



THE FOUR HORSEMEN OF UNANIMITY

UNANIMOUS VERDICTS, MULTIPLICITY, DUPLICITY, ELECTION, AND MERGER

INDICTMENT KILLERS AND FIXES

JUDGE KYLE HIXSON, JUDGE STEVEN SWORD,
JUDGE ANGELITA BLACKSHEAR DALTON, JUDGE TIMOTHY EASTER



The First Horse

General Overview of Unanimity

Judge Kyle Hixson

And I looked, and behold, a white horse. He who sat on it proclaimed,
“You must be unanimous!”

Two Topics

- 1.The history and development of juror unanimity in Tennessee.
- 2.A survey of specific Tennessee statutes and a look at where unanimity is required and where it is not.

Magna Carta



- Approved by King John in 1215
- Required “the lawful judgment of his peers”
- Did not require unanimity in the verdict

Unanimity Emerges in 1367



- Under the rule of King Edward III
- *Anonymous Case*, 41 Lib. Assisarum 11 (1367).
- Becomes a vital right protected by the common law
- Also included the right to a 12-person jury: A “verdict, taken from eleven, was no verdict.” *Anonymous Case*.

William Blackstone



No person can be found guilty of a **serious crime** unless “the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.” 4 W. Blackstone, Commentaries on the Laws of England 343 (1769).

Original State Constitutions

Required Unanimity Explicitly

- North Carolina
 - “That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court[.]” *See* N.C. Declaration of Rights § IX (1776).
- Delaware
- Maryland
- Pennsylvania
- Vermont
- Virginia

Required in More General Terms

- Georgia
- New Jersey
- New York
- South Carolina

The Tennessee Constitution

- “That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.” Tenn. Const. art. I, § 6.
- “That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.” Tenn. Const. art. I, § 8.
- “That **in all criminal prosecutions**, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.” Tenn. Const. art. I, § 9.
- “No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.” Tenn. Const. art. VI, § 14.

But what does the right entail?

Interpreting article I, section 6: “Our decisions hold that this constitutional provision protects the right of trial by jury only as it existed at common law in so far as it had been adopted and was in force in North Carolina, when the territory embraced in Tennessee was ceded by North Carolina to the Federal Government.” *Willard v. State*, 174 Tenn. 642 (1939).

12-Member Juries

- “But what is the right of trial by jury? It is a right guaranteed to every citizen to have the facts involved in any litigation which he may have tried and determined by ‘twelve good and lawful men.’” *Neely v. State*, 63 Tenn. 174, 180 (1874).
- Not 11. *See Bowles v. State*, 37 Tenn. 360 (1858) (reversing manslaughter conviction where only 11 jurors returned the verdict).
- And not 13. *Grooms v. State*, 221 Tenn. 243, 245 (1968).

Only “serious crimes” or “petty offenses”, too?

- “Misdemeanors not involving life or liberty may be tried under the constitution without a jury, because such misdemeanors were triable under the common law without a jury.” *Willard*, 174 Tenn. 642.
- Exception: contemnors may be jailed summarily without a jury trial. *Pass v. State*, 181 Tenn. 613 (1944).

Compare Tennessee and Federal Law

Tennessee Constitution

- 4 constitutional provisions
- 12-person jury
- Applies to **all** jailable offenses and fines over \$50
- Unanimity required

U.S. Constitution

- Art. III and Amend. VI and VII
- Has allowed 6-person juries for serious offenses
- Has allowed non-jury trials for offenses punishable by six months or less
- Until 2020, did not impose unanimity on the States for serious offenses

When is unanimity required?

“Where the intent with which, the mode in, or the means by which, an act is done are essential to the commission of the offense, and the offense may be committed with different intents, in different modes, or by different means, if the jury is satisfied that the act was committed with one (1) of the intents, in one (1) of the modes, or by either of the means charged, the jury shall convict, although uncertain as to which of the intents charged existed, or which mode, or by which of the means charged, the act was committed.” Tenn. Code Ann. § 40-18-112.

Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion),
abrogated on other grounds by Edwards v. Vannoy, 141 S.Ct.
1547 (2021).

- “[T]he jury need not agree as to mere means of satisfying the *actus reus* element of an offense” or “to the alternative means of satisfying the elements of *mens rea*.”
- Affirming an Arizona conviction where a jury convicted of first degree murder in a single count, but where premeditation and felony murder were both potential theories of conviction

Direct Liability vs. Criminal Responsibility

State v. Lemacks, 996 S.W.2d 166 (Tenn. 1999)

- A single-count DUI case where the jury returned a general verdict of guilt even though both theories of direct liability and criminal responsibility were presented in the proof.
- Criminal responsibility is not a separate offense, but rather an alternate theory of the defendant's guilt of the single charged offense.
- The jury was not required to unanimously state which theory they were relying on to find the defendant guilty.

Intentional, knowing, *or* reckless

State v. Lee Harold Cromwell, No. E2017-01320-CCA-R3-CD, 2018 WL 3239948 (Tenn. Crim. App. July 3, 2018)

In a vehicular homicide case, approving instructions that allowed the jury to find that the defendant had acted either intentionally, knowingly, or recklessly

First Degree Murder

State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998)

No constitutional or statutory provision prohibits a jury from rendering a general verdict of guilty of first degree murder where both premeditated and felony murder are charged and submitted to the jury.

Antonio M. Crockett, No. M2018-01416-CCA-R3-PC, 2020 WL 119698
(Tenn. Crim. App. Jan. 10, 2020)

Petitioner was not entitled to unanimity as to whether his felony murder verdict was predicated upon theft or attempted theft. Trial counsel was not deficient for failing to object.

Aggravating Circumstance

State v. Keen, 31 S.W.3d 196 (Tenn. 2000)

- “Torture” and “serious physical abuse beyond that necessary to produce death” are separate theories of establishing especially heinous, atrocious, or cruel.”
- Jury need not be unanimous as to which theory they relied upon to prove the aggravator.

Aggravated Child Abuse

State v. Lakeisha Margaret Watkins, No. M2009-02607-CCA-R3-CD, 2011 WL 2682173 (Tenn. Crim. App. July 8, 2011)

Jury did not have to unanimously decide whether the belt used in the abuse was a “dangerous instrumentality” or a “deadly weapon”.

Child Neglect

State v. Adams, 24 S.W.3d 289 (Tenn. 2000)

Defendant is not entitled to unanimity as to which of the several adverse effects resulted from one period of neglect.

Drugs

State v. Lindsey, 208 S.W.3d 432 (Tenn. Crim. App. 2006)

State v. Angela E. Isabell, No. M2002-00584-CCA-R3-CD, 2003 WL 21486982 (Tenn. Crim. App. June 27, 2003)

Sale and delivery of a controlled substance are separate offenses and must be pled separately with a unanimous verdict as to each allegation.

Drugs—Possession with Intent

State v. John Tyree Lytle, No. E2003-01119-CCA-R3-CD, 2004 WL 9411003 (Tenn. Crim. App. May 3, 2004)

- No plain error as to unanimity where the jury convicted of *possession* with intent to sell or deliver.
- *See also Christopher Lee Shaw v. State*, No. M2017-02379-CCA-R3-PC, 2019 WL 1754045 (Tenn. Crim. App. Apr. 17, 2019); *Gregory Justice v. State*, No. M2012-00183-CCA-R3-PC, 2013 WL 1965999 (Tenn. Crim. App. May 13, 2013); *Arthur Lee Taylor v. State*, No. W2011-00027-CCA-R3-PC, 2012 WL 432856 (Tenn. Crim. App. Feb. 7, 2012).

Arson

State v. Pat Bondurant, No. 01C019606CC00236, 1998 WL 120291 (Tenn. Crim. App. Mar. 18, 1998), *rev'd on other grounds*, 4 S.W.3d 662 (Tenn. 1999)

In arson prosecution, State is not required to elect and prove unanimously whether the defendant “set fire to, burned, caused to be burned, or aided, counseled, or procured the burning” of the property.

Fabricating Evidence

State v. Forbes, 918 S.W.2d 431 (Tenn. Crim. App. 1995)

“Making” and “presenting” false evidence are separate offenses and the jury verdict must be unanimous as to each one.

Perjury

State v. Buford, 216 S.W.3d 323

Section 39-16-704: when two or more statements are made under oath, any two of which cannot both be true, the state need not allege or prove which statement is false.

DUI

State v. Riley Christopher Wilburn, No. M2020-00130-CCA-R3-CD, 2021 WL 2554209 (Tenn. Crim. App. June 22, 2021), *perm. app. denied* (Tenn. Oct. 13, 2021)

- DUI by intoxication and DUI per se are alternate theories of the same offense.
- Thus, they may be charged in the same count and unanimity is not required as to the theory of conviction.

DUI

State v. Joseph Scott Morrell, No. E2013-02431-CCA-R3-CD,
2014 WL 4980400 (Tenn. Crim. App. Oct. 7, 2014)

- Δ was charged with DUI by intoxication by driving **or** being in physical control.
- Δ was not entitled to unanimity on the question of whether the jury found him to be driving or in physical control.

The Second Horse

Problematic Indictments with Multiplicitous and
Duplicitous Counts

Judge Steven Sword

Another horse, fiery red, went out. And it was granted to the one who
sat on it to dismiss the Indictment! (or merge it later)



MULTIPLICITY AND DUPLICITY IN INDICTMENTS

- **Multiplicity is the charging of a single offense in several counts of an indictment.**
 - EG: Defendant breaks into a home and steals some guns and tried to steal other property. Convictions for theft in Count 1 and attempted theft in Count 2 would violate double jeopardy because they were part of the same criminal episode. Aggravated Burglary would stand as a separate offense in Count 3.
- **Duplicity is the charging of multiple offenses in a single count.**
 - EG: Defendant engaged in a home invasion robbery with five separate victims. He was indicted on a single count of aggravated robbery. Multiple victims testified that he entered the home and robbed them.

A MOMENT FOR GRAMMAR

- Multiplicity – noun - the quality or state of being multiple or various.
 - Multiplicitous v. Multiplicious – adjective – resulting from multiplicity.
 - Multiplicitous used more often in Tennessee (4 cases v. 98)
- Duplicity – noun – the quality or state of being twofold or double.
 - Duplicitous v. Duplicious – adjective – marked by duplicity
 - Duplicious only used once in Tennessee, Duplicitous 40



The Problem with Multiplicity

- **Double Jeopardy** Clause of the Fifth Amendment to the United States Constitution
- Tennessee Constitution Article I, § 10 guarantees “[t]hat no person shall, for the same offense, be twice put in jeopardy of life or limb.”.
- Protect against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and **(3) multiple punishments for the same offense.**

See Schiro v. Farley, 510 U.S. 222, 229, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994); State v. Denton, 938 S.W.2d 373, 378 (Tenn.1996).

General Principles

- 1. A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;
- 2. If each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and
- 3. Where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.
- Also consider is sex cases: 1. The nature of the act; 2. The area of the victim's body invaded by the sexually assaultive behavior; 3. The time elapsed between the discrete conduct; 4. The accused's intent, in the sense that the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse; and 5. The cumulative punishment.

See State v. Phillips, 924 S.W.2d 662, 665 (Tenn.1996)

Unit of Prosecution V. Multiple Description

State v. Watkins, 362 S.W.3d 530 (Tenn.2012)

- **Unit-of-prosecution** claims arise when defendants have been charged with multiple violations of the **same statute** for the same offense.
 - EG: Defendant is charged under 39-17-1307 in Count 1 of Unlawful Possession of a Weapon with a prior conviction for Aggravated Assault; and Count 2 Unlawful Possession of a Weapon with a prior conviction for Robbery.
- **Multiple description** claims arise when a defendant has been charged with violating two **different statutes** for the same offense.
 - EG: Defendant is charged with Aggravated Robbery with a deadly weapon in Count 1 for pointing a gun at the victim and demanding cash; and convicted of Aggravated Assault with a deadly weapon in Count 2 for the same act with the gun.

Unit of Prosecution Test

- Judge's job:
 - Identify the Legislature's intent to determine the statute's focus as to the single unit of conduct for purposes of conviction and sentence. In other words, how did the legislature define the scope of conduct composing one violation of the statute. See *State v. Smith*, 436 S.W.3d 751, 768 (Tenn. 2014).
 - 1. Does the statute expressly identify the unit of prosecution?
 - 2. Then, review the statutory history.
 - 3. Finally, perform a factual analysis in the case to determine to determine if only one unit of prosecution has been committed. If so, the multiple convictions are multiplicitous.
 - "Rule of lenity" – if in doubt - cut it out. (Or merge, but that doesn't rhyme)

Multiple Description Test

- 1. Examine the statutory elements without regard to the proof in the case
 - Did the Legislature express an intent to permit or preclude multiple punishments?
 - If no, apply the two-pronged Blockburger test.
- 2. *Blockburger* “same elements” test.
 - Did the convictions result from the same conduct? If not, no double jeopardy problem.
 - Are the elements of both offenses the same? If not, no double jeopardy problem.

Example Cases – Multiple Description

State v. Itzol-Deleon, 537 S.W.3d 434 (Tenn. 2017)

- Convictions: Attempted Agg. Sexual Battery, 4 Counts Aggravated Sexual Battery, 3 Counts Rape of a Child
- State made election after extensive proof on one count of Agg. Sex. Battery (convicted of LIO Att. Agg. Sex. Bat.) and one count of Rape of a Child that involved the same incident.
- CCA merged into RoC based on *State v. Barney*, 986 S.W.2d 545 (Tenn. 1999).
- Supreme Court overrules *Barney* and under *Watkins* applied the *Blockburger* test.
 - Same act or transaction?
 - Different statutory elements?

Non-exclusive factors for same transaction:

- “[W]e offer the following list of non-exclusive factors that may be taken into consideration when, in a multiple description case involving a single victim, the defendant claims that his multiple convictions arise from the same act or transaction:
 1. The nature of the defendant’s actions that are alleged to be in violation of the various statutes (“the defendant’s actions”);
 2. The temporal proximity between the defendant’s actions;
 3. The spatial proximity of the physical locations in which the defendant’s actions took place;
 4. Whether the defendant’s actions contacted different intimate areas of the victim’s body and the degree of proximity of those areas to each other;
 5. Whether the defendant’s contact with different intimate areas of the victim’s body was deliberate or merely incidental to facilitating contact with another intimate area;
 6. Whether the defendant deliberately used different parts of his body (or objects) to assault the victim sexually;
 7. Whether the defendant’s assault was interrupted by some event, giving him an opportunity to either cease his assault or re-form a subsequent intent to commit a subsequent assault;
 8. Indications of the defendant’s intent to commit one or more than one sexual assault on the victim; and
 9. The extent to which any of the defendant’s actions were merely ancillary to, prefatory to, or congruent with, any of his other actions, thereby indicating unitary conduct.

The presence or absence of any one or more particular factors is not determinative.” *Itzol- Deleon*, at 450-451.

- Court held that the defendant’s actions constituted a single, continuous episode of sexual assault

Different Statutory Elements?

- Although the elements are different – sexual contact v. sexual penetration – Agg. Sex. Batt. (Att. Agg. Sex. Batt.) is a lesser-included offense of Rape of a Child.
- “If the elements of the offenses are the same, or one offense is a lesser included of the other, then we will presume that multiple convictions are not intended by the General Assembly and that multiple convictions violate double jeopardy.” *Watkins* at 557.
- Court found violation of double jeopardy and merged the lesser offense.

Example Case – Unit of Prosecution

State v. Harbison, 539 S.W.3d 149 (Tenn. 2018)

- Defendant convicted on 4 counts of employing a firearm during the commission of a dangerous felony – 39-17-1324 – by shooting at four different people during a single incident gun fight. Argued that it was a single gun – thus violated double jeopardy.
- Supreme Court applied the Unit of Prosecution test:
 - Reviewed the plain language of the statute
 - (1) Employed a firearm
 - (2) During the commission of a dangerous felony or attempt to commit a dangerous felony. [Mandatory consecutive to the underlying dangerous felony.]
 - Court held from the language of the statute that the legislature intended each act of employment of the firearm as the unit of prosecution.
 - Court still reviewed the legislative history and found support in the original bill and hearings.
- Court found did not violate double jeopardy and affirmed the 4 convictions.

What if the jury had found guilt on the lesser-included offense of possession of a firearm during a dangerous felony?

- What is the unit of prosecution?
- Elements:
 1. Possessed a deadly weapon
 2. During the commission or attempt to commit a dangerous felony?
- Would the lesser convictions merge while the greater offenses stand separate?

The problem with Duplicity

- Rule 8(a)(1) of the Tennessee Rules of Criminal Procedure on mandatory joinder:
 - “Two or more offenses shall be joined in the same indictment...with each offense stated in a separate count.”
- Sixth Amendment right to know the charges against him/her.
- Unanimity cannot be assured.
- Double jeopardy uncertainty due to the lack of clarity of the offense charged.

Adjudicating a Duplicity Challenge

- Must be raised before trial as a defect in the institution of the prosecution – Rule 12(b)(2)(A).
- Question of law and fact
 - Must examine the wording of the indictment
 - “Thus, the purpose behind the prohibition of a duplicitous indictment is the avoidance of the following dangers:
 - (1) failure to give the defendant adequate notice of the charges against him;
 - (2) exposure of the defendant to the possibility of double jeopardy; and
 - (3) conviction of the defendant by less than a unanimous jury verdict.”

State v. Burnette, No. E2005-00002-CCA-R3-CD; 2006 WL 721306 (Tenn. Crim. App. March 22, 2006).

Duplicity Example Case State v. Lindsey, 208 S.W.3d 432 (Tenn. Crim. App. 2006).

- Count 31 “did unlawfully, feloniously and knowingly ***sell and, or deliver*** point five (.5) grams or more of a substance containing Cocaine, a Schedule II Controlled Substance... contrary to T.C.A. § 39–17–417 ...”
- Not raised pretrial. Trial Court allowed State to amend indictment to just “sell”. Count was duplicitous – charged two offenses (sell and deliver) in a single count. Made clear in the Sentencing Commission Comments of 40-17-417 and *State v. Angela E. Isabell*, No. M2002–00584–CCA–R3–CD, 2003 WL 21486982, (Tenn.Crim.App. June 27, 2003).
- Thus, defense counsel waived the argument. PCR?
- CCA – error to permit amendment to indictment after jeopardy attached, but harmless.

Exceptions to Duplicity

- TCA 40-13-206 “(a) When the offense may be committed by different forms, by different means or with different intents, the forms, means or intents may be alleged in the same count in the alternative.

(b) When an act is criminal, if producing different results, the differing results may be charged in the same count in the alternative.”
- TCA 39-14-105 Theft punishment “The monetary value of property from multiple criminal acts which are charged in a single count of theft of property shall be aggregated to establish value under this section.”

Duplicity example case

State v. Weilacker, No. M2016-00546-CCA-R3-CD; 2018 WL 5099779 (Tenn. Crim. App. October 19, 2018)

- “And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and say that on the date aforesaid, and in the State and County aforesaid, [defendant] unlawfully, feloniously and knowingly did remove or confine [victim] by the use and display of a handgun which is a deadly weapon, to facilitate the commission of a felony, Aggravated Robbery, and did cause said victim to suffer serious bodily injury by shooting him in the legs, in violation of TCA 39-13-305 and against the peace and dignity of the State of Tennessee.”
- Alleges: especially aggravated kidnapping x 2, and aggravated kidnapping

Remedies?

- Dismissal of the indictment is never the remedy. But, may dismiss counts.
- Merger after conviction.
- “MultiplicityThe evils it presents are two-fold. ***First, as to the trial itself, multiplicity may carry the potential of unfair prejudice, such as suggesting to the jury that a defendant is a multiple offender or falsely bolstering the prosecution's proof on such issues as the defendant's motive or knowledge of wrongdoing.*** *State v. Desirey*, 909 S.W.2d 20 (Tenn. Crim. App. 1995) citing *United States v. Sue*, 586 F.2d 70, 71 (8th Cir.1978); *United States v. Ketchum*, 320 F.2d 3, 8 (2d Cir.)”

The Third Horse

Elections

Judge Timothy Easter

So, I looked, and behold, a black horse, and he who sat on it had a pair of scales in his hand. He proclaimed, “thou must choose!”



Election – Judge Easter

WHAT IS MEANT BY ELECTION OF OFFENSES

Doctrine that gives prosecutors DUTY in a case where evidence of multiple separate incidents is introduced TO ELECT for each count charged the specific incident on which the jury should deliberate to determine the defendant's guilt. The election must be made at the conclusion of the State's case-in-chief.

State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994).

WHAT IS PURPOSE OF ELECTION OF OFFENSES

- Allows the defendant to prepare for and defend a specific charge
- Protects the defendant from double jeopardy
- Allows the trial court and appellate courts to review the sufficiency of the evidence for each offense
- Ensures jury unanimity

State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000).

The most important purpose served by the election of offenses doctrine is to “ensure that jurors deliberate over and render a verdict based on the same offense....”

Burlison v. State, 501 S.W. 2d 801, 803 (Tenn. 1973).

Types of Criminal Offenses That May Require Election of Offenses

- Selling intoxicating beverages – *Murphy v. State*, 77 Tenn. 373 (Tenn. 1882).
- Unlawful carrying a pistol – *Holt v. State*, 64 S.W. 473 (Tenn. 1901).
- Aggravated Assault (OPP) - *State v. Smith*, 492 S.W.3d. 224 (Tenn. 2016).
- Attempted second degree murder and two counts of aggravated assault (*State v. James Antonio Bagwell*, No. M2014-00017-CCA-R3-CD, 2015 WL 721069 (Tenn. Crim. App. Feb. 19, 2015)).
- Abuse, neglect, or exploitation (*State v. Tracy Lynn Carman-Thacker*, No. M2014-00757-CCA-R3-CD, 2015 WL 1881135 (Tenn. Crim. App. Apr. 24, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015)).
- Employing a firearm during the commission of a dangerous felony (*State v. Trutonio Yancey*, No. W2011-01543-CCA-R3-CD, 2012 WL 4057369 (Tenn. Crim. App. Sept. 17, 2012), *perm. app. denied* (Tenn. Jan. 14, 2013)).
- Theft (*State v. Jacob Dyck*, No. E2001-00476-CCA-R3-CD, 2002 WL 661921 (Tenn. Crim. App. Apr. 22, 2002), *perm. app. denied* (Tenn. Oct. 28, 2002)).
- Others?
- Sexual offenses against children

When Is Prosecution NOT Required to Elect in
Child Sexual Offenses With Multiple Acts?

**GENERIC
EVIDENCE**

State v. Qualls, 482 S.W.3d 1 (2016).

- Repeated incidents of sexual battery by authority figure occurring over a 8 month period (victim 1) and 29 month period (victim 2)
- 37 open dated counts alleged by months (Jan. 1 – Jan 30, 2007; Feb. 1- Feb. 28, 2007 etc....)
- Each victim testified, without elaboration, in the affirmative that defendant had touched her buttocks and vaginal area over her clothes once between each of monthly dates at the home in Hardeman County.
- Defendant convicted on all counts

Supreme Court of Tennessee

(January 28, 2016)

- Today we join other state courts in concluding that, “[w]ith the exception of those who happen to select victims with better memories or who are one act offenders,” strict application of the election doctrine in generic evidence cases would effectively insulate from prosecution “the most egregious child molesters” and unnecessarily frustrate the administration of justice in this State.

State v. Qualls, 482 S.W.3d 1, 15–16 (Tenn. 2016).

Tennessee Supreme Court adopted the *Jones* approach (*People v. Jones*, 792 P.2d 643 (Cal. 1990)).

- Victim's generic testimony:

- (1) describe "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct";
- (2) identify "*the number of acts committed* with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')"; and
- (3) designate "*the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us') to assure the acts were committed within the applicable limitation period.

This evidence is sufficiently specific to allow the jury to determine guilt if this established

Trial court must determine at the conclusion of the State's case-in-chief whether the proof satisfies the above.

Modified Unanimity Instruction

The state has offered proof in its case in chief of more than one act allegedly committed [by the defendant][by one for whom the state alleges the defendant is criminally responsible] which the state alleges constitutes an element of the offense of as charged in Count of the indictment. To ensure a unanimous verdict, the State must prove beyond a reasonable doubt the commission of **all** of the acts described by the alleged victim [in that particular count] as occurring within the time period charged in [that count of] the indictment.

Before you can find the defendant guilty, you must unanimously agree that the State has proven beyond a reasonable doubt the commission of **all** of the acts described by the alleged victim as occurring within the time period charged in [that count of] the indictment.

- ***TPI 42.25 –***
- ***Election of Offenses (only use in generic evidence cases)***

The Fourth Horse

Merger

Judge Angelita Blackshear Dalton



So, I looked, and behold, a pale horse. And the name of him who sat on it was
Death to Your Multiple Convictions!

Merger of Offenses

Angelita Blackshear Dalton

Alternative Theories & Lesser Included Offenses

- A multiplicitous indictment
 - Charging of a single offense in several counts in the indictment
 - When the acts that make up the alleged offenses **are not** separate and distinct, and
 - One alleged offense is a lesser included offense of the other, or
 - The two alleged offenses were charged as alternative theories, then
 - The jury is to be instructed on all applicable lesser included offenses.
- The jury must be instructed as to the order and method of consideration of the lesser included offenses.

Merger of Offenses

- Defined:
 - Two convictions or guilty verdicts merge into a single conviction to avoid double jeopardy.
 - Example: Jury returns verdicts on two offenses
 - One conviction offense is a lesser included offense of the other
 - Conviction for lesser included offense of reckless homicide merges into greater offense of second degree murder.
 - Convictions for alternative theories of the same offense
 - First Degree Premeditated Murder & First Degree Felony Murder
 - DUI & DUI Per Se

Jury Findings and Double Jeopardy

- Jury convictions for alternative theory charges or lesser included offenses do not violate the double jeopardy clause.
 - “The jury verdict stands as a legitimate finding of fact and law which the trial court should preserve by merging the same offense counts into one judgment of conviction...” *State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App.)
- So, what are WE supposed to do?
 - Preserve and protect the findings of the jury– THE VERDICT!!!
- Why is this important?
 - Consider post-conviction findings that result in the vacation of a conviction!!!

Protecting the Jury's Verdict On Merged Offenses

- Properly record the resulting judgment documents.
- For merged offenses, how do you properly record judgment documents?
 - A single judgment form for merged conviction offenses? **NO!!!**
 - A separate judgment form for each conviction offense? **YES!!!**

Properly Recording the Judgment Documents

State v. Berry, 503 S.W.3d 360 (Tenn. 2015)

- Single Judgment of Conviction vs. Single Judgment Document
 - **Judgment of Conviction:** Upon return of a jury verdict, the trial court pronounces the “judgment of conviction.” *See Tenn. Code Ann. § 40-20-101(a)*.
 - **Judgment Document:** The uniform judgment document used by trial judges for each criminal case resulting in a conviction. *See Tenn. Code Ann. § 40-35-209(f)* and Sup. Ct. Rules, Rule 17.

Properly Recording the Judgment Documents

State v. Berry, 503 S.W.3d 360 (Tenn. 2015)

- “[W]hen a defendant is convicted either by jury verdict or plea in a given count and a sentence imposed by the trial court, the uniform **judgment document** indeed becomes a **judgment of conviction.**”
State v. Berry, 503 S.W.3d at 364.
- “[T]he trial court must record the jury’s disposition in each of the counts. Accordingly, when two jury verdicts are merged into a single conviction, the trial court should complete a uniform judgment document for each count.” *Id.* at 364.

Properly Recording the Judgment Documents

State v. Berry, 503 S.W.3d 360 (Tenn. 2015)

- “The judgment document for the greater (or surviving) conviction should reflect the jury verdict on the greater count and the sentence imposed by the trial court” *Id.* at 364.
- “The judgment document for the lesser (or merged) conviction should reflect the jury verdict on the lesser count and sentence imposed by the trial court.” *Id.* at 364.
- The “Special Conditions” on the judgment document should indicate that the merger of the conviction offenses.

Properly Recording the Judgment Documents

State v. Berry, 503 S.W.3d 360 (Tenn. 2015)

- “This method aligns with the intended purpose of the uniform judgment document and reflects the long-held recognition that the guilty verdict in the lesser or alternative charge is not mere surplusage but remains a valid jury verdict of guilt...” *Id.*
- Moral of the Story: Trial Courts are to enter separate judgement documents for merged offenses that properly reflect the jury verdict and sentence as to each conviction offense.