 837, 850 (Kan. Ct. App.) *aff’d*, 58 P.3d 716 (Kan. 2002) (two counts of aggravated criminal sodomy, single counts of rape, aggravated indecent liberties tied to identified incidents involving Barbie doll; “[b]ecause each charge was predicated on a particular criminal act, we are assured that the jury unanimously agreed to the underlying criminal act giving rise to each conviction.”); *State v. Haskin*, No. 84,661, 2001 Kan. App. LEXIS 386 (May 4, 2001), *petition for review denied* 271 Kan. 1039 (2001) (one count tied only to rape by means of force or fear per victim’s testi-

should be termed “multiple counts” rather than “multiple acts,” although our courts have continued to use “election” terminology to explain their decisions.¹⁵¹

2. The *State v. Hill* Revolution

The final and all-but-fatal challenge to the theoretical coherence of the *Barber* multiple acts elect-or-instruct rule came in *State v. Hill*.¹⁵² Like many revolutionaries, *Hill* has proved itself exceptionally effective at fomenting discontent and effecting overthrow and almost comically ineffective at establishing the rules needed to govern day-to-day life when the fighting has ended. The decision’s failure to articulate a sensible replacement pattern of analysis has led to a great deal of sloppiness and confusion of result and rationale.¹⁵³

At its most basic level, *Hill* appears to have been intended to repair what some believed to be *Barber*’s overcorrection of the unanimity uncertainty—an overcorrection that gave an undue advantage to the defendant, especially in child sexual abuse cases based on generic evidence. *Hill* set out to arrive at two destinations: (1) A rejection of “structural error” or automatic reversal; and (2) the development of an analytical pattern to distinguish two subsets of multiple acts cases, those that truly required reversal because of a greater probability of lack of unanimity and those that did not. Although it successfully rejected structural error, it fell far short of its second goal.

Hill concerned the victimization of a thirteen-year-old girl, B.M., who was home with her little brother, when defendant Jimmy Hill telephoned. Shortly after he learned that the children’s father was not at home, Hill sexually assaulted B.M.¹⁵⁴ According to her testimony,

Hill entered the home, found B.M. in the bathroom, and said, “Hey, I’m here.” He kissed her on the mouth with his tongue. Hill lifted up her sports bra and put his hands down inside her pants and underwear from behind. One finger penetrated B.M.’s vagina. This was repeated from the front. B.M. repeatedly told Hill to stop and go home because her father would be home soon. B.M. was able to push Hill back into the bathtub.

Hill got up, went behind B.M., and kissed her again. He lifted up her sports bra and kissed her chest. B.M. reiterated that her father would be home soon and walked out of the bathroom. Hill fol-

mony); see also *State v. Campbell*, No. 88,887, 2003 WL 22387746 (Kan. Ct. App. Oct. 17, 2003), *aff’d on other grounds*, 101 P.3d 1179 (Kan. 2004) (without citing *Fulton*, panel notes prosecutor told jury in closing argument precisely which evidence supported act required for conviction on each count).

151. See *McIntosh*, 43 P.3d at 837 (“If the State elects a particular criminal act upon which it relies for each charge, the case is not a multiple acts case and the trial court is not required to give a multiple acts unanimity instruction.”).

152. 11 P.3d 506 (Kan. Ct. App. 2000).

153. The Court of Appeals decision in *Hill* was later affirmed by the Kansas Supreme Court, *State v. Hill*, 26 P. 3d 1267 (Kan. 2001), a further destabilizing development discussed *infra*.

154. *State v. Hill*, 11 P.3d 506, 508 (Kan. Ct. App. 2000).

lowed B.M. into the kitchen and asked her “where are we going to get it on” and started kissing and touching her breasts and inserted his finger into her vagina again. B.M. went to the living room, where Hill tried to push her on the couch. She repeated her father was going to be home soon. He kissed her and sat down on the couch. B.M. walked to the bathroom, and Hill agreed he had to leave and left the house.¹⁵⁵

The charges against Hill included only one charge of rape despite the evidence of two penetrations.¹⁵⁶ The State was unaware until the day before trial that B.M. would allege that two penetrations occurred, one in the bathroom and one in the kitchen, apparently minutes apart, and the prosecutor did not elicit the evidence of the second penetration at trial or argue that it supported the rape charge in closing argument. The evidence of the second penetration came in only on cross-examination by the defense.¹⁵⁷

On appeal, Hill contended that the trial court’s failure to instruct the jury that its verdict must be unanimous on which of the two acts of penetration constituted the rape entitled him to reversal. The panel first noted that states were split on whether such an error could ever be harmless and characterized structural error as very rare, even in constitutional cases.¹⁵⁸ It then cited several federal cases that expressed a need for more than a general unanimity instruction only when there was a likelihood of juror confusion in complex cases.¹⁵⁹

Before explaining why it mattered, the panel then quoted from the District of Columbia Court of Appeals’ case of *Simms v. United States*¹⁶⁰ for definitions of legally separate and factually separate incidents:

Incidents are legally separate when “the appellant presents different defenses to separate sets of facts, or when the court’s instructions are ambiguous, but tend to shift the legal theory from a single incident to two separate incidents.” Incidents are “factually separate when independent criminal acts have occurred at different times, or when a subsequent criminal act is motivated by ‘a fresh impulse.’”¹⁶¹

As has been, unfortunately, typical of too many Kansas appellate decisions, *Hill* then merely lists several cases from other jurisdictions

155. *Id.*

156. *Id.* at 509.

157. *Id.*

158. *Id.* at 509-10.

159. *Id.* at 510 (citing *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987)). *Hill*’s emphasis on “jury confusion” instead of “lack of unanimity” as the evil to be avoided probably was no accident. It signaled its shift in perspective from ensuring protection of a criminal defendant’s statutory right when jury agreement is uncertain to protection of a guilty verdict when the court perceives the risk of juror disagreement as minimal. This shift would require *post hoc* jury mind reading.

160. 634 A.2d 442 (D.C. Cir. 1993).

161. *Hill*, 11 P.3d at 510 (quoting *Simms*, 634 A.2d at 442, 445 (citation omitted)).

that have held multiple acts error to be harmless.¹⁶² It does no analysis of the merits of the reasoning or rationales in these cases. The decision follows the catalogue by treating *Barber* and *Wellborn* just as superficially, stating dismissively that other panels of the court of appeals “suggest” that multiple acts error is “subject to structural error review and requires reversal.”¹⁶³ It then attributes *Barber*’s holding to *Sullivan*, with no explanation of why any relationship to *Sullivan* would weaken or strengthen the *Barber* elect-or-instruct holding or “structural error” label. Finally, it simply announces: “We find the authority applying harmless error to be persuasive and adopt the following test that effectively balances the tension between the defendant’s right to a unanimous jury verdict and judicial economy.”¹⁶⁴

The *Hill* panel continues by explaining its new two-step harmless-ness test for multiple acts cases, borrowing the *Simms* definitions, and applying the test to the facts before it:

After the court establishes the jury was presented with evidence of multiple acts, the first step is to determine whether there is a possibility of jury confusion from the record or if evidence showed either legally or factually separate incidents. . . .

When jury confusion is not shown under the first step of the above analysis, the second step is to apply a harmless error analysis to determine if the error was harmless beyond a reasonable doubt with respect to all acts.

In applying this analysis to the present case, the record contains the following evidence: Hill digitally penetrated B.M.’s vagina in the bathroom. B.M. repeatedly told him to stop and managed to push Hill into the tub. After she walked out of the bathroom and into the kitchen, Hill followed her and again inserted his finger into her vagina. At trial, Hill did not testify but generally denied penetrating B.M. According to the above definitions, these events are not legally or factually separate incidents and survive the first step in ensuring no possibility of jury confusion.

In applying a harmless error review, since there was no extrinsic evidence to support the charges, the sole issue was the credibility of the victim’s account of the two alleged penetrations. The evidence in its entirety offered absolutely no possibility of jury disagreement regarding the appellant’s commission of any of these acts. By the jury’s rejection of the appellant’s general denial, the court could unequivocally say there was no rational basis by which the jury could have found that the defendant committed one of the incidents but did not commit the other, and, therefore, the trial court’s error was harmless beyond a reasonable doubt.¹⁶⁵

The panel then throws its colleagues on the *Barber* and *Wellborn* panels a bone:

162. *Id.* at 510-11.

163. *Id.* at 511.

164. This is the opinion’s first mention of judicial economy; it does not explain why judicial economy is an appropriate consideration in this context. *Id.* at 512.

165. *Id.*

This holding should not be interpreted to give prosecutors carte blanche to rely on harmless error review, and it is strongly encouraged that prosecutors elect a specific act or the trial court issue a specific unanimity instruction. In many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless.

It should be acknowledged that a prior Kansas Supreme Court case leaves open the possible interpretation that in multiple acts cases a general unanimity instruction followed by polling the jury is an effective cure to the lack of specific unanimity instruction. See *State v. Smith*, 268 Kan. 222, 230, 993 P.2d 1213 (1999). Polling the jury is insufficient to cure a multiple acts problem unless the jurors are polled specifically to their agreement on the same incident.¹⁶⁶

Hill advanced on petition for review to our supreme court, which affirmed.¹⁶⁷ For the most part, our supreme court's opinion merely parrots the language of the court of appeals' panel and characterizes its listing of cases on one or the other side of the issue as "extensive analysis."¹⁶⁸ The supreme court cites no new case law from other state or federal courts.¹⁶⁹

The supreme court does engage in a slightly more lengthy discussion of *Barber* and *Wellborn*, a two paragraph recitation of their facts and holdings.¹⁷⁰ It then spends two paragraphs on *Timley*, an exercise

166. *Id.* Independent of any other criticism of *Hill*, it is plain that the sentence—"[i]n many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless."—makes no sense.

167. *State v. Hill*, 26 P.3d 1267, 1267 (Kan. 2001).

168. *Id.* at 1271.

169. *Id.* at 1271-73.

170. *Id.* Like the court of appeals panel, the supreme court fails to acknowledge that these two cases are in the majority among the court of appeals cases that have addressed the issue so far. See, e.g., *State v. Donham*, 24 P.3d 750, 756-57 (Kan. Ct App. 2001). Moreover, the supreme court, in *Hill*, adds insult to this injury by inserting a "compare" citation after these two paragraphs, leaving the uninitiated reader with the impression that *Hill* did not set itself apart from the crowd. The citation reads:

Compare *State v. Daniels*, 28 Kan. App. 2d 364, 17 P.3d 373 (2000) (applying the harmless analysis); *State v. Banks*, 28 Kan. App. 2d 829, Syl. ¶ 1, 22 P.3d 1069 (2001) ("When the factual circumstances of a crime involve a short, continuous, single incident comprised of several acts individually sufficient for conviction, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act."); *State v. Fulton*, 28 Kan. App. 2d 815, Syl. ¶ 6, 22 P.3d 167 (2001) ("A continuous incident where a victim is alleged to have been cut more than once by the defendant is not a multiple acts situation requiring a unanimity instruction.").

Hill, 26 P.3d 1267, 1273.

The citation to *Daniels* implies that it arrived at exactly the same harmless pattern spontaneously and independently. This was not the case. The *Hill* panel opinion had circulated to the entire court of appeals but its mandate had not been handed down when *Daniels* was drafted. Mandates are required to make a case final and amenable to citation. The *Daniels* panel, mindful of this rule but evidently wanting to follow *Hill* nonetheless, merely copied *Hill*'s language without citing to it. *Daniels*, 17 P.3d at 377; see also *State v. Zabrin*, 24 P.3d 77, 87-89 (Kan. Ct. App. 2001) (catalog of cases; ultimate conclusion no multiple acts).

The citation to *Banks* is even more troubling. When the supreme court filed its *Hill* decision, *Banks* had already been accepted by the same court for review. Thus citation to it directly violated the rule regarding nonfinal decisions. Furthermore, *Banks* perfectly illustrates the reason for the rule. When the supreme court ultimately reviewed *Banks*, it upheld the court of appeals affirmation of the defendant's conviction but disagreed with the particular holding for which it is cited in this passage of *Hill*. *State v. Banks*, 46 P.3d 546, 551 (Kan. 2002).

in futility, given its own immediate admission that *Timley* is not controlling “because it is an alternative means case, not a multiple acts case.”¹⁷¹

All of this brings our supreme court to what it admits is an obvious conclusion: The question of whether to analyze the lack of unanimity instruction in a multiple acts case under a structural error approach or a harmless error approach is “unsettled.”¹⁷² The only authority mentioned before the supreme court returns to parroting the court of appeals’ opinion is a brief quotation from a *Gonzaga Law Review* article on harmless error in Washington state written by Chief Judge Sweeney of the Washington Court of Appeals. Evidently the supreme court regards the quotation as significant because *Barber* had drawn its elect-or-instruct rule from *Kitchen*, a Washington Supreme Court case. Judge Sweeney states:

In those cases in which the defense to charges based on multiple acts is a general denial, differentiation among a number of events is not required of the jury and therefore is not an issue in controversy. The jury either accepts the victim’s testimony as to all and convicts, or it accepts the defendant’s denial and acquits on all charges. The failure to give a unanimity instruction in those instances is harmless error; it does not relate to an issue in controversy.¹⁷³

Applying the court of appeals’ two-part test, the supreme court notes that the court of appeals regarded the two penetrations as one criminal episode. It is not clear that it completely agrees with this conclusion, because it cites *State v. Zamora*¹⁷⁴ and *State v. Long*¹⁷⁵ for the principle that two penetrations make two rapes under Kansas law. It explains the single count by emphasizing that the prosecution was unaware of the second penetration until just before trial.¹⁷⁶ However, it then states:

Here, materially identical evidence was presented with respect to both acts of rape. Hill did not present a separate defense or offer materially distinct evidence of impeachment regarding any particular act. The defense presented a general denial of participation in any wrongful conduct.

We agree with the Court of Appeals’ conclusion that jury confusion was not shown here. In applying a harmless error review, since there was no extrinsic evidence to support the charges, the sole issue was the credibility of the victim’s account of the two alleged

Finally, the citation to *Fulton* misses the point of that opinion completely; *Fulton* did not find multiple acts error and then classify it as harmless. It found no possibility of error in the first place, partly because of a functional equivalent of an election and partly because of inseparable wounds to the same victim. *Fulton*, 22 P.3d at 172-73.

171. *Hill*, 26 P.3d at 1274.

172. *Id.*

173. *Id.* (quoting Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 302 (1996)).

174. 803 P.2d 568 (Kan. 1990).

175. 993 P.2d 1237 (Kan. Ct. App. 1999), *petition for review denied*, 268 Kan. 892 (2000).

176. *Hill*, 26 P. 3d at 1274.

penetrations. The evidence offered no possibility of jury disagreement regarding Hill's commission of either of these acts. By the jury's rejection of Hill's general denial, we can unequivocally say there was no rational basis by which the jury could have found that Hill committed one rape but did not commit the other.

In many multiple acts cases, the acts will be materially distinct and will be associated with different defenses, so a specific unanimity instruction will be required. Here, however, any error in omitting such an instruction was harmless beyond a reasonable doubt.¹⁷⁷

There are several reasons that *Hill* is open to criticism, beyond its repeated failure to analyze the authorities it cites. The first is that both the court of appeals and supreme court reached out to solve a problem not posed by the facts of the case before them. This exposes a troubling result orientation. As mentioned *supra*, the State did not elicit the evidence of the second penetration at trial or argue that it supported the rape charge in closing argument. The evidence of the second penetration came in only on cross-examination by the defense. These elements of the record are noteworthy, because they provided two of at least three ways the case could have been disposed of without drastic measures.

First, the State's behavior could have been interpreted as an actual election or a functional equivalent. Although *Fulton*¹⁷⁸ was not decided until after the *Hill* panel decision was filed, it was on the books by the time the supreme court weighed in. Furthermore, its reasoning was a natural extension of the *Barber* rule itself, which explicitly directed the reviewing court to look for an election before reversing.¹⁷⁹

Second, the fact that the evidence of the second penetration was not admitted until cross-examination of the victim could have prompted a holding of invited error.¹⁸⁰ A defendant such as Hill, who was charged with a single count supported by a specified act, should not have been able to obtain a reversal because his counsel had introduced the evidence of the second specific act. This would have departed from the *Barber* requirement of automatic reversal but done so on a very narrow basis appropriate only in the rare future case.

177. *Id.* at 1274-75. The supreme court follows this language with the same caveat or "bone" the court of appeals recited at the conclusion of its discussion of the issue. *See id.* at 1275. The supreme court's statement that there was "materially identical evidence" in its discussion of the multiple acts issue is particularly remarkable because it is directly contradicted by its description of events when responding to Hill's multiplicity challenge to his rape and aggravated indecent liberties convictions. In that section of the opinion, the court says: "Here the offenses occurred in the bathroom and in the kitchen. Charges are not multiplicitous when the offenses occur at different times and in different places." *Id.* at 1275.

178. *State v. Fulton*, 23 P.3d 167, 167 (Kan. Ct. App. 2001).

179. *State v. Barber*, 988 P.2d 250, 251 (Kan. Ct. App. 1999).

180. *See State v. Boorigie*, 41 P.3d 764, 772 (Kan. 2002).

The third, less radical avenue open in *Hill* was a *Staggs*-based ruling. *Staggs*¹⁸¹ predated both the panel opinion and supreme court decision in *Hill* and could have supported a finding of unified conduct. “[G]iven the two acts’ relationship to one another as parts of a single series of advances that took place over a few minutes in one home,” the *Hill* panel and the supreme court “could have concluded that the acts were not truly ‘multiple’ at all and found no error.”¹⁸²

The next reason to criticize *Hill* is that its two-part test conflates the search for error and the classification of any error as harmless or reversible. It also creates problems under the *Simms*’ definitions of factual and legal separability.¹⁸³ I addressed this problem in a later child sexual abuse and exploitation case, *State v. Arculeo*:¹⁸⁴

Prior to *Hill*, the Court of Appeals had developed two possible patterns of analysis for facts such as those in *Hill*. Under the first, a panel could have applied the strict elect-or-instruct rule and reversed the conviction because of structural error. Under the second, given the two acts’ relationship to one another as parts of a single series of advances that took place over a few minutes in one home, a panel could have concluded that the acts were not truly “multiple” at all and found no error.

Under *Hill*, we are now directed to first determine whether “there is a possibility of juror confusion from the record or if evidence showed *either* legally *or* factually separate incidents.” On the surface, this part of *Hill*’s holding appears to equate the possibility of juror confusion with the disjunctive legal separability *or* factual separability. Under the surface, however, the Supreme Court actually requires more before it will accept that a jury could have become confused.

“Incidents are legally separate when the defendant presents different defenses to separate sets of facts or when the court’s instructions are ambiguous but tend to shift the legal theory from a single incident to two separate incidents. Incidents are factually separate when independent criminal acts have occurred at different times or when a later criminal act is motivated by ‘a fresh impulse.’”

In other words, *both a particular type* of legal separability *and a particular type* of factual separability are needed to demonstrate the possibility of jury confusion.

The Supreme Court’s application of its new rule to the facts in *Hill* also compels us to refine our understanding of this first step in this way. The *Hill* victim’s ability to identify the order and exact location of the two penetrations at issue unavoidably yielded at least one type of *factual* separability. Furthermore, the Supreme Court candidly observed that each penetration could have supported a separate count of rape without being vulnerable to a multiplicity argument. This was at least one type of *legal* separability. *Cf. State*

181. *State v. Staggs*, 9 P.3d 601, (Kan. Ct. App.), *petition for review denied*, 270 Kan. 903 (2000).

182. *State v. Arculeo*, 36 P.3d 305, 320 (Kan. Ct. App. 2001) (Beier, J., concurring).

183. *Simms v. United States*, 634 A.2d 442, 445 (D.C. Cir. 1993).

184. *Arculeo*, 36 P.3d at 305.

v. Long, 26 Kan. App. 2d 644, 645-47, 993 P.2d 1237 (1999), [*petition for review*] *denied* 268 Kan. 852; 2000 Kan. LEXIS 127 (2000) (multiple charges for multiple penetrations during series of attacks in 2-hour period in one home not multiplicitous).

Yet the Supreme Court found no possibility of jury confusion because the defendant “did not present a separate defense or offer materially distinct evidence of impeachment regarding any particular act.” *Hill*, 271 Kan. at [940], 26 P.3d 1267. Rather, the defendant turned the trial into an up-or-down credibility contest by his “general denial of participation in any wrongful conduct.” 271 Kan. at [940]. The jury was either going to believe the victim’s story that the defendant committed all of the alleged illegal acts, thus giving him his unanimous verdict on each component act, or it was going to believe the defendant’s story that he committed none of them. In the Supreme Court’s language, “the evidence offered no possibility of jury disagreement regarding Hill’s commission of either of these acts. By the jury’s rejection of Hill’s general denial, we can unequivocally say there was no rational basis by which the jury could have found that Hill committed one rape but did not commit the other.” 271 Kan. at [940], 26 P.3d 1267.

The Supreme Court’s first step under *Hill* harkens back to the second possible analysis pattern in the earlier Court of Appeals cases noted above. The difference is in the result that follows from a finding of factual and legal inseparability.

The Court of Appeals’ analysis would have ended there, holding no truly multiple acts existed and thus neither a State election nor multiple acts unanimity instruction was required. This result would have been consistent with that in *Simms v. United States*, 634 A.2d 442, 445 (D.C. App. 1993) (robbery of van containing money and tools constitutes single unbroken chain of events), which originated the definitions of factual and legal separability relied upon in *Hill*. The *Simms* court, when it found no factual or legal separability, arrived at the conclusion there were no truly multiple acts and thus no possibility of jury confusion, rather than the other way around. Once that conclusion was reached, no harmless inquiry was necessary.

Our Supreme Court, however, evidently still regards the dual absences of an election and instruction as error when there is no finding of jury confusion, because it requires the process to continue through *Hill*’s second harmless step. In the words it adopted from the Court of Appeals opinion in *Hill*: “When jury confusion is *not* shown under the first step, the second step is to determine if the error in failing to give a unanimity instruction was harmless beyond a reasonable doubt with respect to all acts.” 271 Kan. at [939], 26 P.3d 1267. This is puzzling, because the first step has already ruled out the existence of jury confusion and the lack of unanimity it can breed. These were the evils the elect-or-instruct rule was designed to eradicate.

Within this analytical context, it is therefore little wonder that the Supreme Court proceeded to decide that whatever error occurred in *Hill* was harmless. Indeed, it is difficult to imagine how any failure to elect or instruct could ever be deemed harmful once the result of *Hill*’s first step was a finding of no possibility of jury confusion.

It is also worth noting that *Hill* gave rise to several unanswered questions. If we are to engage in a harmless analysis when there is no finding of possible jury confusion, how, if at all, should the second step be altered when we find a possibility of such confusion? Structural error analysis is no longer available. Should harmful error be presumed absent a contrary showing from the State? If the burden on appeal does not shift to the State, then is a situation where jury confusion has been demonstrated to be reviewed for harmless no different from one where no jury confusion has been found? If so, then what difference does the presence or absence of the possibility of jury confusion actually make? Does the first step have any validity? And finally, if the two steps ultimately make jury confusion irrelevant, then do we not lose sight of the reason we focused on this issue in the first place?¹⁸⁵

The next reason to criticize *Hill* is that its relationship to the “clearly erroneous” standard under K.S.A. 2003 Supp. 22-3414(3) is unknown. As discussed *supra*, the typical pattern of Kansas cases has been that an unpreserved error in instructions will not be reviewed on appeal unless it is “clearly erroneous.” Once review is granted, clear error usually doubles as the substantive standard for reversal, and there is no further review of the identified error for harmless. Defendants who have acted at trial to preserve any instruction issue for appeal do not have to demonstrate clear error to gain appellate review, but they are subject to harmless review of any error found, either under “prejudice to substantial rights” standard of K.S.A. 60-261 or under the constitutional error standard of *Chapman v. California*.¹⁸⁶ It is unknown how *Hill* fits into this paradigm or if its mention of the clearly erroneous standard means that a defendant who preserves a multiple acts issue at trial through a request or objection should somehow be treated differently on appeal than a defendant who does not.

The next reason that *Hill* is subject to criticism is its equation of the appellate court’s discernment of an overriding role of credibility to the absence of jury confusion and unanimity, *i.e.*, harmless error. Appellate courts are wisely reluctant to make judgments about witness credibility. They also should not presume to know exactly the way credibility factored into a jury’s decision. This flaw in *Hill* also ignores the trial-shaping role of vague evidence and the State’s unfettered decision to charge multiple acts under one count, punishing only the defense for those weaknesses in the case. It is the nature of at least a generic multiple acts case to leave a defendant with nothing but impeachment of the complainant as a defense. As discussed *infra*, there are better ways of dealing with generic evidence multiple acts cases—those in which the complaining witness is incapable of differentiating among the criminal acts in any meaningful way—ways that don’t gut

185. *Id.* at 320-21.

186. 386 U.S. 18, 24, *reh’g denied*, 386 U.S. 987 (1967).

our legislature's guarantee of the criminal defendant's right to a unanimous jury verdict of guilt.

Finally, a closely related reason to criticize *Hill* is that it creates an incentive for the State to rely on vague evidence even when its prosecutor and its witnesses can do better. Vague evidence is less prone to be factually separable and considerably less likely to give rise to legally separable defenses, e.g., alibi, impossibility, conflicting witness accounts, etc. Again, this leaves the defendant little but the creation of a credibility battle for a defense.

What has happened to multiple acts jurisprudence since *Hill*? It has become as confused as *Hill*'s scrambled two-part test appeared to promise that it would.¹⁸⁷ Subsequent case law provides many examples of sloppy analysis and zero analysis defaulting to a harmlessness holding and affirmance under *Hill*.¹⁸⁸ There are fewer reversals, as one would expect, but even they wander to their results on many paths, unable as a group to distill a reliable interpretation or sensible application of *Hill*.¹⁸⁹ Although space does not permit discussion of

187. Another piece of evidence undercutting the soundness of *Hill* is that it has never been cited in any other jurisdiction, although multiple acts law is still developing throughout the country.

188. See *State v. Davis*, 61 P.3d 701, 707-09 (Kan. 2003) (clearly erroneous, *Hill* standards cited; no multiple acts as matter of law); *State v. Hanmont*, No. 89,375, 2003 WL 22990151, at *4 (Kan. Ct. App. Dec. 19, 2003) (case should have been disposed of under *Staggs*; defendant charged with one count of felony obstruction for attempting to elude two police officers chasing him simultaneously, using different routes; panel instead holds no jury confusion under *Hill*); *State v. Vinyard*, 78 P.3d 1196, 1199 (Kan. Ct. App. 2003), *petition for review denied*, 2004 Kan. LEXIS 86 (Feb. 10, 2004) (multiple items of merchandise taken in one trip to department store; case should have been disposed of under *Staggs*; panel instead holds no possibility of jury confusion); *State v. Jones*, No. 89,293, 2003 Kan. App. LEXIS 899 (Oct. 17, 2003), *petition for review denied*, 2003 Kan. LEXIS 738 (Dec. 23, 2003) (one digital, one penile penetration) (“[T]he defendant arguably demonstrates factually separate incidents but cannot demonstrate prejudice in the form of jury confusion. Even if the jury considered the arguments of defense counsel that the sexual contact was consensual rather than choosing to rely upon the defendant’s earlier denial of any sexual contact with the victim, no member of the jury, relying upon the evidence presented, could have believed that the digital penetration was not consensual without finding that the subsequent sexual intercourse was without the victim’s consent as well. In returning a guilty verdict, each of the jurors must have found that either both incidents had been performed without the victim’s consent or that just the sexual intercourse occurred without her consent.”); *State v. Campbell*, No. 88,887, 2003 WL 22387746 (Kan. Ct. App. Oct. 17, 2003), *aff’d on other grounds*, 101 P.3d 1179 (Kan. 2004) (*Hazley*-type case; panel characterized prosecutor’s statement in closing argument as type of election) (“We do not consider this case a “multiple acts” case, and we are convinced that there was no possibility of jury confusion. There was certainly no clear error in not giving the unanimity instruction. Moreover, any such purported error was harmless beyond a reasonable doubt with respect to all acts.”); *State v. Shoptaw*, 56 P.3d 303, 306 (Kan. Ct. App.), *petition for review denied*, 2002 Kan. LEXIS 841 (Dec. 17, 2002) (defendant father’s general denial of daughter’s somewhat specific allegations of sexual abuse makes prosecution of three to ten acts in only three counts without election, specific unanimity instruction harmless); *State v. Martin*, No. 85,527, 2001 Kan. App. LEXIS 926 (Sept. 28, 2001), *petition for review denied*, 273 Kan. 1038 (2002) (case should have been disposed of under *Staggs, Fulton*; instead court says no real possibility of jury confusion, structural error rejected, thus kidnapping conviction affirmed).

189. See *State v. Owens*, 35 P.3d 791, 796-97 (Kan. 2001) (evidence supported defendant’s possession of single weapon on three different occasions; conviction must be reversed in absence of election, specific unanimity instruction under *Hill*; incidents factually, legally separate; trial judge comments indicate possibility of jury confusion); *State v. Letourneau*, No. 91,547 (Kan. Ct. App. Feb. 18, 2005) (introduction of evidence of ingestion of methamphetamine as one of multi-

each of these cases, two of our courts' worst performances will serve to illustrate the current situation: *State v. Banks*¹⁹⁰ and a second case captioned *State v. Daniels*.¹⁹¹

In *Banks*, defendant Howard Banks was convicted of two counts of aggravated indecent liberties in connection with the touching of two girls, one count as to each girl. The girls' stories of the crimes, perpetrated on them when they were together outside a laundromat and then later outside of the defendant's home nearby, varied from one another.¹⁹² The majority of the court of appeals' panel, composed of former Chief Justice Prager and Judge Green, nevertheless held there was no need for a multiple acts instruction.¹⁹³

Initially the court of appeals' majority opinion, written by Chief Justice Prager before the supreme court issued its opinion in *Hill*, does not fully acknowledge the inconsistencies in the girls' testimony or when contrasted with the defendant's denials. Rather, it begins by asserting that the evidence in the case was "not greatly in dispute."¹⁹⁴ Justice Prager does admit that T.N. testified that both she and L.H. were touched at each location; he terms L.H.'s testimony that only one girl was touched at each place "overlapping"¹⁹⁵ rather than "conflicting."

The majority decision ultimately concludes that all of the touchings are not factually separate but rather part of a "continuing course of conduct" or a "single, continuous incident over a short period of time," a la *Staggs*. The unifying factor was the defendant's use of a dog to attract the girls' attention at both locations.¹⁹⁶ Apparently the pooch's participation in both events makes the case distinguishable from *Barber, Crutcher, Wellborn*, and *Kinmon*, which involved factually separate incidents. The difference between the girls' stories is unimportant, in the majority's view,

because of the factual circumstances of Banks' crimes. Because Banks was involved in a short, continuous, single incident compris-

ple acts of possession clear error; closing argument contributed to likely confusion); *State v. Clubb*, 62 P.3d 667, 670 (Kan. Ct. App. 2003) (three incidents with possibility of different defenses introduced in support of one aggravated indecent liberties charge; jury had to consider credibility of multiple witnesses; despite *Hill*'s abolition of structural error approach, defendant's general denial, conviction must be reversed; "[b]ecause the first-step of the analysis strongly suggests the possibility of jury confusion, we need not consider the second step in *Hill*"); *State v. Esher*, No. 88,343, 2003 WL 22005897, at *6 (Kan. Ct. App. Aug. 22, 2003), *petition for review denied*, 2003 Kan. LEXIS 648 (Nov. 12, 2003) (citing clearly erroneous standard, panel reverses conviction of criminal threat after evidence of three threats to different targets admitted).

190. 46 P.3d 546 (Kan. 2002).

191. No. 87,790, 2003 WL 22283001 (Kan. Ct. App. Oct. 3, 2003), *petition for review granted*, 2004 Kan. LEXIS 1 (Jan. 5, 2004).

192. *Banks*, 46 P.3d at 548-49.

193. *State v. Banks*, 22 P.3d 1069, 1070-73 (Kan. Ct. App. 2001), *aff'd*, 46 P.3d 546 (Kan. 2002).

194. *Id.* at 1070.

195. *Id.* at 1071.

196. *Id.* at 1071-72.

ing one *or more* acts of molestation against each girl, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act. Here, the compatible evidence showed that each girl had been molested *at least once*. As a result, because the evidence showed no real possibility existed for juror confusion, Banks was not deprived of a unanimous verdict.¹⁹⁷

The emphasized language in this passage demonstrates that the majority failed to grasp the import of the *Staggs* label it placed on the facts before it. *Staggs* came out the way it did because the punch and the kick at issue were part of *one* fight. In contrast, the *Banks* majority knew it was dealing with *two* victims, and one of their versions of the evidence was that each of the girls was molested *more than once in more than one place at more than one time*.

This was one of the major themes of my dissent from the panel majority. I rejected the *Staggs* analogy, focusing on the lapse in time between the incidents, the two locations, and the victims' conflicting stories:

In contrast [to *Staggs*], here we have a situation where at least two physical acts are far more factually separate and far less uniformly described. Depending on which victim's testimony is believed, there were either two touchings per girl in two different places separated by at least several minutes or one touching per girl, one in one place at one time and one in another place at least several minutes later.

. . . With no further guidance than [the jury was] given here, the members . . . were free to cobble together their ultimate result from varying versions of the evidence. Confusion and lack of unanimity were genuine and practical hazards, not merely remote or purely academic risks.¹⁹⁸

I did not point out in my dissent, although it was also true, that the majority took its "factually separate" language from the court of appeals' *Hill* decision, which was still pending before our supreme court. As in the first *Daniels* case,¹⁹⁹ *Hill* had begun to work its mischief in *Banks*, despite the absence of a mandate.

On petition for review of *Banks*, our supreme court was not encumbered by the absence of a *Hill* mandate. The court had already decided *Hill* and could cite it and rely upon it outright. The justices upheld *Banks*' conviction, although they correctly rejected the panel majority's *Staggs* rationale.²⁰⁰ The opinion's author, Justice Davis, fully recognized the conflict in the girls' testimony as well as inconsistencies in the accounts they had given to others. This did not prevent him, however, from describing *Hill* as having a "striking similarity" to

197. *Id.* at 1072-73 (emphasis added).

198. *Id.* at 1074 (citations omitted).

199. *State v. Daniels*, 17 P.3d 373 (Kan. Ct. App. 2000).

200. *State v. Banks*, 46 P.3d 546, 552 (Kan. 2002).

the facts of *Banks*.²⁰¹ This surprising statement is followed by this passage:

Hill was convicted of rape, aggravated indecent liberties with a child, and aggravated indecent solicitation of a child. Evidence at trial indicated that Hill penetrated the victim in the bathroom, followed by penetration of the victim in the kitchen just off the bathroom. However, until the day before trial, the State was unaware that an alleged penetration had occurred in the kitchen and Hill was only charged with one count of rape. This court noted that “materially identical evidence was presented with respect to both acts of rape. Hill did not present a separate defense or offer materially distinct evidence of impeachment regarding any particular act. The defense presented a general denial of participation in any wrongful conduct.”²⁰²

This passage obviously does not explain how the facts of *Hill* and *Banks* are similar; and, of course, they are not. Even Justice Davis seems to realize this at a later point in the opinion but then discounts what should be the critical and controlling distinctions:

The facts in the present case are more distinct in time and space than the facts in *Hill*, yet the *Hill* court concluded the incidents were factually separate. In *Hill*, the first incident occurred in the bathroom and the second occurred in the kitchen in the same house. In the present case, the first incidents occurred at the laundry and the second incidents occurred near Banks’ house, a greater distinction in both time and space. Under the test set forth in *Hill*, we conclude that the majority opinion of the Court of Appeals that the acts of touching were not separate incidents but a continuing course of conduct was in error. This case is a multiple acts case and the harmless error analysis set forth in *Hill* applies.

The first step in the *Hill* analysis is to determine whether the jury could have been confused as to which acts the State alleged occurred. As the *Hill* court points out, confusion stems from legally or factually separate incidents. We have determined that the incidents in this case are factually separate incidents. Such a determination does not necessarily cause confusion nor does it preclude application of a harmless error analysis. However, under the test set forth in *Hill*, the incidents in this case are not legally separate.²⁰³

Thus, after *Hill*, all that matters in the end are Banks’ general denials of the girls’ allegations. In essence, a general denial equals a credibility contest, which in turn equals no possibility of jury confusion, which in turn equals no reversible error.

[B]ased on the same legal defense to the crimes, there is no reason for this court to believe the jury would have believed some of the incidents but not the others. Banks’ response to [the detective] that he had no idea why T.N. or L.H. would say those things if nothing had happened suggests that the issue for resolution by the jury was one of whom they believed, T.N. and L.H. or Banks. Just as in *Hill*

201. *Id.* at 550-51.

202. *Id.* (quoting *State v. Hill*, 26 P.3d 1267, 1274-75 (Kan. 2001)).

203. *Id.* at 551.

there was no extrinsic evidence to support the charges. The jury rejected Banks' general denial and unequivocally demonstrated it believed in the credibility of the victims with its verdict. We do not believe that the difference in testimony of the victims concerning the number of times they were touched at each location is determinative. The question for the jury based upon the general denial of Banks was one of credibility and jury confusion. . . . The jury either believed the victims or the defendant.

While there was evidence of factually separate acts, Banks presented a unified defense to all acts. Because there was no extrinsic evidence other than the credibility of the victims, we can unequivocally determine that the jury would not have disagreed as to the commission of any of these acts. Thus, the Court of Appeals may be affirmed on this point, for the reasons given are immaterial if the ruling is correct for any reason. We conclude that the failure to give a unanimity instruction under the facts of this case was harmless error.²⁰⁴

The supreme court's opinion in *Banks* is a textbook illustration of how *Hill*'s conflation of the error and harmlessness inquiries leads to sloppy analysis. As discussed in my earlier dissent at the court of appeals level, the testimony of the State's witnesses in *Banks* could easily have led to jury confusion about what was done to which girl at which time and which place. The State's mere designation of one count for one victim and one count for the other did not completely solve this problem. Even if the *Hill* standard—whether the evidence offered “any possibility of jury disagreement”²⁰⁵ regarding Banks' commission of all of the offenses—is applied, the potential for confusion was demonstrated.

The second *Daniels* case²⁰⁶ also illustrates the mess that multiple acts law has become. Sonji Daniels was accused and convicted of aiding and abetting and conspiracy to commit an aggravated robbery. She also was charged with and convicted of one count of endangering a child, although the evidence showed the involvement of two of her sons. One merely rode along in the getaway car; the second was solicited to participate directly in the robbery.²⁰⁷

The court of appeals, under the authority of *Hill*, saw no multiple acts problem, despite two victims and allegations of varying acts as to each.²⁰⁸ The defendant had not argued the issue, instead asserting on appeal that the evidence as to one of the children was insufficient.

204. *Id.* at 552 (citation omitted). The opinion also inexplicably cites the clearly erroneous standard. *Id.* at 550.

205. Even one victim's story can leave open this possibility that, as in *Hill*, the story changes over time. It strains credulity to say that a jury cannot possibly disagree when two victims are involved and their stories do not match.

206. *State v. Daniels*, No. 87,790, 2003 WL 22283001 (Kan. Ct. App. Oct. 3, 2003), *petition for review granted*, 2004 Kan. LEXIS 1 (Jan. 5, 2004).

207. *Id.* at *9-10.

208. *Id.* at *10.

The panel, composed of Chief Judge Rulon, Judge Lewis, and Senior District Judge Wahl, agreed with that assertion.

Without further evidence of potential harm to D.D. as the result of being in the car as the conspiracy to commit the robbery transpired, the State's theory of the crime is based entirely upon conjecture and hypothesis. There was no evidence to suggest that Moss would likely become violently angry if the robbery attempt had failed, as the State suggests. There was no evidence that the defendant was likely to attempt to evade the police, if the robbery attempt had been discovered, as the State contends. In fact, the evidence presented at trial was that the defendant fully cooperated with the police when they did attempt to investigate the car in connection with the robbery.²⁰⁹

However, the panel regarded the State's evidence of the child solicited to be a principle in the crime as enough to repel the sufficiency challenge to the conviction.

The facts distinguishing Dante from D.D., however, are notable. Unlike D.D. who merely observed the plans to commit the robbery, Dante was asked by the defendant to commit the robbery. . . .

A crime in which the death of some person is likely also supports a finding that a lesser degree of harm is probable, not only to the victim or victims but also to the participants. Consequently, if the jury believed the circumstantial and direct evidence that the defendant solicited the assistance of Dante in committing the robbery, the jury possessed sufficient evidence from which to convict the defendant of endangering Dante.²¹⁰

In other words, the panel affirmed the conviction by applying a *Johnson*-like bastardization of the alternative means rule. Evidence supporting the endangerment of one child was adequate to uphold the conviction despite the acknowledged insufficiency of evidence on the endangerment of the other child. This was so even though, "[a]s charged in the case, the State implied that the defendant had endangered the lives of both" in a single criminal count.²¹¹

In its parting words, the panel noted the potential for a multiple acts issue:

Ordinarily, because the State charged only one count of endangering a child but provided factual allegations concerning both Dante and D.D., this court might be presented with a multiple acts problem. However, the district court did instruct the jury that each verdict must be unanimous.

Moreover, under the two-prong harmless error test promulgated by *State v. Hill*, there is no possibility that any juror who believed that the defendant had placed D.D. in danger by conspiring to commit robbery in his presence and driving those who would actually commit the robbery to the entrance of the alley would not also believe

209. *Id.*

210. *Id.*

211. *Id.* at *9.

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that the defendant had solicited Dante's assistance in committing the robbery.²¹²

The first problem with the *Daniels* treatment of the child endangerment count is that even *Hill* would not support disregard of a multiple acts issue merely because a general unanimity instruction is given. The panel does not even bother with the questions of factual and legal separability, which *Hill* makes significant.

The other problem is that the panel could have disposed of any potential multiple acts problem by examining the instructions given to Daniels' jury more carefully. The jury was instructed that, in order to find Daniels guilty of child endangerment, it had to find an endangerment of D.D. and Dante. In other words, the jury was told it must acquit unless it found evidence to fully support *both* of the multiple acts described in the one count.²¹³ There was no multiple acts "problem" because the jury—through the use of the conjunctive "and"—was told it could convict only if it reached a unanimous decision that *both* children were placed in danger.

Thus the panel's approach led it to an outcome exactly 180 degrees from the correct one. There remained a sufficiency problem; the State failed to prove the case as it had chosen to configure it. Because Daniels was charged in one count with two acts of child endangerment, and because the jury was instructed that the count required unanimity on *both* acts, the panel's conclusion that the evidence of one act was insufficient should have doomed rather than saved the conviction. Daniels was entitled to reversal.²¹⁴

V. POTENTIAL FUTURE DIRECTIONS

A. *Alternative Means*

In the alternative means arena, two potential future directions merit discussion. The first has to do with the *Johnson* aberration. As discussed *supra*, *Johnson* departed from the clear rule of *Timley*, permitting a conviction to stand when the court instructed on various theories, despite insufficient evidence on one of those theories. Although this may have been good law in Kansas before *Timley*, it is not good law now. Fortunately, *Johnson* has been slow to catch on, but it should not be viewed as a minor threat. Our supreme court recently missed an opportunity to consider this inconsistency, granting a petition for review in *Ibarra* but limiting the further appeal of that case to issues other than alternative means. If a later opportunity arises to

212. *Id.* at *10 (citation omitted).

213. *Id.*

214. *Daniels'* petition for review was granted by the Kansas Supreme Court on Jan. 5, 2004. 2004 Kan. LEXIS 1 (Jan. 5, 2004).

reaffirm *Timley* and reject *Johnson*, the supreme court should take it. *Johnson* needs to be uprooted before it blossoms into alternative means law's *Hill*.

Second, expanded use of special verdicts shows promise for the handling of future first-degree murder cases relying on evidence of both premeditation and felony murder. Although special verdicts have long been avoided in criminal cases for fear of interfering with the jury's function and prejudicing its deliberations,²¹⁵ they can be both helpful and protective of a defendant's rights in these particular alternative means situations.

As discussed *supra*, Kansas law is clear that first-degree murder is one crime only, and premeditation and felony murder constitute mere alternative means of its commission.²¹⁶ However, the difference in the theory relied upon by the jury can have an enormous effect on the time served after conviction. Premeditated murder with aggravating circumstances is punishable by life without parole for fifty years,²¹⁷ whereas the longest sentence applicable to felony murder is life with parole eligibility in twenty years.²¹⁸ A district judge may impose a premeditated murder sentence only if he or she is certain that every juror relied on a premeditated murder theory to convict.²¹⁹

The profitable use of a simple special verdict form was demonstrated in the new case of *State v. Morton*.²²⁰ In that case, where the alternative theories of premeditation and felony murder were presented to the jury, the verdict form listed four options. The jury could: (1) unanimously agree that the defendant was guilty of premeditated murder; (2) unanimously agree that the defendant was guilty of felony murder; (3) fail to agree on the underlying theory but agree that the defendant was guilty of first-degree murder under a combination of the theories; or (4) unanimously agree that the defendant was not guilty. The jury selected the third option.²²¹

The availability of this option, and its differentiation from the two single-theory options on the verdict form, guided the sentencing judge, who appropriately sentenced the defendant only to the less harsh penalty applicable to felony murder. The use of the special verdict form ensured unanimity on the offense committed and fully informed the judge of the jury's reasoning, protecting the defendant

215. See generally Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263 (2003).

216. See, e.g., *State v. Hoge*, 80 P.3d 52, 59 (Kan. 2003).

217. KAN. STAT. ANN. § 21-4635(a) (2003).

218. *Id.* § 22-3717(b)(2).

219. See *State v. Vontress*, 970 P.2d 42, 53 (Kan. 1998).

220. *State v. Morton*, 86 P.3d 535, 538-40 (Kan. 2004).

221. *Id.* at 540.

from an interpretation of the verdict that could have led to a Hard 50 sentence.

B. *Multiple Acts*

Our first priority in future multiple acts cases is to fix our *Hill* mess. We need to rethink the path we have taken, abandon what has not made sense, and fashion suitably pragmatic *and* protective rules. If we are careful and thoughtful, we can get to a place where we know, rather than merely pretend, that we are affirming verdicts where jurors agreed unanimously on the crime committed. We can improve on the protection afforded defendants by the *Barber* elect-or-instruct rule and assist prosecutors in achieving accurate and fair convictions.

This effort is imperative. Buying the State's theory that one child was touched because the child says so is simply not the same as buying the State's tandem theory that the child's companion was touched even when the companion says she was not.²²² Buying the State's theory that one child was endangered because he was solicited to commit a felony is simply not the same as buying the State's theory that a different child was endangered because he was along for the ride in the getaway car.²²³ The defendant's decision to defend a case by denying all allegations—especially since that decision may be prompted in part by the vagueness of the State's assertions and the crippling effect of propensity evidence—is simply not the same thing as saying that, to the extent *any* piece of the State's evidence is more credible than the denial, then *all* of the State's evidence is. To the extent that *Hill* has promoted or allowed such equations by its conflation of the error and harmlessness inquiries, our supreme court must start by overruling it at its first opportunity.

The question then becomes: What should the rule be? I suggest that we need more than one rule and that, as with prairie architecture, form should follow function. Both our courts and our legislature have roles to play in the solution.

The problem with multiple acts law to this point, and the *Hill* formula in particular, is not just that it confuses error existence with error harmlessness. Nor is it that it allows the introduction of highly prejudicial propensity evidence. This area of the law's most basic problem is its erection of an elaborate infrastructure to preserve a tool that prosecutors often do not need. Worse, we have used the defendant's statutory right to juror agreement on the most basic facts of the offense of conviction as the infrastructure's foundation. While we

222. See *State v. Banks*, 46 P.3d 546, 552 (Kan. 2002).

223. See *State v. Daniels*, No. 87,790, 2003 WL 22283001, at *9 (Kan. Ct. App. Oct. 3, 2003), *petition for review granted*, 2004 Kan. LEXIS 1 (Jan. 5, 2004).

have been busy formulating and reformulating patterns of analysis, there has frequently been no reason the State must be free to prosecute more than one criminal act in one count.

This leads to my first proposal: When the State has evidence of more than one specific criminal act and the acts can be differentiated from one another factually, then the State must be required to charge and prosecute each act in its own count. Let us reacquaint ourselves with the concept of duplicity and the reason it is to be avoided.²²⁴ Without duplicity to guide us, we have arrived at a place where the multiple acts defendant faces a Catch-22. The State is free to decide at its leisure whether to charge and pursue multiple acts of one crime in multiple counts or in one count. Either way, it is permitted to put on all of its evidence. If it pursues multiple counts, the convictions are protected from reversal for multiplicity under *Long*²²⁵ and similar cases. If it pursues only one count, the conviction is effectively insulated by *Hill*²²⁶ and its progeny. A defendant cannot win an appeal, even when his or her ability to develop and present a defense has been hamstrung by vague testimony and uncontrolled admission of propensity evidence.

Even a return to the strict elect-or-instruct rule of *Barber* would not accomplish all that this first proposal to alter the common law could. Unfortunately, *Barber* perpetuated as big a problem as it cured, leaving too much discretion with the prosecutor on whether to elect and, if so, when. It left too great an incentive to admit all of the evidence against a defendant—including what would otherwise be deemed unduly prejudicial and inadmissible—under the umbrella of a multiple acts count.

This first proposed rule should not apply in a true *Staggs* fight situation or a true *Hazley* simultaneous possession situation. Whether a given set of facts fits in one of those analytically identical categories should be relatively easy to discern, and prosecutors could still pursue multiple acts that are clearly part of a criminal whole in a single count.

Of course, even with the *Staggs/Hazley* exception, there is plenty for both sides to dislike in my proposed rule. The rule would force the State to work harder to gather and organize its evidence at an earlier point in the case, before it files or amends its charging document. It

224. “Duplicity is the joining in a single count of a complaint two or more distinct and separate offenses. Duplicitous charging confuses the defendant as to how he or she must prepare a defense and confuses the jury.” *State v. Fulton*, 22 P.3d 167, 173 (Kan. Ct. App. 2001) (citations omitted); *see also* *State v. Campbell*, 539 P.2d 329, 347-48 (Kan.), *cert. denied*, 423 U.S. 1017 (1975) (vice of duplicity recited; jury unable to convict of one offense, acquit of another).

225. *State v. Long*, 993 P.2d 1237, 1238 (Kan. Ct. App. 1999).

226. *See, e.g., State v. Hill* 26 P. 3d 1267, (Kan. 2001); *see also* *State v. Kessler*, 73 P.3d 761, 766-67 (Kan. 2003) (discussion of multiplicity challenge echoes *Hill* multiple acts dismissal; credibility contest reliance).

would expose some defendants who would have been prosecuted for one offense to prosecution for multiple offenses, meaning the potential for multiple penalties, including consecutive prison sentences.

I nevertheless believe the advantages of the rule outweigh any disadvantages. By its nature, the rule would eliminate the evils we say we are aiming at: The potential for jury confusion and lack of unanimity. The effectiveness and fairness of the process will benefit from elimination of the incentive for the State to be lazy, unprepared, or deliberately manipulative. Propensity evidence will again be subject to the full examination it must undergo pursuant to K.S.A. 60-455 or a recognized exception. Also, because the State would be forced to be more specific about which pieces of evidence relate to which counts, defendants and their counsel might be better able to discover grounds for and evidence to support worthy defenses.²²⁷

A second new common law rule is needed for cases in which the State cannot muster anything other than generic evidence, *i.e.*, evidence of multiple criminal acts that cannot be factually differentiated by its witnesses. This rule also need not implicate a defendant's right under the jury unanimity statute.

Such generic evidence situations often arise in child abuse cases, when the victims are too young and/or too inarticulate to describe repeated, long term abuse in specific terms. As described in *Arculeo*, the child's description may offer "no distinguishing characteristics identifying any separate and distinct incidents." Rather, the abuse results in "an amalgamation of the crimes in the child's mind." The child's testimony is "reduced to a general, and customarily abbreviated, recitation of what happened on a continuing basis."²²⁸

I see two possibilities for such cases. First, the legislature should consider amending our criminal code to recognize the continuing nature of certain offenses against children. These actions would give the State an option to charge in one count a group of offenses the child witness cannot separate factually.²²⁹

Second, for offenses that remain single-act crimes, the courts should adopt a second common law rule to make room for generic evidence cases. If one count is filed for more than one act, jurors would have to be instructed that, to convict on that count, they must unanimously agree the defendant committed *all* of the alleged acts *or*

227. We know that this rule is workable, because several of our cases record instances when the prosecution has been able to do just that. *See* *State v. Dickson*, 69 P.3d 549, 557-58 (Kan. 2003); *Schuster v. State*, No. 85,496, 18 P.3d 985, 2000 Kan. App. LEXIS 1348 (Dec. 29, 2000).

228. *State v. Arculeo*, 36 P.3d 305, 314 (Kan. Ct. App. 2001) (quoting *People v. Luna*, 250 Cal. Rptr. 878 (Cal. Ct. App. 1988)).

229. *See State v. Wellborn*, 4 P.3d 1178, 1180 (Kan. Ct. App. 2000), *petition for review denied*, 269 Kan. 940 (2000).

any one of them. I described this approach in my *Arculeo* concurrence, citing an Alabama case:

The Alabama court held that, because the statutory scheme at issue did not allow for charging of a continuing offense covering child sexual abuse, a situation Kansas faces as well, see [*State v. Wellborn*, 27 Kan. App. 2d 393, 395 (2000)], the strict elect-or-instruct rule must be modified:

“When there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.” [*R.L.G. Jr., v. State*, 712 So. 2d 348, 361 (Ala. Crim. App. 1997)] (quoting *People v. Jones*, 51 Cal. 3d 294, 322, 270 Ca. Rptr. 611, 792 P.2d 643 [1990]). In my view, the Alabama court’s idea of a modified unanimity instruction for generic evidence child abuse cases has merit. Such a rule also could be applied in cases such as *Hill*, when the victim’s testimony is more specific as to multiple acts but the defendant’s general denial reduces the trial to a credibility contest. I believe jurors should be told that they may find the defendant guilty if they unanimously agree he or she committed *any one of the acts or all of the acts* described. Such an instruction strikes a sound balance between the defendant’s and the victim’s rights while respecting the current statutory scheme. If this rule were adopted, the absence of such an instruction would be regarded as error. Then, in keeping with the Supreme Court’s unequivocal expression of disapproval for structural error analysis, a harmlessness analysis would follow. This pattern, to me, vastly improves upon the internally inconsistent *Hill* two-step analysis.

A strict elect-or-instruct rule is inappropriate for the truly generic evidence child abuse case. Some exception is necessary to ensure that perpetrators of the most egregious violations upon the most vulnerable of our children are punished. Given the absence of a continuing offense covering child sexual abuse in our criminal code and the inability of the youngest and most traumatized children to recite specifics of the circumstances surrounding the abuse they have suffered, the rule must be relaxed when credibility is the only genuine issue. It is simply impossible for the prosecutor to elect which among multiple indistinguishable acts he or she relies upon for conviction, and it is likewise impossible for jurors to select one from a string of undifferentiated incidents to arrive at a verdict. Rigid adherence to the elect-or-instruct rule would disable or derail prosecution altogether, removing from the reach of the law those whose depredations were so frequent or so long-term or so aimed at the inarticulate that generic testimony is all that can be marshaled against them.²³⁰

In *Arculeo*, I also emphasized that the elect-or-instruct rule would still have to be applied strictly in

230. *Arculeo*, 36 P.3d at 322.

any case in which the defendant had ammunition beyond general attacks on the victim's credibility, or general endorsements of his or her own . . . [i]f alibi or identity was in issue, if the victim or other witnesses were able to put any more meat on the bones of the allegations that might be picked off by cross-examination about physical implausibility or other weaknesses²³¹

For all of the reasons I have discussed *supra*, I now believe that the elect-or-instruct rule is an imperfect safeguard of the defendant's right to a unanimous verdict. I now believe that such a case should have to be charged and pursued in multiple counts. Duplicity analysis should be resurrected and applied.

VI. CONCLUSION

It is within our power to improve the analytical integrity and predictability of alternative means and multiple acts law in Kansas. In the alternative means arena, the supreme court should take its first opportunity to correct any deviation from the *Timley* rule. In the multiple acts area, the court should force the State to pursue multiple counts when there is evidence to support factually distinct multiple acts. It should require a special unanimity instruction that the jury must agree on all acts or any one act when there is only generic evidence to support a single count. The legislature also should consider amendment of the criminal code to allow certain acts perpetrated on children to be charged as continuing conduct crimes.

Finally, this area of the law (and many others) could benefit from culture changes in each of Kansas' appellate courts and in the way they interact with one another. The current culture of the court of appeals exalts independence over cohesive development of legal principles. Any panel is free to ignore or reject any previous panel's ruling on an issue, so long as the earlier ruling has not received supreme court imprimatur. If this practice were changed, then district judges, litigants, and their lawyers would not be left wondering which of two conflicting panels to follow while they wait for the supreme court to opine on a new issue. Had this practice been in place at the time of *Johnson* and *Hill*, those panels would not have been prevented from criticizing their colleagues' ideas. They could have expressed their doubts about the *Timley* and *Barber* rules, but they would not have been able to hand down a conflicting rule that produced immediate and widespread confusion.

For its part, the current culture of the supreme court also contributes to situations such as the one in which we find ourselves on alternative means and multiple acts. Although some issues of first

231. *Id.*

impression go automatically to the high court—for example, cases in which statutes are struck down as unconstitutional—this is far from inevitably the case. The court of appeals handles a much higher volume of appeals, and many issues of first impression are heard by one of its panels before reaching the supreme court. The supreme court should adopt operating procedures that lead to more prompt review of such cases. The usual, rather than exceptional course, should be to order such cases transferred to the supreme court before hearing in the court of appeals. Any cases of first impression not handled in this matter should routinely be accepted on petition for review, even if the court of appeals' reasoning and outcome have been sound. Litigants and their lawyers and district judges are entitled to leadership and guidance from their state's supreme court, sooner rather than later.