Approved 2-1-89
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:00 a.m./~~p.m.~~ on January 30, 1989 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Winter, Yost, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Jane Tharp, Committee Secretary

Conferees appearing before the committee:

Attorney General Robert T. Stephan
Senator Michael Johnston
Jim Clark, Kansas County and District Attorneys Association
Paul Morrison, Johnson County District Attorney
Wint Winter, Sr., Ottawa, Governor's Commission of Children and Families
James McHenry - Kansas Child Abuse Prevention Council, Inc.
Ron Wurtz, Public Defender

Senate Bills 44 and 48 - An act concerning crimes and punishments; relating to murder in the first degree; child abuse and aggravated battery.

The chairman explained the bills and pointed out the bills are exactly alike.

Staff presented a brief history of the issue. Copies of his handouts are attached (See Attachments I).

Attorney General Robert T. Stephan appeared in support of the bills. He stated I believe it is clear that the death of a child from child abuse should be among those crimes for which the severest of penalties is available. During committee discussion, the chairman inquired if there is any reason to expedite this matter. General Stephan replied this happens far too often in this society. With the nature of the crime we should not delay the message loud and clear, if a child is killed while being abused that is a first degree murder charge. A copy of General Stephan's testimony is attached (See Attachment II).

Senator Michael Johnston, prime sponsor of Senate Bill 44, testified children, who are in most cases defenseless when faced with abusive behavior against them, need and deserve special protection. A copy of his testimony is attached (See Attachment III).

Jim Clark, Kansas Counties and District Attorneys Association, appeared in support of both bills. He stated while individual prosecutors are left to grapple with the slippery slope of stare decisis in these individual child abuse cases, the protection of children is left to the Legislature. A copy of his testimony is attached (See Attachment IV).

Paul Morrison, Johnson County District Attorney, testified we can't use child abuse as an underlying charge anymore. Children deserve special protection because they can't defend themselves.It is important from a practical prospective as a prosecutor homicide cases are much more difficult to prove when they involve child abuse. He said it is different from a bar fight or fight in the street. This almost always is hidden from the eyes of witnesses. Often it occurs over a lengthy period of time. The chairman inquired to what extent are other adult members of the household aware of and failed to take action. Mr. Morrison replied it is fairly common for people to be aware of a problem. Usually someone has seen the abuse before and that person will not take action or are afraid of the abuser themselves.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 30, 1989

Senate Bills 44 and 48 - continued

Wint Winter, Sr., Ottawa, appeared on behalf of the Governor's Commission of Children and Families. He explained the commission held six hearings around the State of Kansas. They had 500 people who felt strongly about children's issues. He stated child abuse in Kansas is rampant and sexual abuse is epidemic. Kansas did act in the Lucas case. The Supreme Court asked the Legislature to act upon this issue. Mr. Winter submitted one of these bills be amended to expedite it on to the governor's desk as soon as possible.

James McHenry, Kansas Child Abuse Prevention Council, Inc., thanked the committee for expediting the hearings on the bills. He encouraged favorable action on the bill with the hope it will send a message. He said as he has traveled over the state the severity of the cases seems to be increasing.

Ron Wurtz, Public Defender, stated he is testifying as a criminal defense lawyer. He stated he is in support of punishing anyone who abuses to kill children. He pointed out the bill might be applied more broadly than anyone intends. If the bill is passed as presently proposed, this will make it first degree murder to kill anyone under age eighteen. When Subsection (d) was added, aggravated battery, this may expand the bill into another situation. He said he would like the committee to seriously consider what amendments need to be made to effect what we want to accomplish. If the merger part of it is taken out, you can get 18 years to life sentence, and I wonder if that isn't sufficient. I don't oppose the bill as a citizen but as a person who will be defending people the bill may expand the law. He asked the committee to consider his recommendation. During discussion a committee member suggested amending the child abuse statute and add if child died in child abuse. Mr. Wurtz replied, sounds like a point of concern. We are comfortable about what felony murder is. This could end up in reversals. We could end up with a person in with first degree murder charge where it could be manslaughter. A committee member inquired about deleting K.S.A. 21-3416 and leave in K.S.A. 21-3609. Mr. Wurtz replied I would be more comfortable with that. Another committee member inquired is there any feasible way of approaching this as 12 and under or eight and under. Mr. Wurtz replied, I believe there is aggravated indecent liberties which involves a child under sixteen. A committee member asked Jim Clark what is his opinion of the removal of the aggravated battery section here? Mr. Clark replied their preference was not to remove that; with the court decision it would pass the muster. A staff member inquired, what do you think about listing the different crimes. If you had struck a child as a single blow, would that act uphold a child abuse charge without aggravated battery section? Mr. Clark replied, continuing course of conduct. Forensic evidence is hard to tell.

The hearings on Senate Bills 44 and 48 were concluded.

Senator Gaines moved to amend Senate Bill 48 in lines 32 through 35 by deleting Subsection (d). Senator Morris seconded the motion. The motion carried.

Senator Morris moved to amend the bill to take effect after its publication in the Kansas register. Senator Gaines seconded the motion. The motion carried.

The chairman requested the minutes reflect that the committee does not intend to limit or change existing case law regarding the felony murder rule, with the exception of the change to statutorily overrule the State v. Lucas and State v. Prouse cases by specifically including child abuse as an additional felony which could serve as a basis for a felony murder change.

Senator Gaines moved to report the bill favorably as amended. Senator Bond seconded the motion. The motion carried.

Senator Petty moved to approve the minutes of January 25 and 26, 1989. Senator Rock seconded the motion. The motion carried.

The meeting adjourned.

Copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-30-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jon Brax	Topeka	Kansas Legislative Post
Paul Morrison	Olathe	Johnson County D.A.
Ron Wurtz	Topeka	Public Defender
Martin McKinney	Topeka	WIBW
Wint Winter	Ottawa	Children & Families Commission
Jim McHenry	Topeka	Ks. Child Abuse Prevention Council
Jan Clark	Topeka	KCDAA
Ray Cunningham	Topeka	KTKA
Paul Shelby	Topeka	Supreme Court
M. Hawver	"	Crim. Jud.
D Wolgast	Topeka	Sen. Johnston
J H Bergman	Kansas City	Park College
Jason 14-Bridge	Topeka	Observer
Julie Bussett	Topeka	Attorney General's Office
Nancy Lindberg	Topeka	AG
Barb Clayton	Topeka	AG
[illegible] Hagman	Topeka	DOB
Mary Slaybaugh	Topeka	SRS
Helen Stephens	Topeka	KPOA
C. + M. McConnell	Top	UPI
Mary Horak	Top	AG
Michael Horak	Topeka	AP
Ed Hamm	Topeka	KSNT
Melissa Vogel	Topeka	Intern
Paula Jo Speakhouse	Lawrence	Intern

Attachment I
Senate Judiciary
1-30-89

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Senora Armstrong	Topeka, KS.	Intern
Becky Shirley	Topeka	Intern

2. 1. Murder in the first degree. Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

Murder in the first degree is a class A felony.

History: L. 1969, ch. 180, § 21-3401; L. 1972, ch. 112, § 1; July 1.

21-3414. Aggravated battery. Aggravated battery is the unlawful touching or application of force to the person of another with intent to injure that person or another and which either:

(a) Inflicts great bodily harm upon him; or

(b) Causes any disfigurement or dismemberment to or of his person; or

(c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted.

Aggravated battery is a class C felony.

History: L. 1969, ch. 180, § 21-3414; July 1, 1970.

21-3609. Abuse of a child. Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years.

Abuse of a child is a class D felony.

History: L. 1969, ch. 180, § 21-3609; L. 1984, ch. 119, § 12; May 17.

Attachment I
SJC
1-30-89

No. 60,939

STATE OF KANSAS, *Appellee*, v. ROBERT LYNN LUCAS, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Felony Murder—Purpose of Felony-murder Doctrine.* The purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or accidentally, and the doctrine should not be extended beyond its rational function which it was designed to serve.

2. SAME—*Felony Murder—Application of Felony-murder Doctrine.* In order to apply the felony-murder doctrine: (1) the underlying felony must be one which is inherently dangerous to human life; and (2) the elements of the underlying felony must be so distinct from the homicide so as not to be an ingredient of the homicide.

3. SAME—*Felony Murder—Determination of Whether Underlying Felony Is Inherently Dangerous to Human Life so as to Justify Charge of Felony Murder.* In determining whether an underlying felony is inherently dangerous to human life so as to justify a charge of felony murder, the elements of the underlying felony should be viewed in the abstract, and the circumstances of the commission of the felony should not be considered in making the determination.

4. SAME—*Felony Murder—Consideration of Factors Such as Time, Distance, and Causal Relationship between Underlying Felony and the Homicide.* Time, distance, and the causal relationship between the underlying felony and the killing are factors to be considered in determining whether the killing is a part of the felony and, therefore, subject to the felony-murder rule.

5. SAME—*Child Abuse—Abuse Which Results in Death of Child Merges with Killing and Constitutes Single Offense.* A single assaultive incident of abuse of a child (K.S.A. 1987 Supp. 21-3609) which results in the death of a child merges with killing and constitutes only one offense. The coupling together of prior acts of abuse of a child with the lethal act of abuse into one collective charge of abuse of a child does not prevent the operation of the merger rule. Language to the contrary found in *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985), is disapproved.

6. SAME—*Police Interrogation of Suspect—Custodial and Investigative Interrogation Distinguished.* The determination of whether a police interrogation is custodial and thus subject to *Miranda* warnings as opposed to investigative must be made on a case-by-case basis. Factors to be applied in making this determination are discussed. The interrogation herein is held to be custodial and the admission of the videotape thereof is held to be error. Such error is held to be harmless error, as is more fully set forth in the opinion.

7. SAME—*Gruesome Photographs—Admissibility.* Although special care must be taken in admitting photographs taken after the pathologist has intervened, lest the evidence be made more grisly than necessary, those photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible.

8. SAME—*Child Abuse—Sufficiency of Evidence to Sustain Guilty Verdict.* Under the facts of this case there is sufficient evidence for a rational factfinder to find the appellant guilty of child abuse of the surviving child beyond a reasonable doubt pursuant to K.S.A. 1987 Supp. 21-3609.

Appeal from Johnson district court, GERALD L. HOUGLAND, judge. Opinion filed July 8, 1988. Affirmed in part, reversed in part, and remanded for further proceedings.

Karen Mayberry, assistant appellate defender, argued the cause, and *Rosanne Piatt*, assistant appellate defender, and *Benjamin C. Wood*, chief appellate defender, were on the briefs for appellant.

Michael B. Buser, assistant district attorney, argued the cause, and *Robert T. Stephan*, attorney general, and *Dennis W. Moore*, district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

McFARLAND, J.: Robert Lynn Lucas appeals his jury trial convictions of two counts of child abuse, K.S.A. 1987 Supp. 21-3609, (one count as to victim Shannon Woodside and one count as to victim Shaina Woodside) and one count of felony murder, K.S.A. 21-3401, as to victim Shaina Woodside. Lucas was sentenced to three to eight years' imprisonment on each count of child abuse and to life imprisonment for felony murder.

At the times of the crimes of which defendant was convicted, he was living in Olathe with Jean Woodside and her two daughters, Shaina (age 18 months at the time of her death) and Shannon (age 3 years). Mrs. Woodside worked three evenings a week and attended school the other four evenings. Defendant had the children in his care every evening and frequently in the daytime. At approximately 10:30 p.m. on July 6, 1986, defendant called 911, the emergency number, to request medical assistance for Shaina. First on the scene was Officer James Stover. He found the defendant in an upstairs bathroom standing over the unconscious body of Shaina. Shannon was in the bathtub. Officer Stover carried Shaina downstairs and observed she was not breathing and had no pulse. He commenced CPR. A Med-Act unit arrived and Shaina was taken to a local hospital. Officer Stover asked defendant what had happened and defendant gave a lengthy detailed account of how he had placed the two little girls in the tub for their evening bath, shut the glass shower doors, and gone downstairs to watch television. Sometime later he had returned upstairs to check on the children and had found Shaina floating face down in the tub. His efforts at CPR were

unsuccessful, but the child vomited up her dinner along with a toothpaste tube cap. Thereafter he went downstairs and telephoned the child's mother, requesting that she return home. Defendant then called 911.

After the child had been taken to the hospital, Officer Stover stayed at the residence with the defendant. Upon Mrs. Woodside's arrival, the three went to the hospital. The child was pronounced dead at the hospital. A number of suspicious injuries were observed on her body at the hospital, including patterned burns on her buttocks, three burns resembling cigarette burns on other parts of her body, severe fresh lacerations to her nipples, and numerous bruised areas on many different parts of her body. At this point Detective Joseph Pruett, an experienced investigator of homicide and child abuse cases, was sent to the hospital where he viewed Shaina's body. As per his prior instructions from his Chief of Detectives, Captain John Bunker, Detective Pruett escorted defendant to the Olathe Police Station for an interview. This interview will be discussed in greater detail in one of the issues raised herein. Immediately thereafter, defendant was arrested on a charge of child abuse as to Shaina. The cause of death had not been determined at this time.

The following afternoon an autopsy was performed which showed Shaina had suffered severe multiple blows to the head, one of which had hemorrhaged ¾ inch past the arachnoid, the thin covering of the brain. The coroner testified the sub-arachnoid hemorrhage could have caused Shaina to lose consciousness. The head injuries appeared to have been inflicted near the time of death. The coroner testified Shaina's body showed injuries which were the "characteristic stigmata that one sees in child abuse." He found it probable Shaina had met her death by losing consciousness in a body of water and drowning. The head injuries were first disclosed during the autopsy.

Further investigation and trial evidence revealed a real-life horror story of abuse inflicted by the defendant on both little girls over a period of time, directed particularly at Shaina. The evidence relative to the abuse of Shannon will be discussed in a separate issue. There was evidence that defendant had, prior to July 6, 1986, beaten Shaina severely with a heavy leather belt, poured Tabasco sauce down her throat, set her down on a hot stove burner, and repeatedly pinched and bitten the child. While

in his care Shaina's arm had been broken. A few days before Shaina's death, Mrs. Woodside had observed Shaina in a dazed condition while in the bathroom with defendant. Defendant told her that he had "tranked" the child. He explained this consisted of holding his hand over the child's face until she passed out from lack of oxygen. He further stated he had used this form of "discipline" on his child of a previous marriage. He generally explained Shaina's injuries, when observed by others, as arising from accidents or efforts at discipline.

Defendant was charged with and convicted of child abuse as to Shannon and child abuse and felony murder as to Shaina. The matter before us is defendant's direct appeal from these convictions.

For his first issue, defendant contends the district court erred in failing to dismiss the charge of felony murder as the child abuse charge merged into the felony murder and could not constitute the requisite collateral felony to support the felony-murder charge.

The Kansas felony-murder statute is K.S.A. 21-3401, which provides:

> "Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation *or committed in the perpetration or attempt to perpetrate any felony.*" (Emphasis supplied.)

As we stated in *State v. Lashley*, 233 Kan. 620, 664 P.2d 1358 (1983):

> "A literal reading of this statute would find any felony to be sufficient to support a charge of felony murder if a causal relation exists. The purpose of the statute is to deter those engaged in felonies from killing negligently or accidentally, and that doctrine should not be extended beyond its rational function which it was designed to serve." 233 Kan. at 631.

In Kansas, as in many other states, the application of felony murder has been limited by judicial decision to situations where: (1) the underlying felony is inherently dangerous to human life; and (2) the elements of the underlying felony are so distinct from the homicide as not to be an ingredient of the homicide. See *State v. Lashley*, 233 Kan. 620, and Annot., 40 A.L.R.3d 1341.

In determining whether a particular felony is inherently dangerous to human life so as to justify a charge of felony murder, the elements of the underlying felony should be viewed in the abstract, and the circumstances of the commission of the felony

should not be considered in making the determination. *State v. Underwood*, 228 Kan. 294, 306, 615 P.2d 153 (1980).

K.S.A. 21-3110(8) states:

" 'Forcible felony' includes any treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery, aggravated sodomy and any other felony which involves the use or threat of physical force or violence against any person."

Clearly, all of the crimes specifically designated therein would supply the requisite underlying felony for a felony-murder conviction unless the doctrine of merger applies (discussed later herein).

In *State v. Lashley*, 233 Kan. at 633, we held that while some of the offenses defined with the theft statute (K.S.A. 21-3701) were not inherently dangerous to human life, two of the designated offenses were.

K.S.A. 1987 Supp. 21-3609 provides:

"Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years."

Clearly, abuse of a child as defined by K.S.A. 1987 Supp. 21-3609 is a felony inherently dangerous to human life and no contrary assertion is made herein. Rather, the issue herein is whether the underlying or collateral felony is so distinct from the homicide as not to be an ingredient of the homicide. If the underlying felony does not meet this test it is said to merge with the homicide and preclude the application of felony murder. Thus, a crime such as second-degree murder may not serve as the underlying felony supporting first-degree felony murder because second-degree murder is one of the lesser included offenses of first-degree murder. Otherwise, all degrees of homicide would constitute murder in the first degree, regardless of the defendant's intention or premeditation. First-degree premeditated murder (or any lesser degree of homicide) could, of course, constitute the requisite underlying felony where, for instance, a defendant kills victim B during his or her commission of a homicide on victim A. The homicide of victim A could be the underlying felony for a felony-murder charge for the death of victim B.

In *State v. Fisher*, 120 Kan. 226, 230-31, 243 Pac. 291 (1926), we held a farmer's son who killed a four-year-old child while shooting at a trespasser could not be charged with felony murder

on the basis of an underlying felony of assault with a deadly weapon. We held the elements of the underlying felony must be so distinct from the homicide as not to be an ingredient of the homicide. The son could therefore be charged with first-degree murder, or some lesser degree of murder, but not with felony murder because the underlying felony merged with the homicide so there were not two separate felonies. There was but a single criminal act involved.

State v. Clark, 204 Kan. 38, 460 P.2d 586 (1969), is a case in which the defendant had been convicted of felony murder based upon the underlying felony of felonious assault. Defendant had stabbed his wife, who died as a result thereof. We held that the felonious assault was an integral part of the homicide and reversed the conviction. To hold otherwise, we said, would preclude the jury from considering premeditation in the great majority of homicide cases.

We turn now to abuse of a child as the underlying felony to support felony murder. The State relies heavily on *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985). The *Brown* opinion is short and of special significance herein. Accordingly, the opinion as it relates to the issue before us is reproduced as follows:

"These consolidated appeals arise from defendant's conviction of involuntary manslaughter (K.S.A. 1984 Supp. 21-3404) and child abuse (K.S.A. 21-3609). The State appeals in Case No. 56,525 on a question reserved pursuant to K.S.A. 22-3602(b)(3) and the defendant appeals in Case No. 56,997 from alleged erroneous trial court rulings.

"The facts giving rise to the charges are not seriously disputed. Defendant Eileen Brown gave birth to a son, Randell Brown, on March 10, 1983. He was released from the hospital into his mother's care five days later, weighing five pounds and in good health. On April 21, 1983, defendant brought Randell Brown to the hospital where he was pronounced dead. The child was emaciated and had bruises on his head, abdomen and buttocks. Randell weighed only four pounds and three ounces on April 21, although according to expert testimony he should have weighed around seven pounds, five ounces. The pathologist who performed an autopsy on the child concluded Randell exhibited:

'1. Neglect with weight loss and fat atrophy.

'2. Evidence of abuse with healing fracture of left clavicle shoulder, abdominal bruise and right parietal skull fracture with scalp hematoma.

'3. Cerebral hematomas . . . .'

"On the day Randell died Eileen Brown gave a written statement to the police in which she admitted jerking the child by the neck because he wouldn't stop crying, shaking him, and hitting him on his face and chest; she also spoke of being under tremendous pressure living alone and trying to raise two children. Four days later she gave the police another written statement in which sh

admitted feeling a great deal of anger and stress, hitting Randell on the right side of his head with her fist, and later hitting him in the chest. Following a preliminary hearing, defendant was bound over on charges of first-degree murder, abuse of a child, and aggravated battery. Prior to trial the State dismissed the charge of aggravated battery. We will consider each appeal separately.

. . . .

Case No. 56,997

"Defendant Eileen M. Brown was tried on one count of first-degree felony murder and one count of abuse of a child. The court gave the full range of instructions on lesser included offenses of murder and the jury found defendant guilty of involuntary manslaughter and abuse of a child. For her first point on appeal defendant contends that the trial court erred in denying her motion to dismiss on grounds there was no independent collateral felony to support the felony murder charge. It is defendant's contention that the child abuse charge merged in the charge of felony murder and, having done so, no collateral felony remained to support the felony murder charge. We agree with the trial court's ruling.

"K.S.A. 21-3609, abuse of a child, was amended in 1984 but the amendment only changed the classification of the crime from a class E felony to a class D felony. The elements of the offense, which were not affected by the 1984 amendment, read:

'Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of eighteen (18) years.'

K.S.A. 21-3401, first-degree murder, reads:

'Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.'

"To invoke the felony murder rule there must be proof a homicide was committed in the perpetration of or an attempt to perpetrate a felony and that the collateral felony was one inherently dangerous to human life. *State v. Lashley*, 233 Kan. 620, 631, 664 P.2d 1358 (1983). However, the felony murder doctrine is not applicable when the other felony is an integral part of the homicide. *State v. Clark*, 204 Kan. 38, Syl. ¶ 1, 460 P.2d 586 (1969). In such a case the collateral felony is said to have merged with the homicide and results in only one offense. In order to make this determination, we have held:

'The proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide.'

State v. Rueckert, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977).

It is obvious from even a cursory reading of the statutes that a charge of abuse of a child does not meet the *Rueckert* test for merger into a charge of felony first-degree murder.

"We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder. See *People v. Smith*, 35 Cal. 3d 798, 201 Cal. Rptr. 311 (1984), and *Massie v. State*, 553 P.2d 186 (Okla. Crim. 1976). Cases supporting the doctrine that child abuse constitutes a collateral felony that will support a charge of felony murder include *People v. Northrup*, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (1982); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *Holt v. State*, 247 Ga. 648, 278 S.E.2d 390 (1981); *Miller v. State*, 379 So. 2d 421 (Fla. Dist. App. 1980); *State v. O'Blasney*, 297 N.W.2d 797 (S.D. 1980).

"We hold that the charge of abuse of a child did not merge into the homicide and the trial court did not err in denying defendant's motions for dismissal." 236 Kan. at 801-04.

In *Brown*, we relied on *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977), for the test in determining merger, iterated as follows:

"The proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide."

This is a rather misleading statement as a lesser crime necessarily proved in establishing the charged crime is a lesser included offense of the charged crime. See K.S.A. 1987 Supp. 21-3107(2)(d). As we stated in *State v. Moore*, 242 Kan. 1, Syl. ¶ 1, 748 P.2d 833 (1987):

"An offense is a lesser included offense under K.S.A. [1987 Supp.] 21-3107(2)(d) when all of the elements necessary to prove the lesser offense are present and required to establish the elements of the greater offense."

In considering merger, the test is more correctly stated as being whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide. See *State v. Lashley*, 233 Kan. 620, as previously cited. In this context, "collateral felony" is perhaps a more meaningful term than "underlying felony" although the two terms are used synonymously and interchangeably in our opinions discussing the felony-murder doctrine.

In the case before us the abuse of a child charge, like that in *Brown*, encompassed multiple acts of abuse. Specifically, Instruction No. 11 stated:

"The defendant is charged in Count I with the crime of abuse of a child (Shaina Woodside). The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

1. That the defendant willfully tortured or cruelly beat or inflicted cruel and inhuman corporal punishment upon a child under the age of eighteen years; and
2. That this act occurred on or about the month of November, 1985, through July 6, 1986, in Johnson County, Kansas."

Instruction No. 16 provided:

"The defendant is charged in Count III with the crime of felony murder. The defendant pleads not guilty.

"To establish this charge each of the following claims must be proved:

1. That the defendant killed Shaina Woodside;
2. That such killing was done while in the commission of abuse of a child, a felony; and
3. That this act occurred on or about the 6th day of July, 1986, in Johnson County, Kansas.

The elements of abuse of a child are set forth in Instruction No. 11."

It was the State's theory that Shaina died as a result of a severe beating to her head administered by the defendant from which she lost consciousness and drowned in the bathtub. There was no claim that any of the other acts of abuse caused or contributed to her death. The defendant could have been found guilty of abuse of a child based solely on the fatal beating and convicted of felony murder solely on the fatal beating. If one and the same act can constitute both felony murder and the underlying felony, it would seem superfluous to determine if the underlying felony was inherently dangerous to human life or to consider the time, distance, and causal relationship of the underlying felony to the killing.

Had an adult been beaten on the head, lost consciousness as a result thereof, and drowned in a pool of water or been asphyxiated by his blood or vomit, we would have no hesitancy in holding that the aggravated battery (the beating) was an integral part of the homicide and that it merged therewith and could not serve as the underlying felony. Can a different result logically be reached by designating the beating as abuse of a child rather than aggravated battery? We believe not.

The facts herein are shocking, appalling, heinous, and whatever other synonym one wishes to apply. The jury could have easily concluded defendant was a vicious and sadistic person. It can be argued that special protection needs to be afforded to children and felony murder should apply where a child dies as the result of the offense of child abuse. But to so hold actually gives less protection to children. Abuse of a child is a Class D felony. Aggravated battery is a Class C felony. If abuse of a child is the highest offense for severely beating, shooting, or stabbing a child who survives the attack, the penalty would be less than for the same act committed against an adult.

Simple battery is defined by K.S.A. 21-3412 as follows:

"Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner."

Aggravated battery is defined by K.S.A. 21-3414 as follows:

"Aggravated battery is the unlawful touching or application of force to the person of another with intent to injure that person or another and which either:

(a) Inflicts great bodily harm upon him; or

(b) Causes any disfigurement or dismemberment to or of his person; or

(c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment or death can be inflicted."

There is nothing in the aggravated battery statute limiting its application to cases where the victim is 18 years of age or older. Abuse of a child does not contain the great bodily harm requirement. Aggravated battery obviously can be committed against a child under 18 years of age.

Faced with the horror of the killing of small children by those responsible for their care, some courts have taken rather illogical positions. Particularly noteworthy in this group is *People v. Jackson*, 218 Cal. Rptr. 637 (1985). Defendant Jackson became angry with his 33-month-old son because the child, in dressing, put his pants on backwards. Defendant then beat the child with a 36" long, 2" thick wooden dowel rod. He then strangled the child until the boy passed out, and then resumed beating the child's head with the dowel rod. The child died from his head injuries. Defendant was convicted of felony murder with the underlying felony being child abuse. The California Court of Appeals affirmed. It recognized the merger doctrine but held it inapplicable, reasoning:

"In the instant case, we find discernible in appellant's conduct an independent, collateral purpose separate from the intent to inflict bodily harm. That purpose was to punish; to chastise; to bend the child's actions into conformity with his father's idea of propriety, and to impress upon him the virtue of obedience.

. . . .

"While such an intent (i.e., chastisement) is not in itself a felonious one, the intent to chastise *in a 'cruel or inhuman'* (inherently dangerous) manner is felonious. Moreover, in our opinion a murder conviction predicated upon a violation of Penal Code section 273d under the circumstances here presented is entirely consistent with and well serves the public policy underlying the felony-murder rule, which is 'to deter those engaged in felonies from killing negligently or accidentally.' (*People v. Satchell* (1971) 6 Cal. 3d 28, 34, 98 C Rptr. 33, 489 P.2d 1361.) Thus, conduct violative of Penal Code section 27 always inherently dangerous, but it need not, of course, be in every instance fa Here the independent purpose of the underlying felony was to coerce the child

into obeying his father's will. There is, of course, nothing criminal in such purpose, and had appellant administered light corporal punishment or some other rational discipline appropriate to the circumstances, Vic, Jr., would still be alive. Only the inherently dangerous and entirely disproportionate means chosen to effectuate appellant's punitive purpose rendered his conduct felonious. Strangulation and the *first* blow to the head with a truncheon constituted felony child abuse as defined in Penal Code section 273d. Subsequent, lethal blows in our opinion rendered appellant culpable of murder by operation of the felony-murder rule; for it was precisely these subsequent blows that the rule was designed to deter." 218 Cal. Rptr. at 641-42.

Another California Court of Appeals case, *People v. Benway*, 164 Cal. App. 3d 505, 210 Cal. Rptr. 530 (1985), also decided in 1985, held merger did apply. The *Benway* court held:

"We see no reason why the felony-murder rule should apply to some—but not all—violations of section 273a, subdivision (1). For example in *Smith* [35 Cal. 3d 798, 201 Cal. Rptr. 311, 678 P.2d 886 (1984),] and *Shockley*, [79 Cal. App. 3d 669, 145 Cal. Rptr. 200 (1978),] both defendants were guilty of creating a life threatening environment for their children despite the affirmative duty imposed upon them by section 273a, subdivision (1). The only difference is that the defendant in *Smith* accomplished this result by direct physical abuse while in *Shockley* the defendant employed an indirect method. The distinction between the form of abuse does not justify disparate treatment among defendants who severely abuse children. It would make little sense to treat those who directly batter their children more leniently than those who inflict no injuries themselves but merely allow others the opportunity to do so. Therefore, we conclude all forms of felony child abuse, whether 'assaultive,' 'nonassaultive,' 'active,' or 'passive,' constitute a 'single course of conduct with a single purpose.' (*People v. Burton* (1971) 6 Cal. 3d 375, 387.) The conduct is 'an "integral part of" and "included in fact" in the homicide within the meaning of *Ireland* [70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969)].' (*People v. Smith, supra*, 35 Cal. 3d at p. 806, fn. omitted.) Thus, when death occurs, the act or omission to act merges into the homicide.

"This result is also supported by the purpose of the felony-murder rule itself. The Supreme Court in *Smith* reiterated that 'the ostensible purpose of the felony-murder rule is not to deter the underlying felony, but instead to deter negligent or accidental killings that may occur in the course of committing that felony.' (*People v. Smith, supra*, 35 Cal. 3d at p. 807.) As in *Smith*, when a person willfully causes or permits the infliction of unjustifiable pain *or* willfully causes or permits a child to be placed in a dangerous situation under circumstances likely to produce death, 'it is difficult to see how the assailant would be further deterred from killing negligently or accidentally in the course of that felony by application of the felony-murder rule.' (*Ibid.*) Furthermore, by further restricting the application of the felony-murder rule, we comply with the Supreme Court's directive that the felony-murder rule " 'should not be extended beyond any rational function that it is designed to serve" [and should] be given the narrowest possible application consistent with its ostensible purpose . . . .' (*People v. Smith, supra*, 35 Cal. 3d at p. 803.)

"Applying the felony-murder rule in the narrowest possible way, as we must, we are compelled to conclude there is no independent felonious design when *any* form of felony child abuse is willfully committed under circumstances likely to produce great bodily harm or death. Therefore, Benway's act of placing Raelynn in a dangerous situation must merge into the homicide. Consequently, it was error to convict Benway of second degree felony murder." 164 Cal. App. 3d at 512-13.

A number of other jurisdictions have wrestled with the same type of issue as is before us. Faced with the large variation in factual situations, felony-murder statutes, and child abuse statutes involved, these cases are not particularly helpful.

In *State v. Brown*, 236 Kan. 800, we declined to decide whether "a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of murder." We now conclude that a single instance of assaultive conduct will not support the use of abuse of a child as the collateral felony for felony murder when that act is an integral part of the homicide. Should this result change if the prosecution can present evidence that on one or more prior occasions the defendant directed assaultive conduct toward the same victim regardless of whether or not such other conduct was a contributing factor in the child's death? What deterrent effect would be accomplished? If an individual beats a child to death in July, what logical or legal basis is there to escalate the charge from manslaughter to first-degree felony murder based on the fact he had beaten the child several months previously? A wife-beater who ultimately batters his wife to death faces no first-degree felony murder charge simply because he may have injured his wife on previous occasions.

We conclude that, when a child dies from an act of assaultive conduct, evidence of prior acts of abuse cannot be used to escalate the charge into felony murder. Such acts could be used as additional counts of abuse of a child but the prosecutorial device of charging multiple acts of abuse of a child in one count cannot bootstrap a felony-murder charge. Any language to the contrary in *State v. Brown*, 236 Kan. 800, is disapproved.

If additional protection for children is desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first- or second-degree felony murder.

For his second issue, defendant contends the trial court e

in admitting into evidence a videotape interview of himself taken by a police officer some three hours after he had reported Shaina's death. A *Miranda* warning was given to the defendant only at the conclusion of the admitted interview, at which time defendant declined to answer any further questions. The crucial determination here is whether or not the interrogation was investigative or custodial. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). The determination of whether interrogation was custodial must be made on a case-by-case basis. *State v. Edwards*, 224 Kan. 266, 268, 579 P.2d 1209 (1978). The issue needs to be determined herein, as it will arise on any subsequent retrial of defendant.

We found no violation of the defendant's constitutional rights in *State v. Taylor*, 234 Kan. 401, 405-06, 673 P.2d 1140 (1983), where a husband who had reported his wife missing was asked to come to the police station at 12:10 p.m. and questioned without being restrained until suspicions developed that his wife was a homicide victim, at which time he was given a *Miranda* warning. This case has similarity to the case at bar. Here, Lucas called the police and reported the death. He was in charge of the victim. Ostensibly the child had drowned, as he had reported. It was natural that the police would interview him to help determine how Shaina had drowned. To this extent, an interview would be clearly investigatory, as it had not yet been determined a crime had been committed.

In *State v. Carson*, 216 Kan. 711, 715, 533 P.2d 1342 (1975), we listed five factors helpful in considering whether questioning constitutes custodial interrogation. Let us consider each factor in light of the facts of the case.

(1) The nature of the investigator: Lucas was questioned by a single plainclothes detective. The detective had been requested by his captain to go to the hospital, view Shaina's body, and accompany Lucas back to the police station to question him. Lucas and Woodside were not allowed to see Shaina's body. The detective drove Lucas to the station in an unmarked car. The focus was clearly on child abuse at this time. The detective had had extensive experience in homicides and child abuse and had conducted seminars on child abuse.

(2) The nature of the suspect: Lucas was an articulate adult of apparently normal intelligence. He had been described to the detective as the person who was in charge of Shaina's care at the time of her death.

(3) The time and place of the interrogation: The interrogation took place at the police station at 12:45 a.m., soon after Shaina was pronounced dead. Lucas was left alone while the detective activated a hidden camera in a small interview room in a restricted area of the police station. Lucas was not told the interview would be recorded. The fact the interview was videotaped is not of much significance. It appears to be routine procedure for the Olathe police to videotape statements in such circumstances. The interview with Woodside was under similar conditions.

(4) The nature of the interrogation: The first 25 minutes of the interview consisted mainly of gathering detailed biographical information about Lucas, his past history, and his relationship with Woodside. The questioning then turned to the events of that night. Lucas asked to be allowed to use the restroom, but the detective told him to wait and "get through this basic story because I think the Captain will be down in just a minute and he may have a few questions for you and I want to continue with this." When Lucas asked if it would be a long wait, the detective said, "Well, as long as it takes." About 15 minutes later, after hearing Lucas' explanations for some of Shaina's injuries, the detective left to consult with his captain about arresting Lucas and Lucas was allowed a to use the restroom. He had to be accompanied by an officer because the interview room was in a restricted area in which a citizen could not walk unaccompanied.

In his testimony, the detective stated there were three distinct parts to the interview. These may be categorized as: (1) Tell me about yourself (biographical); (2) tell me how the little girl died; and (3) I saw the little girl's body and I don't believe your version of the events. Defendant was then asked about particular injuries the detective had previously observed on the dead child's body.

(5) The progress of the invetigation at the time of interrogation: The cause of death had not yet been determined, but child abuse was certainly suspected. Lucas was known to be the only adult with Shaina in the hours before her death. The focus of the investigation was on Lucas from the beginning of this interrogation.

We hold the video tape of the interrogation was admitt

error in violation of *Miranda*, but in this case the error was harmless. The first part of the interrogation was purely biographical. It is neither exculpatory or inculpatory. It consists of neutral facts. The second part of the interview—how the child died—was essentially a repetition of what defendant had told Officer Stover at the house in a purely investigatory situation. The third part is a closer question, but again defendant admitted to no fault. He explained some of her injuries as accidental or done for a proper disciplinary purpose. Some injuries were not explained. Those that were explained were done so by versions he had previously told Mrs. Woodside, the child's mother. Essentially nothing material that could not have been learned from other sources was involved. The detective did not know of any child abuse aimed at Shannon and no inquiry was made as to defendant's treatment of the older child.

We conclude that it was error to admit the videotaped interview in this case, but that it was harmless error as we are satisfied that its exclusion would not have altered any of the three jury verdicts herein. *State v. Abu-Isba*, 235 Kan. 851, 859, 685 P.2d 856 (1984); *State v. Arney*, 218 Kan. 369, Syl. ¶ 2, 544 P.2d 334 (1975).

The third issue is whether the trial court erred in admitting two photographs of Shaina's skull taken during the autopsy. We accept the admission of photographs into evidence as within the discretion of the trial court unless it is shown such discretion has been abused. *State v. Kendig*, 233 Kan. 890, 893, 666 P.2d 684 (1983).

The trial court carefully inquired of the pathologist whether the injuries could be illustrated without showing the photographs with the skull cap pulled back. The pathologist replied they could not, as the bruising was not visible externally. This is borne out by the other photographs of Shaina's head. The two photos show the extent and location of Shaina's internal head injuries as the other photographs do not. These injuries are of particular importance because the pathologist testified they were inflicted around the time of death and it was probable that the deepest blow caused Shaina to lose consciousness in the bathtub. The number, severity, and location of the bruises show it was extremely unlikely Shaina could have sustained those injuries by falling down the stairs, or by falling once in the bathtub.

The court explained to the jury, following the presentation of the two photographs, that they were necessarily introduced in order to show the nature and extent of Shaina's injuries.

Although special care must be taken in admitting photographs taken after the pathologist has intervened, lest the evidence be made more grisly than necessary, those photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible. See *State v. Yarrington*, 238 Kan. 141, 144, 708 P.2d 524 (1985). The photographs in question were unquestionably helpful in showing the actual extent of Shaina's head injuries, which was not evident otherwise. The pictures were structured only to serve their proper purpose and were not introduced for shock purposes. We find no showing of abuse of discretion in the trial court's admission of the photographs into evidence.

The final issue is a challenge to the sufficiency of the evidence supporting the defendant's conviction of child abuse as to the surviving child, Shannon. When the sufficiency of the evidence is challenged, the standard of review on appeal is whether the evidence, viewed in the light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Grubbs*, 242 Kan. 224, Syl. ¶ 1, 747 P.2d 140 (1987); *State v. Dressel*, 241 Kan. 426, Syl. ¶ 1, 738 P.2d 830 (1987); *State v. Bird*, 240 Kan. 288, 298, 729 P.2d 1136 (1986).

There was evidence showing that defendant had pinched Shannon's nipples so fiercely she cried and could not be consoled; that he whipped her so severely that she had purple bruises from her lower back to her upper legs which remained visible for over a week; and that he placed her in an unheated room in the wintertime without clothing, food, or drink for over five hours. We have no hesitancy in concluding that defendant's challenge to the sufficiency of the evidence as to his conviction of the child abuse of Shannon is wholly without merit.

Defendant's conviction of abuse of a child, Shannon Woodside, (Count II) is affirmed; defendant's convictions of felony murder (Count III), and abuse of a child, Shaina Woodside, (Count I) are reversed and the case is remanded for further proceedings.

HERD, J. dissenting: The facts in this case do not just

overruling of *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985). To establish this point, I shall repeat a statement of the facts in more detail than is in the majority opinion. The appellant, Robert Lucas, is a cruel, sadistic person. He vented those tendencies on Shaina and Shannon Woodside while babysitting, ultimately killing Shaina.

Witnesses testified to innumerable incidents of cruelty by Lucas to the two little girls during the last several months before Shaina's death. A former babysitter, Debbie Moore, testified Lucas often told Shaina she was ugly and told Ms. Moore to pour Tabasco sauce down Shaina's throat if she bit anyone. Lucas had a fixation on biting. One time when he came to pick up the girls from Ms. Moore, he called for Shannon to come to him and asked her if Shaina had bitten her. Shannon said Shaina had not. Lucas repeated the question and received another denial. He then caught her off guard by asking, "Where did she bite you?" Shannon pointed to her arm. Lucas thereupon called Shaina into the room and bit her so hard she had a bruise the next day. Ms. Moore said she had seen Lucas bite Shaina another time. She also said she had seen Lucas scare Shaina by making an ugly face at her. He explained he was doing this to demonstrate "he meant business" and that they had to mind him. Ms. Moore testified that Lucas said, "I love to intimidate that child and make her cry." When Shaina would run to Ms. Moore for comfort, Lucas would admonish Ms. Moore by saying, "Please don't pick her up. We're trying to break her of the habit of being babied all the time and picking her up when she wants to be picked up all the time and be held." He was saying this about an eighteen-month-old baby. Once, when the girls arrived at Ms. Moore's house, Shannon had a black eye and Shaina had a large bruise on the back of her leg and on her cheekbone. Shannon explained her bruises by saying she had fallen, but when asked about Shaina's she blurted out, "Robbie," then would say no more.

Mrs. Woodside, her sister, and her parents testified Lucas once beat Shannon so hard with a belt she was bruised purple from her lower back to her thighs for well over a week. Woodside told of an incident in January when Shannon wet her pants. As Lucas approached Shannon threateningly, she began to cry and asked if he was going to beat her again. Lucas stripped her clothes off, put her in a diaper, and placed her on the floor in an unheated

room. She remained there for four hours until her grandmother came and dressed and fed her. As soon as the grandmother left, Lucas undressed Shannon and returned her to the cold room until Woodside came home.

The grandmother testified the girls were deathly afraid of Lucas; that Shaina would cry whenever Lucas picked her up, and if anyone else was around she would put her arms up, pleading to go to them. Woodside's sister said Lucas repeatedly gave Shaina hard pinches to her chest and bottom, making her cry.

Lucas also broke Shaina's arm, but he had a ready explanation. He said she slipped when he held her up in the shower and he had to grab her arm. Several weeks later, Woodside found burns on Shaina's bottom. Lucas said he had spanked her. When asked why they looked like burns, he said he had accidentally set her on the stove burner when he was distracted by Shannon and the telephone.

On July 5, Woodside found a burn on Shaina's hip and bruises around her thighs. Lucas had his usual ready explanation. He said he had playfully snapped her with a washcloth and she had fallen into his cigarette.

The "tranking" incident, described in the majority opinion, occurred the next morning. Shaina was killed that evening. When her mother left for work on July 6, Shaina's only apparent injuries were burn marks on her bottom, bruises on her thighs, a cigarette burn, a cut on her lip, a scratch on her nose, and a scar on her chin. At about 10:30 p.m., when the emergency medical crew arrived, Shaina was found to have numerous scars from burns on her buttocks which appeared to have been made by a V-shaped instrument, and bruises on her hips, legs, arms, spine, neck, and face. She had cigarette burns on her abdomen and her nipples were lacerated. In addition, there were injuries to her head which caused her to lose consciousness and drown in the bathtub.

Thus, we can see Robert Lucas continuously tortured this eighteen-month-old baby over a period of at least a month, and ultimately caused her premature death.

I am dissenting to the majority opinion for its misplaced reliance on merger to grant this child killer a new trial. Luca was properly convicted of felony murder.

The legislature defines murder in K.S.A. 21-3401 as:

"Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or *committed in the perpetration or attempt to perpetrate any felony.*"

Under constitutional democracy with its division of powers, the power to define and punish crimes rests in the legislature. There is a wide latitude on the part of lawmakers to define an offense and to exclude elements of knowledge from its definition. 22 C.J.S., Criminal Law § 11.

The legislature established felony murder as a crime. Its purpose was to make all persons responsible for the logical consequences of their wrongful acts even though premeditation could not be established. The judiciary's function with regard to such legislation is to rule on its constitutionality and then strictly construe any ambiguity in favor of the accused. K.S.A. 21-3401 has been found constitutional. *State v. Crump,* 232 Kan. 265, 268-69, 654 P.2d 922 (1982); *State v. Goodseal,* 220 Kan. 487, 493-94, 553 P.2d 279 (1976), *overruled on other grounds* 228 Kan. 294, 615 P.2d 153 (1980).

Felony murder is a much-criticized doctrine. In spite of the criticism, it serves a useful purpose in our concept of justice. It is a deterrent to accidental or negligent killings in the course of a felony for gain, such as arson or burglary.

Although K.S.A. 21-3401 clearly and unambiguously allows the application of the felony-murder doctrine when a killing occurs in the perpetration of "any" felony, we have judicially limited the rule in the interest of justice. The first limitation on the doctrine has been to apply the rule only in cases where the underlying felony is inherently dangerous to human life. Only in inherently dangerous felonies do we find the accused had sufficient disregard for human life to justify imposing upon him or her a conclusive presumption of *mens rea* for murder.

Similarly, we refuse to apply the doctrine where there is no actual underlying felony. Thus, our second limitation is the merger doctrine. It prevents a homicidal offense from acting as an underlying felony to support felony murder. A felony other than the killing itself must have been committed to support a felony-murder charge. For example, if a person commits the sole felony of involuntary manslaughter, that felony may not be used to support a felony-murder charge.

The third limitation is the application of the merger doctrine to nonhomicidal offenses such as assault. For example, most murders are committed by means of an aggravated battery. We have held an accused may not be charged with both murder and aggravated battery because the crime consists of one act; the murder and the battery merge. Where there is only one act, there is no separate felony to add to the equation. See, for minority positions refusing this limitation, *Robles v. State,* 188 So. 2d 789 (Fla. 1966); *Baker v. State,* 236 Ga. 754, 225 S.E.2d 269 (1976); *People v. Viser,* 62 Ill. 2d 568, 343 N.E.2d 903 (1975); *State v. Wanrow,* 91 Wash. 2d 301, 588 P.2d 1320 (1978).

There are exceptions to our use of the third limitation to the statute. If an assault ending in death were carried out by means of extended torture or kidnapping, the felony is sufficiently collateral to justify the use of its *mens rea* for murder. In *State v. Foy,* 224 Kan. 558, 582 P.2d 281 (1978), we held a burglary carried out with the sole purpose of committing an assault which ended in death was sufficient to support felony murder. See *Harris v. United States,* 377 A.2d 34 (D.C. 1977); *People v. Miller,* 32 N.Y.2d 157, 344 N.Y.S.2d 342, 297 N.E.2d 85 (1973).

One other exception under the third judicial limitation to our felony-murder statute was announced in *State v. Brown,* 236 Kan. 800. In that case, we acknowledged there were instances where the merger doctrine should be limited to the second limitation, the lesser offenses of homicide. See *Bolton v. State,* 253 Ga. 116, 318 S.E.2d 138 (1984); *Ex Parte Easter,* 615 S.W.2d 719 (Tex. Crim. App.), *cert. denied* 454 U.S. 943 (1981).

Brown was similar to the case at bar. It involved the death of a six-week-old baby boy who showed signs of severe neglect and abuse. His shoulder and skull were fractured and he was emaciated and bruised. Although the exact cause of death was not given, it was obviously a result of abuse. The baby's mother was charged with child abuse and felony murder. We affirmed her conviction of child abuse and involuntary manslaughter.

We did not decide in *Brown* whether "a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder." 236 Kan. at 803-04. By this language we distinguished continuing child abuse from the crime assault. Lucas argues this case is distinguishable from *Brown* i

that the evidence tends to show Shaina's death resulted directly from one assault—his beating of her in the bathtub, from which she fell face down in the water. He argues the case is thus no different from other assault cases which end in death. In *Brown*, the death appeared to have been caused by the cumulative effect of multiple abuse heaped on the baby's body, whereas in this case the coroner's testimony showed it was probable Shaina would not have died but for the drowning.

The question which should therefore be determined in the instant case is whether a continuing course of child abuse, insufficient in itself to cause death, prevents merger of the final attack of abuse with felony murder. Lucas contends that child abuse, a crime which carries a lesser penalty than assault but, like assault, consists of violence with no other purpose but to harm, must be deemed to merge.

Our statute allows a defendant to be charged with felony murder for a death resulting from the commission of "any" felony. We have seen that the statute has only been limited by judicial decree in instances where it is unjust not to evaluate the intentions of the defendant in committing the killing.

The majority repeatedly compares the beating and death of children with that of adults to prove its logic that our limitations to the statute should apply to a continuing course of child abuse. The majority states that if the legislature feels the death of children by felonious abuse from their caretakers is a more serious concern in our society than other assaults, the legislature should enact a statute making it so. The legislature has already spoken on that issue and made all homicides resulting from commission of a felony first-degree felony murder. The majority ignores the fact that any limitation is created only by our limitation of K.S.A. 21-3401. We need only follow our precedent in *Brown* and affirm the trial court to see justice done.

In a case where the facts show continuing child abuse, the defendant has engaged in a course of conduct which no longer entitles him to judicial checks upon the statute. This was not a case of accident, self-defense, or a one-time fit of passion.

Lucas abused Shaina over and over again for a period of months. He had time to sit back and reflect as he watched her toddle around, bruised, burned, and fearful. He saw the effects of

his anger and of his strength but his conclusion upon reflection was, "I love to intimidate that child and make her cry."

We have held burglary to be sufficiently removed from homicide to prevent merger, even when its purpose was to commit an assault, because of the additional circumstances surrounding the assault which increased the danger to the victim. Here, not only was Shaina trapped in her own home, but the additional circumstance of her age placed her in great danger from those adults closest to her whom she had the right to trust to act for her ultimate good. That trust was horribly breached.

Sometime during that dreadful night, Shaina's nipples were torn, her body bruised, and her torso burned with cigarettes. Such acts of torture do not deserve the protection from the severity of the felony-murder rule given defendants charged with assault. The age of the victim and the continuing nature of the torture are the elements which distinguish child abuse from assault. These elements create a circumstance in which the danger to the victim is so great that the felony-murder doctrine is justifiably imposed.

I do not think, under the facts of this case, we are justified in overruling *Brown*. I would affirm.

MILLER, and HOLMES, JJ., join the foregoing dissent.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 60,939

STATE OF KANSAS,
Appellee,

v.

ROBERT LYNN LUCAS,
Appellant.

OPINION ON REHEARING

Appeal from Johnson district court, GERALD L. HOUGLAND, judge. Opinion on rehearing filed January 20, 1989. (For original opinion, see *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 [1988].) Affirmed on rehearing.

Karen Mayberry, assistant appellate defender, argued the cause, and *Rosanne Piatt*, assistant appellate defender, and *Benjamin C. Wood*, chief appellate defender, were on the briefs for appellant.

Dennis W. Moore, district attorney, argued the cause, and *Michael B. Buser*, assistant district attorney, and *Robert T. Stephan*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

McFARLAND, J.: In our original opinion, defendant's conviction of the child abuse of Shannon Woodside was affirmed, and his convictions of felony murder and child abuse of Shaina Woodside were reversed and the case was remanded for further proceedings. Subsequently, the State filed a motion for rehearing. The motion was granted on August 26, 1988.

The case was reargued on December 8, 1988. After due consideration, we affirm our original opinion.

MILLER, C.J., and SIX, J., dissenting.

HERD, J., I reassert my dissent to the original opinion.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 61,872

STATE OF KANSAS,

Appellee,

v.

ROBERT GENE PROUSE,

Appellant.

SYLLABUS BY THE COURT

1.

Although special care must be taken in admitting photographs taken after the pathologist has intervened, lest the evidence be made more grisly than necessary, those photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible.

2.

Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony which contradicts the witnesses on the opposite side, but also corroborates previous testimony. The use and extent of rebuttal rests in the sound discretion of the trial court and its ruling will not be reversed unless it appears the discretion has been abused to a party's prejudice.

3.

The purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or

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accidentally, and the doctrine should not be extended beyond its rational function which it was designed to serve.

4.

In order to apply the felony-murder doctrine: (1) the underlying felony must be one which is inherently dangerous to human life; and (2) the elements of the underlying felony must be so distinct from the homicide so as not to be an ingredient of the homicide.

5.

In determining whether an underlying felony is inherently dangerous to human life so as to justify a charge of felony murder, the elements of the underlying felony should be viewed in the abstract, and the circumstances of the commission of the felony should not be considered in making the determination.

6.

Time, distance, and the causal relationship between the underlying felony and the killing are factors to be considered in determining whether the killing is a part of the felony and, therefore, subject to the felony-murder rule.

7.

A single assaultive incident of abuse of a child (K.S.A. 1987 Supp. 21-3609) which results in the death of a child merges with the killing and constitutes only one offense. The coupling together of prior acts of abuse of a child with the lethal act of abuse into one collective charge of abuse of a child does not prevent the operation of the merger rule.

8.

When a prosecutor desires to charge both statutory means of the commission of involuntary manslaughter for the same homicide, the same should be accomplished by charging the two different means of commission in alternative counts.

Appeal from Sumner district court, LLOYD K. McDANIEL, judge. Opinion filed January 20, 1989. Reversed and remanded.

Lucille Marino, assistant appellate defender, argued the cause, and *Benjamin C. Wood*, chief appellate defender, was with her on the brief for appellant.

Kerwin L. Spencer, county attorney, argued the cause, and *Robert T. Stephan*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

McFARLAND, J.: Robert Gene Prouse appeals his jury trial convictions of child abuse (K.S.A. 1987 Supp. 21-3609) and first-degree felony murder (K.S.A. 21-3401).

On February 15, 1987, defendant and his wife, Susan Prouse, brought their seven-week-old daughter, Felicity, to the emergency room of the Caldwell Hospital. The baby was not breathing. CPR was administered. Twenty minutes later Felicity was pronounced dead. The examining physician, Dr. Ray Stowers, observed multiple contusions and abrasions on the child's face and a large hematoma behind the right ear. He asked defendant how these injuries occurred. Defendant said the child had fallen from her crib two or three weeks earlier and that, a few days previously, the family cat had scratched the child's eyelid. Defendant further stated the child had received no injuries the day of her death, and she was not breathing when he found her. Dr. Stowers believed defendant's explanation was inconsistent with the observed injuries and notified the Sumner County Medical Examiner. An autopsy was performed the following day by Dr. David DeJong.

The autopsy revealed a traumatic separation of the parietal, occipital, and temporal bone plates. The parietal bone plate was totally loose and fell from the skull upon the rolling back of the scalp. A subdural hematoma consisting of clotted and liquified blood was observed. Multiple external bruises and contusions to the head were observed. There were no injuries to any part of the body other than the head. Dr. DeJong concluded the injuries and death were the result of child abuse. The separation of the bony plates was due to a single localized blow occurring probably within hours of death but possibly within "a day or two before that." He stated the injury could not have resulted from a fall from her crib.

Multiple blows to the head were the probable causes of the various contusions and abrasions.

The subsequent investigation revealed defendant had been alone with the child during the day in question until approximately 6:00 p.m. when the wife returned from work. Shortly after that the child was discovered not to be breathing. A babysitter had been with the child the day before. She observed no injuries except for the cat scratch over the eye. Defendant again stated there had been no accidental injuries on the day of the child's death and that nothing unusual had occurred.

Defendant was charged with first-degree felony murder and child abuse. He was also charged with involuntary manslaughter (K.S.A. 1987 Supp. 21-3404) and endangering a child (K.S.A. 21-3608). Defendant could not be found guilty of all four charges. He could be found guilty of (1) felony murder with child abuse as the collateral felony, or (2) involuntary manslaughter with endangering a child as the unlawful act not amounting to a felony, or he could be found not guilty. The jury found defendant guilty of first-degree felony murder and child abuse. Defendant appeals therefrom.

For his first issue, defendant contends the district court abused its discretion in admitting three of the nine autopsy photographs. The six unobjected-to photographs show the external injuries prior to any alteration of the body by autopsy. The three objected-to photographs show the internal head injuries with the scalp rolled back. Defendant contends the three photographs were gruesome, inflammatory, and repugnant.

The admission of photographs into evidence is within the discretion of the trial court unless it is shown such discretion is abused. *State v. Kendig*, 233 Kan. 890, 893, 666 P.2d 684 (1983).

A similar issue was raised in *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), involving comparable photographs. In *Lucas*, Syl. ¶ 7, we held:

> "Although special care must be taken in admitting photographs taken after the pathologist has intervened, lest the evidence be made more grisly than necessary, those photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible."

The three photographs herein assisted the jury's understanding of Dr. DeJong's testimony as to the separation of the bones, the subdural hematoma, and the force necessary to cause such injuries. We find no abuse of judicial discretion in the admission of the photographs.

For his second issue, defendant contends the trial court erred in the admission of certain rebuttal testimony.

Defendant presented testimony that he was a person of great self-control who never became angry. Further, defendant testified "there isn't anything a child could do to upset me."

The State called Sherri Manske as a rebuttal witness. She testified she had lived with defendant from October 1984 to January 1985. Living with them were her four-month-old baby and another child about a year older. She testified that the baby's crying upset defendant and that he would cover up the baby's mouth to stop the crying. This happened several times even though she told him not to do it. She testified she had seen displays of temper by defendant and that he had become physically violent on one occasion by throwing the furniture around. The couple had split up over this last incident.

The use and extent of rebuttal evidence rests in the sound discretion of the trial court and its ruling will not be reversed unless it appears the discretion was abused to a party's prejudice. *State v. Richard*, 235 Kan. 355, 360, 681 P.2d 612 (1984); *State v. Weigel*, 228 Kan. 194, 200, 612 P.2d 636 (1980); *State v. Lovelace*, 227 Kan. 348, 353, 607 P.2d 49 (1980).

In their briefs, the parties go off on a tangent as to whether or not the rebuttal testimony was precluded by K.S.A. 60-447, which provides:

> "Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character."

K.S.A. 60-447 is inapplicable herein. The complained-of testimony was not offered to prove guilt. Rather, the purpose of such testimony was to refute certain testimony introduced by defendant as to his great self-control and inability to become upset with a child. This was clearly proper rebuttal evidence.

As we held in *State v. Lovelace*, 227 Kan. 348, Syl. ¶ 7:

> "Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony which contradicts the witnesses on the opposite side, but also corroborates previous testimony. The use and extent of rebuttal rests in the sound discretion of the trial court and its ruling will not be reversed unless it appears the discretion has been abused to a party's prejudice."

For his third issue, defendant contends it was error for the trial court to instruct the jury on felony murder because child abuse is not an independent collateral felony and, accordingly, merged into the felony-murder charge.

This same issue was before the court in *State v. Lucas*, 243 Kan. 462, which was decided subsequent to the trial herein. In *Lucas*, we analyzed the existing Kansas case law relative to felony murder, which was summarized in Syl. ¶¶ 1-4 as follows:

> "The purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or accidentally, and the doctrine should not be extended beyond its rational function which it was designed to serve."

> "In order to apply the felony-murder doctrine: (1) the underlying felony must be one which is inherently dangerous to human life; and (2) the elements of the underlying felony must be so distinct from the homicide so as not to be an ingredient of the homicide."
>
> "In determining whether an underlying felony is inherently dangerous to human life so as to justify a charge of felony murder, the elements of the underlying felony should be viewed in the abstract, and the circumstances of the commission of the felony should not be considered in making the determination."
>
> "Time, distance, and the causal relationship between the underlying felony and the killing are factors to be considered in determining whether the killing is a part of the felony and, therefore, subject to the felony-murder rule."

The collateral felony must, therefore, be felonious conduct other than the lethal act itself. Thus, a homicide occurring during the commission of an independent felony, such as aggravated robbery, rape, or kidnapping, comes under the felony-murder statute (K.S.A. 21-3401). However, the lethal act itself cannot serve as the independent collateral felony necessary to support a felony-murder conviction. Thus, an aggravated battery (K.S.A. 21-3414) resulting in the death of the victim merges into the homicide and cannot serve as the collateral felony for felony-murder purposes. For further illustration, consider the situation where a robber shoots the victim during the commission of an aggravated robbery. If the victim lives, the robber could be convicted of the two separate felonies he or she committed--aggravated battery and aggravated robbery. If the victim dies as a result of the injuries so

received, the robber may still be convicted of two felonies--felony murder and aggravated robbery. However, if the only felonious conduct involved is the cause of the victim's death, then the doctrine of merger prevents the prosecution from splitting the act into a felony murder and a collateral felony charge. Therefore, an aggravated battery cannot serve as the collateral felony for felony murder. We then held in *Lucas* that designating an aggravated battery against a child as child abuse does not avoid the merger doctrine and result in two independent felonies. Specifically, we held in *Lucas*:

> "A single assaultive incident of abuse of a child (K.S.A. 1987 Supp. 21-3609) which results in the death of a child merges with killing and constitutes only one offense. The coupling together of prior acts of abuse of a child with the lethal act of abuse into one collective charge of abuse of a child does not prevent the operation of the merger rule. Language to the contrary found in *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985), is disapproved." 243 Kan. 462, Syl. ¶ 5.

We further observed:

> "If additional protection for children is desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first- or second-degree felony murder." 243 Kan. at 473.

We granted a rehearing in *State v. Lucas*. The original opinion therein has been affirmed this date.

In accordance therewith, the first-degree felony murder and child abuse convictions must be reversed and the case remanded for trial on appropriate charges.

For his fourth issue, defendant contends the trial court erred in failing to instruct on the full range of lesser homicide offenses. By virtue of the result reached in the preceding issue, this issue is moot.

For his final issue, defendant contends the trial court erred in requiring the prosecution to elect between two theories of the means of commission of the involuntary manslaughter charge and in instructing the jury on the sole remaining theory as to the means of commission.

As will be recalled, the jury was instructed on alternative counts. Defendant could have been: (1) convicted of felony murder and child abuse; (2) convicted of involuntary manslaughter and endangering a child; or (3) found not guilty. These instructions parallel the information except that the involuntary manslaughter charge in the information provided two means of its commission as follows:

> "and on or about February 15, 1987 said Robert Gene Prouse, in Sumner County, Kansas did then and there unintentionally kill a human being, to-wit: Felicity Prouse; without malice, while in the wanton commission of an unlawful act not amounting to a felony, to-wit: Endangering a Child by causing or permitting her to suffer unjustifiable physical pain or mental distress or to be placed in a situation where her life, body, or health were endangered in violation of K.S.A. 21-3608; said unlawful act being prohibited by a statute enacted for the protection of human life or safety; or did

unintentionally kill a human being, to-wit: Felicity Prouse; without malice while in the commission of a lawful act, to-wit: disciplining Felicity Prouse; in an unlawful or wanton manner, to-wit: by striking her head or causing her head to strike another object as a means to stop some behavior by the child such as crying which said Robert Prouse did not approve of. K.S.A. 21-3404 INVOLUNTARY MANSLAUGHTER Class D Felony."

K.S.A. 1987 Supp. 21-3404 defines involuntary manslaughter as:

"(a) Involuntary manslaughter is the unlawful killing of a human being, without malice, which is done unintentionally in the wanton commission of an unlawful act not amounting to felony, or in the commission of a lawful act in an unlawful or wanton manner.

"(b) As used in this section, an 'unlawful act' is any act which is prohibited by a statute of the United States or the state of Kansas or an ordinance of any city within the state, which statute or ordinance is enacted for the protection of human life or safety."

The involuntary manslaughter charge herein used endangering a child as the unlawful act element for one means of committing the crime, and the doing of a lawful act in an unlawful or wanton manner for an alternative means of commission of the crime. On its own motion, the trial court forced the State to elect as to the means of commission. Defense counsel made no objection to the forced election and did not request both theories of commission be submitted to the jury. In fact,

defendant's proposed instruction included only the first theory of commission. A litigant may not invite and lead a trial court into error and then complain of the trial court's action on appeal. *State v. Salton*, 238 Kan. 835, Syl. ¶ 1, 715 P.2d 412 (1986). Further, we are satisfied this matter had no bearing on the outcome of the trial.

We believe, however, that it is appropriate to address the matter as it could arise again in a retrial herein. The defense cites cases dealing with a trial court's duty to instruct on all lesser included offenses pursuant to K.S.A. 1987 Supp. 21-3107(3). Involuntary manslaughter was a charged crime, not a lesser included offense herein. Likewise, this does not involve an amendment of an information by the State. Rather, the effect was the trial court deleted part of the charge on its own motion.

Inasmuch as the involuntary manslaughter charge in the information was one count alleging two different means of commission, presumably the instruction and verdict form would have presented the whole charge to the jury without the court's intervention. Hence, had defendant been convicted of involuntary manslaughter, it would be impossible to determine which means of commission the jury had found occurred. A challenge to the sufficiency of the evidence supporting the conviction would reveal this problem.

We believe that the proper method to be employed would be to charge the two different alleged means of commission as alternative counts of involuntary manslaughter. This would separate the elements instructions and the verdict forms and enable a reviewing court to determine precisely what the jury found. Further, it would prevent the jury from hybridizing the two means into some means of commission not specified in the statute defining involuntary manslaughter.

This conclusion is consistent with *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), wherein we held:

> "It has long been the law of Kansas that an accusatory pleading in a criminal action may, in order to meet the exigencies of proof, charge the commission of the same offense in different ways. In such a situation, a conviction can be upheld only on one count, the function of the added counts in the pleading being to anticipate and obviate fatal variance between allegations and proof. Thus, it has been held proper to charge by several counts of an information the same offense committed in different ways or by different means to the extent necessary to provide for every possible contingency in the evidence. *Williams v. Darr*, 4 Kan. App. 2d 178, 180-81, 603 P.2d 1021 (1979); *State v. Hagan*, 3 Kan. App. 2d 558, 598 P.2d 550 (1979); *State v. Pierce, et al.*, 205 Kan. 433, 469 P.2d 308 (1970); *State v. Emory*, 116 Kan. 381, 226 Pac. 754 (1924); and *State v. Harris*, 103 Kan. 347, 175 Pac. 153 (1918).
>
> "Where there is a question in the mind of the prosecutor as to what the evidence will disclose at trial, the correct procedure is to charge the defendant in the alternative under those subsections of K.S.A. 1979 Supp. 21-3701 which may possibly be established by the evidence. This may properly be done under Kansas law by charging several counts in the information to provide for every possible contingency in the evidence. By so doing, the jury may properly be instructed on the elements necessary to establish the crime of theft under any of the subsections charged and the

defendant will have no basis to complain that he has been prejudiced in his defense." 228 Kan. at 503-04.

The defendant's convictions of first-degree felony murder and child abuse are reversed and the case is remanded for trial on appropriate charges.

HOLMES, J., concurring: As the author of the majority opinion in *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985), and one of the dissenting justices in *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), I feel obligated to comment upon my change of position as reflected by my joining with the majority in the present case.

It has been said that hard facts often make bad law. *Brown* was one of those cases. The unusual factual and procedural background of *Brown* need not be repeated here. Suffice it to say, the decision in *Brown* was motivated, in my opinion, by a sincere desire to reach the "right" result, but in doing so, the court lost sight of the applicable law of this state. In *Lucas*, the facts were so revolting and the actions of the defendant so heinous that I felt the law established by *Brown* was applicable and correct. I am now convinced that my position was not supported by the prior case law of Kansas, nor by that of most other states with statutes similar to our felony-murder statute.

Kansas has recognized the felony-murder rule since before statehood. Kan. Terr. Stat. 1855 ch. 48 § 1 provided in part:

> "Every murder . . . which shall be committed in the perpetration, or attempt to perpetrate any . . . felony, shall be deemed murder in the first degree."

In *State v. Fisher*, 120 Kan. 226, 243 Pac. 291 (1926), this court adopted the merger limitation to the broad application of the statute to "any felony." In *Fisher* the defendant fired a gun at a car full of people trespassing upon and damaging his property and one of the shots killed a four-year-old occupant of the car. The driver of the vehicle had cut Fisher's fences and was driving through his wheat field. After four fences had been cut, Fisher attempted to stop the driver by shooting at the tires and gasoline tank of the car. Unfortunately, one shot hit the young child in the car, killing him. Fisher was found guilty of murder in the first degree based upon the felony-murder rule. In reversing the conviction, Justice Harvey, writing for the court, stated:

> "It is the contention of the state that if murder is committed in the perpetration or the attempt to perpetrate any other felony, it is murder in the first degree; hence, that if the boy, John Michael Foley, met his death at the hands of defendant, while defendant was committing an assault with a deadly weapon, under such circumstances that it amounted to a felony under any statute pertaining thereto, the offense is murder in the first degree. This contention cannot be sustained. The effect of it would be to make any homicide, not excusable or justifiable, which by our statute is defined to be manslaughter in any of the degrees, or murder in the second degree, to constitute murder in the first degree. In other words, there could, under this interpretation of the statute, be no such thing as any lower degree of homicide than murder in the first degree. In 29 C.J. 1107, it is said:
>
> > '"Under a statute making the unintentional killing of another while engaged in the commission of a felony murder in the first degree, the other

elements constituting the felony must be so distinct from that of the homicide as not to be an ingredient of the homicide indictable therewith or convictable thereunder." (See, also, cases there cited.)'

". . . Here the act of the defendant in doing the shooting is either murder in the first degree or some other offense. That same act cannot be made the basis, first, of some other felony, as manslaughter, and then that felony used as an element of murder in the first degree." 120 Kan. at 230-31.

The merger doctrine, as adopted in *Fisher*, has been the law of Kansas since at least 1926. Later, the court imposed an additional limitation on the broad language of the felony-murder rule and required that the underlying felony must be "inherently dangerous" to support a charge of murder in the first degree based upon the perpetration of a felony. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967), *overruled on other grounds State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980). Both court-imposed limitations are generally recognized as furthering the actual purpose and legislative intent of the statute. See *State v. Lucas*, 243 Kan. 462, Syl. ¶¶ 1, 2; Note, *Criminal Law--Felony Murder in Kansas--The Prosecutor's New Device: State v. Goodseal*, 26 Kan. L. Rev. 145 (1977).

I am now convinced that the attempt to graft an exception on the limitation imposed by *Fisher* is erroneous and not supported by any valid legal principle. If the merger doctrine is good law, and I think it is, then any attempt to carve out an exception to cover unintentional or accidental deaths resulting from child abuse should be done by the legislature. If the legislature believes that such an exception should be the law, it should adopt such a statute. Until it does, the limitations

imposed upon the broad language of the statute remain the law of Kansas. I concur in the majority opinion.

SIX, J., dissenting: I dissent from the felony-murder portion of the majority opinion. The majority reasons it was error for the trial court to instruct the jury on felony murder because child abuse is not an independent collateral felony and accordingly merged into the felony-murder charge. The majority opinion quotes *State v. Lucas*, 243 Kan. 462, Syl. ¶ 5, 759 P.2d 90 (1988), *aff'd this date* 244 Kan. ___, ____ P.2d ____ (1989):

> "A single assaultive incident of abuse of a child (K.S.A. 1987 Supp. 21-3609) which results in the death of a child merges with killing and constitutes only one offense."

I disagree. I would affirm the trial court on all issues raised in this appeal.

In my view, the felony-murder rule applies in K.S.A. 1987 Supp. 21-3609 (child abuse) cases whether death results from facts which show a continuing course of conduct or a single act of child abuse.

Prouse was convicted of first-degree murder under K.S.A. 21-3401:

> "Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate *any* felony.
>
> "Murder in the first degree is a class A felony." (Emphasis added.)

He was also found guilty of the felony of child abuse under K.S.A. 1987 Supp. 21-3609:

> "Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years."

Under the felony-murder doctrine, when a death occurs in the course of a felony, the intent to commit the felony is transferred to the act of killing in order to find culpability for the homicide. The rule serves the purpose of relieving the State of the burden of proving premeditation or malice. A strategic advantage is thus provided to prosecutors. The theory is that proof of intent to commit the underlying felony is sufficient to show a guilty mens rea for murder. *State v. Rueckert,* 221 Kan. 727, 730, 561 P.2d 850 (1977). The history of the felony-murder rule began in Kansas with our territorial government. Kan. Terr. Stat. 1855 ch. 48 § 1. For a detailed analysis of the history, rationale, and criticism of the felony-murder rule see, Note, *Criminal Law--Felony Murder in Kansas--The Prosecutor's New Device: State v. Goodseal,* 26 Kan. L. Rev. 145 (1977). England, where the doctrine originated, abolished the rule in 1957. The Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1. The great majority of states which follow the doctrine subject it to two limitations: (1) The underlying felony must be inherently dangerous to human life; and (2) the elements of the underlying felony must be so distinct from the homicide so as not to be an ingredient of the homicide. See Annot., *Application of Felony-Murder Doctrine Where the Felony Relied Upon is an Includible Offense with the Homicide,* 40 A.L.R.3d 1341. This court has adopted both limitations. *State v Lashley,* 233 Kan. 620, 631, 664 P.2d 1358 (1983); *State v. Fisher,* 120 Kan. 226, 231, 243 Pac. 291 (1926).

This court, in 1985, reviewed child abuse and felony murder in *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985). The facts in *Brown* are similar to those in this case. Felicity Prouse was seven weeks old when she died. *Brown* involved the death of a month-old baby boy who showed signs of severe neglect and abuse.

In *Brown*, the court stated that an offense of child abuse did not merge into a charge of felony first-degree murder. I agree with the observation made in *Brown*. "*It is obvious from even a cursory reading of the statutes that a charge of abuse of a child does not meet the* Rueckert *test for merger into a charge of felony first-degree murder.*" 236 Kan. at 803. (Emphasis added.)

We should not overrule *Brown*.

Child abuse is a felony inherently dangerous to human life. *State v. Lucas*, 243 Kan. at 466. I agree with the majority that we are to consider the elements of the collateral felony in the abstract.

We should apply the same logic to a child abuse felony-murder analysis as we apply to other felonies deemed inherently dangerous to human life.

In overruling *Brown*, *Lucas* holds that the test for merger is more correctly stated as being whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide. 243 Kan. at 469.

The majority, in citing *Lucas*, reasons that had an adult been beaten on the head and drowned in a pool of water, the court would not hesitate in holding that the aggravated battery (the beating) was an intregral part of the homicide.

The collateral "adult victim" felony merged with the homicide. *Lucas*, 243 Kan. at 470. The majority inquires: "Can a different result logically be reached by designating the beating as abuse of a child rather than aggravated battery?" The majority's answer is, "No." *Lucas*, 243 Kan. at 470. I disagree.

In my view, K.S.A. 1987 Supp. 21-3609, the child abuse statute, is support for application of the felony-murder rule. The current Kansas criminal code was adopted in 1969. K.S.A. 21-3101. Subsection (1) of K.S.A. 21-3102 states:

> "No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state . . . ."

The statutory history of K.S.A. 21-3102(1) indicates:

> "Subsection (1) restates, but does not change the law of Kansas. Common law crimes are abolished in that the judiciary has no power to find and punish crimes not defined by legislative authority."

The legislature has characterized child abuse as a class D felony.

The elements of child abuse are not the "ingredients" of a first-degree murder charge.

I agree with the reasoning of this court in *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6: "The proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide."

I defer to the legislature. The legislature has extended an option to prosecutors by designating the beating of a child as child abuse, K.S.A. 1987 Supp. 21-3609, or aggravated battery, K.S.A. 21-3414. Neither the authority nor the wisdom of the legislature, in adopting the child abuse statute, has been questioned. I suggest that there is no more dominant thread in either the legislative or the judicial fabric than the recognition of children as a protected class. The examples of that recognition are legion and require no citation.

Such a finding is consistent with our public policy underlying the felony-murder rule (to deter all those engaged in felonies from killing negligently or accidentally, *State v. Brantley*, 236 Kan. 379, 380-81, 691 P.2d 26 [1984]).

In addition to the deterrence concept as an underlying purpose of the felony-murder rule, I suggest that the rule serves the objective of proportional justice.

> "Such diverse philosophers and judges as Jeremy Bentham, H. L. A. Hart, Sir James Fitzjames Stephen, Joel Feinberg, and Chief Justice Warren Burger have noted the disrespect that the law engenders when its response is disproportionate to public evaluations of the severity of an alleged violation." Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J.L. & Pub. Pol'y. 359, 362 (1985).

I agree with the observation: "The homicide of a child in the course of an effort to injure him can be seen as a very serious crime in the scale of offense grading because of the vulnerability of the child." Crump & Crump at 382.

In my view, the underlying or collateral felony, child abuse, K.S.A. 1987 Supp. 21-3609, supplies the necessary culpable mental state for the murder conviction. The crime of child abuse is not a lesser included offense to the crime of murder; consequently, it is distinct from and not an ingredient of the homicide.

The underlying or collateral felony in Prouse's case, child abuse, does not merge. See *Ex Parte Easter*, 615 S.W.2d 719 (Tex. Crim.), *cert. denied* 454 U.S. 943 (1981).

Prouse's convictions of first-degree felony murder and child abuse should be affirmed.

HERD, J.: I join the foregoing dissent.

MILLER, C.J., dissenting.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

Testimony of Attorney General
Robert T. Stephan
Before the Senate Judiciary Committee
RE: Senate Bills 44 and 48

I am here today to strongly encourage you to support House Bills 44 & 48.

On July 8, 1988, the Kansas Supreme Court reversed an earlier decision holding that an individual whose acts of child abuse result in the victims' death cannot be charged with first degree murder under the felony-murder rule.

Prior to this decision the Court had held in State v Brown that when a pattern of child abuse led to the eventual death of the victim, the felony murder rule could be used to support a charge of first degree murder.

However, in State v Lucas, the court found that the child abuse and death merge into one act and cannot be charged separately with the abuse being the collateral felony for felony murder.

To understand the impact that the Lucas decision will have, it is important that we understand the facts of thatcase. The victim was an 18-month old child named Shaina who had been tortured and abused by Robert Lynn Lucas who was living with Shaina's mother.

Attachment II
SJC
1-30-89

I would like to read to you the way Justice Herd in his dissent describes the condition Shaina was in prior to and after her death:

"When her mother left for work on July 6, Shaina's only apparent injuries were burn marks on her bottom, bruises on her thighs, a cigarette burn, a cut on her lip, a scratch on her nose, and a scar on her chin. At about 10:30 p.m., when the emergency medical crew arrived, Shaina was found to have numerous scars from burns on her buttocks which appeared to have been made by a V-shaped instrument, and bruises on her hips, legs, arms, spine, neck, and face. She had cigarette burns on her abdomen and her nipples were lacerated. In addition, there were injuries to her head which caused her to lose consciousness and drown in the bathtub.

Thus, we can see Robert Lucas continuously tortured this eighteen-month-old baby over a period of at least a month, and ultimately caused her premature death."

I believe it is clear that the death of a child from child abuse should be among those crimes for which the severest of penalties is available.

Since the Lucas case was decided, the convictions of two other men have been overturned and the Lucas case has been reheard and upheld by a 4-3 vote.

While there is a basis for the majority view of the court no one should be allowed to kill a child and not be subject to first degree murder. I would point out that the Courts' difficulty with

the use of child abuse as the underlying felony for felony murder was not a constitutional concern, but a statutory one.

As was stated in the majority opinion in the Lucas case, "if additional protection is desired for children, the legislature might well consider such legislation."

In other states, including Florida, Mississippi, and Indiana, such statutes have been adopted. Kansas should be added to that list.

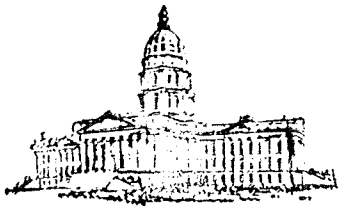
Since the Supreme Courts decisions in this area have been close, there is a chance that the court could reverse itself. However that could take some time and I believe this issue is of such importance that the legislature should take immediate action to protect all children. For they are the most defenceless human beings in our society and deserve our help.

If ever there was a bill that should pass by a unanimous decision, this is it.

MICHAEL L. JOHNSTON
SENATE DEMOCRATIC LEADER
SENATOR, FOURTEENTH DISTRICT
LABETTE COUNTY AND PARTS OF
CRAWFORD, MONTGOMERY AND
NEOSHO COUNTIES
P.O. BOX A
PARSONS, KANSAS 67357-0040

State of Kansas

Senate Chamber



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TESTIMONY OF SENATOR MICHAEL L. JOHNSTON

Senate Bill 44 - First degree murder for death resulting from child abuse

Senate Judiciary Committee January 30, 1989

Senate Bill 44 is identical to Senate Bill 48 introduced by this committee. Both would classify the crime of murder of a child resulting from child abuse or aggravated battery, as murder in the first degree, a Class A felony.

My colleagues and I introduced S.B. 44 in response to a Kansas Supreme Court case last summer, State v. Lucas, 243 Kan. 462, which held that the death of a child caused by child abuse did not meet the requirements of felony murder, and therefore was not punishable as first degree murder. The Court determined that the act of abuse merged into the homicide, creating one offense rather than a separate offense of murder committed during the commission of another crime, which is required for felony murder conviction. That 4 - 3 decision was recently reaffirmed by the Court.

Children, who are in most cases defenseless when faced with abusive behavior against them, need and deserve special

Attachment III
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protection. The Court in the Lucas decision recognized this when it provided an open invitation to the Legislature to reconsider the penalties available when children die as a result of abuse. The Court stated, "If additional protection for children is desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first- or second-degree felony murder."

Senate Bill 44 would provide that special protection and would assure a penalty befitting the heinous crime of killing a child by abusive acts. The Court has spoken, and now the Legislature must speak to rectify this situation. Therefore, I urge your favorable consideration of Senate Bill 44.

Kansas County & District Attorneys Association
827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351
EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony on Senate Bills 44 & 48
by
James W. Clark, KCDAA Executive Director

In 1985, in an opinion by Justice Holmes, the Kansas Supreme Court unanimously affirmed a felony murder conviction where abuse of a child, K.S.A. 21-1987 Supp. 21-3609, was the underlying felony, State v. Brown, 236 Kan. 800. In reliance on this case, prosecutors have brought approximately eight cases alleging abuse of a child as the underlying felony, and obtained convictions for felony murder. In July of 1988, the Supreme Court reversed itself in State v. Lucas, and in a 4 to 3 decision, held that the underlying felony of abuse of a child merges with the homicide, specifically finding no difference from a beating of an adult which eventually results in death. The Johnson County District Attorney's office requested and was granted a re-hearing in December, and the outcome remained undecided. The effect of a re-hearing was dramatized by the fact the Chief Justice Prager, who voted with the majority in Lucas, had retired, and was replaced by Justice Six. Prosecutors of this State obviously hoped that the newest Justice would affirm the earlier holding in Brown, thereby securing the basis for the subsequent eight felony murder convictions. Their wish was granted on January 20, 1989, when the Court issued its decision on rehearing in the Lucas case. Justice Six did vote to affirm Brown, however, his opinion is written in dissent as the majority of the Court still upheld Lucas and reversed Brown. Justice Holmes, who authored the Brown opinion, switched his vote. The effect on the eight other cases remains to be determined, however, it is clear that future cases involving the abuse of child which results in death may only be brought as second degree murder cases at best, unless legislative action is taken.

The Supreme Court has clearly recognized the validity of legislative action in the Lucas case, when it stated: "If additional protection for children is desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first- or second-degree murder." 759 P.2d 99. This same language was also quoted with approval in State v. Prouse (No. 61,872, January 20, 1989), which was a companion case to Lucas on re-hearing.

In conclusion, while individual prosecutors are left to grapple with the slippery slope of stare decisis in these individual child abuse cases, the protection of children is left to the Legislature. Your favorable recommendation on one or both of these bills will enhance that protection.

Attachment IV
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