

**Pattern
Instructions for Kansas—
CRIMINAL 2d**

(Cite as PIK 2d)

Prepared by

**KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS**

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FOREWORD

The preparation and publication of *Pattern Instructions for Kansas-Criminal 2d* has been accomplished through the efforts of the Judicial Council Advisory Committee on Pattern Criminal Jury Instructions.

The original publication of *PIK-Criminal* in 1971 and supplements prepared in 1975 and 1979 have been of great assistance to the bench and bar of this State in the preparation of jury instructions in criminal cases. *PIK-Criminal 2d* will provide the same good service to Kansas judges and lawyers.

PIK-Criminal 2d covers statutes through the 1982 legislative session, Supreme Court decisions through Vol. 231, No. 3, and Court of Appeals 2d decisions through Vol. 7, No. 5.

The Kansas Judicial Council congratulates the members of the Advisory Committee for a difficult job well done.

David Prager, Chairman,
Kansas Judicial Council

PREFACE

Trial by jury, as an institution, has gained in popularity during the past twenty years. In 1955, for example, 55,670 jury trials were held in federal, state, and local courts and this figure increased by 1973 to 150,000, an increase of approximately two and one-half times. The increase has weakened arguments that the jury system needed modification as an outmoded institution and has revealed that the jury is deeply ingrained in the justice system of America.

Pattern jury instructions have played a part—perhaps substantial—in the improved position of the jury. They have relieved busy trial judges of the burden of spending countless hours in the preparation for trial and have spared appellate courts from frequent analysis of nonuniform treatments of the law. They have saved taxpayers money with the reduction of appellate review of faulty instructions and have given judges additional time to address other matters in the judicial process. More importantly, the concept of substantial justice has been fostered by assisting courts to properly instruct the jury as to the law with a return of more just verdicts. They have further served the utility of obtaining uniformity in jury instruction with the elimination of uncertainty between the bench and bar.

Pattern instructions, however, have certain disadvantages. They are not a substitute for thinking but are simply guides. If applied without reflection on applicable legal principles, a chilling effect would result upon the evolution of new legal principles. Each case has its own uniqueness and patterns frequently need to be modified to cover that special need.

Pattern instructions have been available in Kansas since 1964 when the first edition of *PIK-Civil* was published. *PIK-Criminal* was published in 1971 and *PIK-Civil 2d* was published in 1977. Supplements to both have been published to update and reflect statutory changes and appellate court decisions.

The Kansas District Judges Association appointed a committee on jury instructions in 1963. At that time justification for pattern jury instructions in Kansas was said to be the need to improve the art of meaningful communication with the jury. Jury instructions were criticized as being overly technical, too lengthy, complicated, and designed in many instances to satisfy the appellate court rather than to communicate or inform.

The Committee continued the policy of applying certain principles in the preparation of the instructions. The first principle was that the instructions should be an accurate and impartial statement of the law. Second, the instructions should be stated in brief, simple language that would be clear and understandable to jurors. Third, they should be general instructions that could be adapted to varying circumstances.

The Committee prepared several new and revised instructions and, where appropriate, the notes on use have been amended and the comments updated. The Committee further determined that where a crime required a specific intent, a reference in the instruction to general intent was not necessary. However, if the crime did not require a specific criminal intent, one of the claims should include the word "intentional" to satisfy the statutory requirements of K.S.A. 21-3201 (1).

In preparing *PIK-Criminal 2d*, the Committee concluded that a loose-leaf binder should be used. This should permit flexibility in the amendment and modification of patterns without the publication of separate supplements or a new text.

The composition of the Committee has changed since the publication of *PIK-Criminal* in 1971. Four members of the original committee are still active members: Justice David Prager, Judge B. Mack Bryant, Judge Frederick Woelzel, and Judge Herbert W. Walton. The Honorable Alex Hotchkiss died in 1973 and his vacancy on the committee was filled through the appointment of Judge Michael Barbara, who is now a Professor of Law at Washburn University, Topeka, Kansas. Judge Albert B. Fletcher was appointed Chief Judge of the U.S. Military Court of Appeals in 1975 and his vacancy on the committee was filled by the appointment of Judge Ronald Innes in 1976. Professor Earl B. Shurtz resigned as a member of the committee on November 11, 1977, and his vacancy was filled by the appointment of Judge Bob Abbott, Judge of the Kansas Court of Appeals. Judge Don Musser died in January, 1982. This publication is dedicated to him. Chief Judge J. Richard Foth of the Kansas Court of Appeals and Judge John Brookens were appointed as members of the committee in April, 1982.

The Committee extends its thanks to the Governor's Committee on Criminal Administration for the grant of federal assistance to the Judicial Council under provisions of Title I of the Omnibus Crime Control and Safe Streets Acts of 1968 to make this publi-

cation possible. The committee also expresses its appreciation to the many law enforcement agencies and prosecutors for their support in obtaining approval of the grant.

The Committee is indebted to others who made it possible to prepare this book. We extend our thanks to the Kansas Judicial Council for its financial support and to its Research Director, Randy M. Hearrell, Research Assistant Matthew B. Lynch, and Fiscal Officer & Administrative Assistant Nell Ann Gaunt. We are grateful to the Kansas judges and lawyers who have furnished criticism and comment. I express my personal thanks to the committee members and staff for their cooperation and dedication to this work. The Committee continues to encourage comment and criticism from lawyers and judges toward the objective of improving the administration of justice.

Herbert W. Walton, Chairman,
Kansas Judicial Council Advisory
Committee on Criminal Jury Instructions

Dedication



It seems appropriate that this Committee dedicate *PIK-Criminal 2d* to the memory of Judge Donald H. Musser. In 1963 he started the movement for pattern jury instructions to be used in Kansas. He is entitled to be remembered as the father of the Kansas movement.

Believing that the average quality of jury instructions in this, as well as almost all other states, was intolerable, he was the first to react by doing something of significant value.

He personally, and one by one, selected and committed trial judges to undertake a complete redrafting of instructions so that they would be an accurate statement, understandable by "the man on the street." A measure of his dedication and power of persuasion, is that he accomplished this when it appeared that everyone's expense, as well as his time, would be complete gifts to the project.

True to his beginning, he served thereafter as the leader of the group. He was chairman of the civil committee until his death on January 14, 1982, and served a two year term as chairman of the criminal committee. He capably handled his administrative tasks which often were taxing of both time and

ability. Throughout the work of each committee, he carried his full share of drafting assignments.

Perhaps the judge's greatest contribution came from the direction he gave as to policy. His faith in the value of simple and crisp language carried over into his questions to committee members: "Did the court really say that?" "But what really does all that mean?" His statements had a similar ring: "The first sentence is all that is needed." "Real people just don't talk like that." "We don't use those kinds of words."

Don loved simple maxims and enjoyed passing them on to others. One of his latest was, "The opera isn't over until the fat lady sings." If the word "opera" may be considered a figure of speech to symbolize something a person enjoys, then his "opera" was hunting, his activity on his last day. We hope the singing of the wind in the trees, the pianissimo of shuffling feet in the grass, and the staccato forte of the firing gun were good music to his ears on that last day.

We deeply regret, however, that the final song had to come when he yet had so much to give and so much that he wished to accomplish and enjoy.

For the future, the words must come from the past. But come they will, by recall, over and over, to those of us who worked with him.

We will continue to benefit from his inspiration and the message in his words as we rehear them: "But what really does all that mean?" "Real people just don't talk like that."

Frederick Woleslagel,
For and by request of the Committee

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

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51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

The defendant is charged with the crime of _____ . The defendant pleads not guilty.

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

You may consider the testimony of witnesses, an article or document marked as an exhibit, or any other matter admitted in evidence such as an admission or stipulation. You should consider only testimony and exhibits admitted into evidence.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness testifies.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

The second paragraph of the above instruction relative to the elements of the crime must be supplemented by setting forth the elements in detail for the particular crime. These elements will be found by referring to that section of this book which deals with that crime.

Lesser included offenses should not be given in introductory instructions. A judge cannot be sure if any lesser included offenses are proper for jury consideration until he hears the evidence. Two factors suggest, however, the desirability of alerting the jury to the possibility of lesser offense consideration: (1) A judge's communication should be consistent from the start to the finish of the trial, and (2) It seems somewhat unfair for the jury to first learn at the end of the trial that there may be a number of crimes to consider in addition to the crime charged. Notice might be given in this way:

Depending upon what the evidence is, it may be required that you also consider one or more less serious crimes than the one I have defined. If this becomes necessary, I will tell you in my final instructions and I will give you specific definitions at that time.

If a judge wishes to give some instructions before the introduction of evidence, it is authorized by K.S.A. 22-3414(3), and we believe it is also within a judge's inherent authority.

Comment

The Committee recommends that the above basic instructions be given to the jury before the introduction of evidence. It is believed that by so doing the jury will have a better understanding of its function and this should be helpful to the jury in evaluating the evidence.

In addition to the above instructions, some courts may desire to give PIK 2d 51.05, Rulings of the Court. It should not be objectionable to do this, but it is believed most judges would consider such an instruction out of place as an introductory instruction and consequently it is not included.

That part of the instruction relating to the right of a jury "to use common knowledge and experience" was inferentially approved in *State v. Fenton*, 228 Kan. 658, 666, 620 P.2d 813 (1980).

PATTERN INSTRUCTIONS FOR KANSAS

**51.02 CONSIDERATION AND BINDING APPLICATION
OF INSTRUCTIONS**

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.

Notes on Use

For authority, see K.S.A. 22-3403(3).

Comment

The implication of *State v. McClanahan*, 212 Kan. 208, 510 P.2d 153 (1973) is that this instruction complies with the statutory directive and the law of Kansas relative to the province of a jury.

PATTERN INSTRUCTIONS FOR KANSAS

**51.03 CONSIDERATION AND GUIDING APPLICATION
OF INSTRUCTIONS**

The instruction which originally appeared as PIK 51.03 is deleted because it was disapproved for use by *State v. McClanahan*, 212 Kan. 208, 213, 510 P.2d 153 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

51.04 CONSIDERATION OF EVIDENCE

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

PATTERN INSTRUCTIONS FOR KANSAS

51.05 RULINGS OF THE COURT

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Notes on Use

This instruction should be given in ordinary cases. *State v. Boyd*, 222 Kan. 155, 159, 563 P.2d 446 (1977), would suggest that comment on the truth or the falsity of evidence would not be approved in Kansas. The questioned judicial action in *Boyd*, however, related to a judge's question to a witness rather than to comments on the evidence.

PATTERN INSTRUCTIONS FOR KANSAS

51.06 STATEMENTS AND ARGUMENTS OF COUNSEL

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

PATTERN INSTRUCTIONS FOR KANSAS

51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

You must consider this case without favoritism or sympathy for or against either party. Neither sympathy nor prejudice should influence you.

Notes on Use

The Committee recommends that unless there are very unusual circumstances the above instruction should not be given. Ordinarily PIK 2d 52.09, Credibility of Witnesses, should be a sufficient guide for the jury. Additionally, the above instruction is objectionable in that it tells the jury what not to do rather than what to do.

Comment

In *State v. Sully*, 219 Kan. 222, 547 P.2d 344 (1976), the Supreme Court approved not giving this precautionary instruction unless there are very unusual circumstances as being "the better practice." To give this instruction, however, "would not constitute error."

If a precautionary instruction of this type is to be given, it appears that one "in substantial accord" with this instruction will be approved. *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

51.08 FORM OF PRONOUN—SINGULAR AND PLURAL

The instruction originally contained in PIK is deleted because the Committee believes the proper practice is for a judge to tailor his instructions to the parties by generally using their names. Where a pronoun is used, it should express both the sex and the number to which the pronoun refers.

PATTERN INSTRUCTIONS FOR KANSAS

**51.09 IF JURY RECEIVES INSTRUCTIONS BEFORE
CLOSE OF CASE**

The instruction originally contained in PIK is omitted as the Committee now concludes it is unnecessary.

PATTERN INSTRUCTIONS FOR KANSAS

51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining the guilt or innocence of the defendant. The disposition of the case thereafter is a matter for determination by the Court.

Notes on Use

The Committee recommends that neither in *voir dire* nor in argument should the matter of sentence or other disposition be mentioned.

Comment

The instruction was approved in *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973).

CHAPTER 52.00
EVIDENCE AND GUIDES FOR ITS
CONSIDERATION

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PATTERN INSTRUCTIONS FOR KANSAS

52.01 INFORMATION—INDICTMENT

The Committee recommends that no separate instruction be given.

Comment

K.S.A. 22-3414(3) provides in part “. . . and the judge may, in his discretion, *after the opening statements*, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented.”

Instruction on the elements for the crime charged, the burden of proof, presumption of innocence, reasonable doubt (PIK 2d 52.02) and credibility of witnesses (PIK 2d 52.09) could be given following opening statements.

K.S.A. 22-3414 does not require that the instructions be in writing.

PATTERN INSTRUCTIONS FOR KANSAS

52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

The law places the burden upon the State to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must assume that the defendant is innocent unless you are convinced from all of the evidence in the case that he is guilty.

You should evaluate the evidence admitted in this case and determine the innocence or guilt of the defendant entirely in accordance with these instructions. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant not guilty. If you have no reasonable doubt as to the truth of any of them, you should find the defendant guilty.

Notes on Use

This instruction must be given in each criminal case and should follow the element instruction for the crime charged. See K.S.A. 21-3109. Defendant presumed innocent; reasonable doubt as to guilt.

See K.S.A. 60-401(d) for burden of proof.

Comment

This instruction was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980). *State v. Peoples*, 227 Kan. 127, 135, 136, 605 P.2d 135 (1980) stated that when separate offenses are involved, there is no need for there to be a statement about reasonable doubt as to each offense charged.

State v. Behler, 230 Kan. 278, 281, 634 P.2d 1071 (1981), held that defense counsel should have been permitted to use the phrase "beyond a reasonable doubt" in *voir dire* and argument. The opinion is directed only to counsel's permissible scope of argument, it is not a criticism of PIK 52.02.

See Notes on Use, Presumption of Innocence (PIK 2d 52.03) and Reasonable Doubt (PIK 2d 52.04).

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52.03 PRESUMPTION OF INNOCENCE

The Committee recommends that there be no separate instruction defining presumption of innocence.

Notes on Use

PIK 2d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law of presumption of innocence. For authority see K.S.A. 21-3109.

Comment

Failure to give a detailed instruction was approved in *State v. Taylor*, 212 Kan. 780, 784 (1973). See Comment to PIK 2d 52.02.

PATTERN INSTRUCTIONS FOR KANSAS

52.04 REASONABLE DOUBT

The Committee recommends that there be no separate instruction defining reasonable doubt.

Notes on Use

PIK 2d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to reasonable doubt. See “Notes on Use” thereto.

For authority, see K.S.A. 21-3109.

Comment

The Committee believes that the words “reasonable doubt” are so clear in their meaning that no explanation is necessary.

The Kansas Supreme Court approved this principle in *State v. Bridges*, 29 Kan. 138, 141 (1882), by stating: “It has often been said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase ‘reasonable doubt’ than that which is imparted by the words themselves.”

State v. Davis, 48 Kan. 1, 10, 28 P. 1092, (1892), states: “It is to be presumed that the jury understood what the words ‘reasonable doubt’ meant. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language.”

The position of the Committee opposing any separate instruction on reasonable doubt was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980).

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52.05 STIPULATIONS AND ADMISSIONS

**The following facts have been agreed to by the parties
and are to be considered by you as true:**

- (1) _____.
- (2) _____.
- (3) _____.

Comment

K.S.A. 22-3217 provides for pretrial in criminal matters. The Committee suggests the use of pretrial the same as in civil cases to determine facts in controversy and questions of law which may arise during the trial. The statutory tools for disclosures and admissions in the criminal procedural code are as follows:

K.S.A. 22-3211, Depositions.

K.S.A. 22-3212, Discovery and inspection.

K.S.A. 22-3213, Production of statements and reports.

**52.06 PROOF OF OTHER CRIME—LIMITED
ADMISSIBILITY OF EVIDENCE**

Evidence has been admitted tending to prove that the defendant committed (crimes) (a crime) other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's (motive) (opportunity) (intent) (preparation) (plan) (knowledge) (identity) (absence of mistake or accident).

Notes on Use

For authority, see K.S.A. 60-455.

Your attention is directed to K.S.A. 60-447(b), Character trait as proof of conduct, and K.S.A. 60-445, Discretion of judge to exclude admissible evidence.

Comment

The question of the admissibility of evidence of other crimes is one that has caused some confusion in the trial courts as well as differing interpretations among members of the appellate courts. For this reason, the members of the PIK Committee feel that a full examination of the issue is justified.

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977); *State v. Cross*, 216 Kan. 511, 517, 532 P.2d 1357 (1975); *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). Although the same evidentiary question exists in civil actions, since the principal focus of most civil actions is not the plaintiff's or defendant's commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and therefore committed the crime with which he has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin* 129-130 (Special Report, November 1961). While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted by the court in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

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“First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed. Thus, in several ways the defendant is prejudiced by such evidence.”

In recognition of the probable prejudice resulting from the admission of independent offenses, the Kansas Supreme Court has taken a very restrictive stance and has announced that the rule is to be strictly enforced and that evidence of other offenses is not to be admitted without a good and sound reason. *State v. Wasinger*, 220 Kan. 599, 602, 556 P.2d 189 (1976). Such evidence may *not* be admitted for the purpose of proving the defendant's inclination, tendency, attitude, propensity, or disposition to commit crime. *State v. Bly*, 215 Kan. at 175.

II. ADMISSION UNDER K.S.A. 60-455

The starting point in any examination of the admissibility of other crimes or civil wrongs should be K.S.A. 60-455. The statute, which provides for the exclusion of any evidence tending to show the defendant's general disposition to commit crimes, reads as follows:

“Subject to K.S.A. 60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”

Under the statute, evidence of other crimes may be admitted following a separate hearing if relevant to prove one of the eight factors specified in the statute and if the evidence meets the other criteria of admissibility set out below.

A. Separate Hearing Required. Admissibility of evidence of other crimes under K.S.A. 60-455 should be determined in advance of trial in the absence of the jury. See *State v. Wasinger*, 220 Kan. at 602-603; *State v. Moore*, 218 Kan. 450, 454, 543 P.2d 923 (1975); *State v. Gunselman*, 210 Kan. 481, 488, 502 P.2d 705 (1972). The issue might well be determined at a pretrial hearing or an informal conference. As noted by a distinguished commentator, the task of determining admissibility can best be performed in an organized and unhurried atmosphere, in which the parties can fully explore the evidentiary pattern. Slough, *Other Vices, Other Crimes; Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 166 (1978). The hearing should be held prior to trial to avoid delaying the progression of the trial. The purpose of the hearing is to apply the three-part test set forth below.

B. Test of Admissibility. In accordance with the restrictive stance of the Court regarding admission of other crimes or civil wrongs, the trial court must employ a three-part test to determine whether such evidence may be admitted. Before admitting the evidence, the trial court must find that the other crime is (1) *relevant* to prove (2) *a material fact that is substantially in issue*, and (3) then *balance* the probative value of the evidence against its *prejudicial effect*.

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(1) *relevancy*. Initially, the trial court must determine whether the prior conviction is relevant to prove one of the eight factors specified in K.S.A. 60-455. The determinator of relevancy must be based upon some knowledge of the facts, circumstances or nature of the prior offense. *State v. Cross*, 216 Kan. at 520. Relevancy is more a matter of logic and experience than of law. Evidence is relevant if it has any tendency to prove or disprove a material fact, or if it renders the desired inference more probable than it would be without the evidence. *State v. Faulkner*, 220 Kan. 153, 155, 551 P.2d 1247 (1976). If a particular factor, enumerated in the statute, is not an issue in the case, evidence of other crimes to prove that particular factor is irrelevant. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977).

(2) *substantial issue*. Once the trial court has found the other crimes evidence relevant to prove one of the eight statutory factors, it must then consider whether the factor to be proven is a substantial issue in the case. To be *substantial*, it must have *probative value* and *materiality*.

(a) *materiality*. Materiality requires that the fact to be proved is significant under the substantive law of the case and properly at issue. *State v. Faulkner*, 220 Kan. at 156. To be material for purposes of K.S.A. 60-455, the fact must have a legitimate and effective bearing on the decision of the case and be in dispute. *State v. Faulkner*, 220 Kan. at 156.

(b) *probative value*. Probative value consists of more than logical relevancy. Evidence of other crimes has no real probative value if the fact it is supposed to prove is not substantially in issue. In other words, the factor or factors being considered (e.g., intent, motive, knowledge, identity, etc.) must be substantially in issue before a trial court should admit evidence of other crimes to prove such factors. *State v. Bly*, 215 Kan. at 176.

For example, where criminal intent is obviously proved by the mere doing of an act, the introduction of other crimes evidence has no probative value to prove intent—i.e. where an armed robber extracts money from a store owner at gunpoint, his intent is not genuinely in dispute. Likewise, where a defendant admits that he committed the act and his presence at the scene of the crime is not disputed, a trial court should not admit other crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176.

(3) *balancing*. As the third step of the test, the trial court must weigh the probative value of the evidence for the limited purpose for which it is offered against the risk of undue prejudice. *State v. Marquez*, 222 Kan. at 445. If the potential for natural bias and prejudice overbalances the contribution to the rational development of the case, the evidence must be barred. *State v. Bly*, 215 Kan. at 175. The balancing process is discussed extensively in *State v. Davis*, 213 Kan. 54, 57-59, 515 P.2d 802 (1973).

C. *Eight Specific Factors*. Since evidence of other crimes and civil wrongs may be admitted under K.S.A. 60-455 only when relevant to prove one of the eight statutory factors, it is important to understand what evidence is material to prove each of the specified factors. As noted above, prior to admitting evidence to prove one of these factors, it is important to establish the nature, facts, and circumstances of the other crimes.

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(1) *motive*. Motive may be defined as the cause or reason which induces action. While evidence of other crimes or civil wrongs may occasionally prove to be relevant to the issue of motive (*State v. Craig*, 215 Kan. 381, 382-383, 524 P.2d 679 [1974]), it is more often the case that the prior crime has no relevance to the issue. (See *e.g.*, *State v. McCorgary*, 224 Kan. 677, 684-685, 585 P.2d 1024 [1978].) A prior crime would be relevant to the issue of motive where the defendant committed a subsequent crime to conceal a prior crime or to conceal or destroy evidence of a prior crime. It is not proper to introduce evidence of other crimes on the issue of motive merely to show similar yet unconnected crimes.

(2) *opportunity*. Opportunity simply means that the defendant was at a certain place at a certain time and consequently had the opportunity to commit the offense charged. Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. 98, 112 (1977); *State v. Russell*, 117 Kan. 228, 230 Pac. 1053 (1924). Opportunity also includes the defendant's physical ability to commit the offense. Slough, *Other Vices, Other Crimes; Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 164 (1978). In order to introduce evidence of another crime to prove opportunity, the two crimes must be closely connected in time and place. *Example*: If a defendant is charged with burglary during which a larceny was committed, evidence showing that the defendant committed the larceny is admissible as tending to show that he also committed the burglary.

Where evidence of a separate crime that is not an element of the present crime is relevant to show opportunity, in order to avoid probable prejudice it may be preferable to have the witness to the separate crime testify regarding his or her observations of the defendant, without testifying concerning the details of the other criminal activity.

(3) *intent*. For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal; in that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

Examples: Where the defendant broke a jewelry store window, took the items on display, and fled, it was clear that the crime was intentional and evidence of a prior crime should not have been admitted. *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1977). Intent is not at issue where there is clear evidence of malice and willfulness. *State v. Henson*, 221 Kan. 635, 645, 562 P.2d 51 (1977). Intent was properly in issue where the charge of attempted burglary was supported by circumstantial evidence and the defense alleged that the defendant was on his way to see his girlfriend. *State v. Wasinger*, 220 Kan. at 602-603.

(4) *preparation*. Preparation for an offense consists of devising or arranging

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means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts that very logically convince the reasonable mind that the actor intended that prior activities culminate in the happening of the crime in issue may have strong probative value in showing preparation. *State v. Marquez*, 222 Kan. 446; Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

(5) *plan*. Plan refers to an antecedent mental condition that points to the doing of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Strictly speaking, *the exception is limited to evidence which shows some causal connection between the two offenses*, so that proof of the prior offense could be said to evidence a preexisting design, plan, or scheme directed toward the doing of the offense charged. Something more than the doing of similar acts is required to have probative value in showing plan, because the object is not merely to negate an innocent intent or show identical offenses, but to prove the existence of a definite project directed toward the doing of the offense charged. *State v. Marquez*, 222 Kan. at 446-447; *State v. Gourley*, 224 Kan. 167, 170, 578 P.2d 713 (1978); *State v. McBarron*, 224 Kan. 710, 713, 585 P.2d 1041 (1978); Slough articles, 20 Kan. L. Rev. at 419-420 and 26 Kan. L. Rev. at 163. In *State v. Fabian*, 204 Kan. 237, 461 P.2d 799 (1969), evidence of prior crimes was properly admitted to show a preconceived "creeping" plan to steal from a series of stores.

(6) *knowledge*. Knowledge signifies an awareness of wrongdoing. Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 419; *State v. Faulkner*, 220 Kan. at 156. Knowledge is important as an element in crimes requiring specific intent, such as receiving stolen property, forgery (*State v. Wright*, 194 Kan. 271, 275-276, 398 P.2d 339 [1965]), uttering forged instruments, making fraudulent entries, and possession of illegal drugs (*State v. Faulkner*, 220 Kan. at 156). See Slough, 20 Kan. L. Rev. at 419.

(7) *identity*. Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness is important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975).

For examples, see *State v. King*, 111 Kan. 140, 206 Pac. 883 (1922) (where the circumstances surrounding the deaths of three victims were very similar); *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973) (where the burglar followed a similar elaborate ritual in four separate burglaries); and *State v. Johnson*, 210 Kan. 288 (where two prior homicides were accomplished in a manner almost identical to the offense charged.)

(8) *absence of mistake or accident*. Absence of mistake simply denotes an absence of honest error; evidence of prior acts illustrates that the doing of the criminal act in question was intentional. *State v. Faulkner*, 220 Kan. at 156-157; Slough, 20 Kan. L. Rev. at 422.

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D. *Limiting Jury Instruction Required.* In every case where evidence of other crimes is admitted solely under the authority of K.S.A. 60-455, the trial court must give an instruction [PIK 2d 52.06] limiting the purpose for which evidence of similar offenses is to be considered by the jury. *State v. Bly*, 215 Kan. at 176. The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. An instruction concerning the purpose of evidence of other offenses should include only those factors of K.S.A. 60-455 that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. at 176.

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. at 686; *State v. Marquez*, 222 Kan. at 447-448. The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. Reversal may also be required where no limiting instruction is given, even though not requested by the defendant. *State v. Roth*, 200 Kan. 677, 680, 438 P.2d 58 (1968).

E. *Other Considerations.* There are several other considerations relating to the introduction of other crimes evidence under K.S.A. 60-455 that should be considered by the trial court.

* *conviction not required.* To be admissible under 60-455, it is not necessary for the state to show that the defendant was actually convicted of the other offense. *State v. Henson*, 221 Kan. at 644, *State v. Powell*, 220 Kan. 168, 172, 551 P.2d 902 (1976). The statute specifically includes other crimes or *civil wrongs*. An acquittal of the defendant of a prior offense does not bar evidence thereof where otherwise admissible; the acquittal bears only upon the weight to be given to such evidence. *State v. Darling*, 197 Kan. 471, 419 P.2d 836 (1966).

* *acquittal as a collateral estoppel.* When an application is made to admit evidence of a prior offense of which the defendant has been acquitted, an additional consideration may present itself—the possibility of collateral estoppel. When an issue of ultimate fact has once been determined by a valid and final verdict or judgment, that issue cannot again be litigated between the same parties in any future lawsuit under the rule of collateral estoppel. See *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970). Thus, when a prior similar offense is offered as evidence on a particular issue of material fact and the defendant was previously tried and acquitted of the offense based on a determination of that issue, collateral estoppel nullifies the probative value of the evidence of the former offense. Then such evidence should not be admitted. *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981).

* *prior or subsequent crime.* Evidence of either prior or subsequent crimes may be introduced pursuant to 60-455 if the other requirements of admission are met. *State v. Carter*, 220 Kan. 16, 23, 551 P.2d 851 (1976); *State v. Bly*, 215 Kan. at 176-177; *State v. Morgan*, 207 Kan. 581, 582, 485 P.2d 1371 (1971).

* *remoteness in time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens.

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State v. Cross, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction); *State v. Fannan*, 167 Kan. 723, 207 P.2d 1176 (1949) (proper admission of 17-year-old conviction); *State v. Owen*, 162 Kan. 255, 176 P.2d 564 (1947) (28-year-old conviction excluded for lack of probative value).

* *admissibility as to one of several crimes*. Evidence of a prior offense need not be admissible as to every offense for which the defendant is being tried. *State v. McGee*, 224 Kan. 173, 177, 578 P.2d 269 (1978). In such instances, however, the trial court should instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted.

* *admission in civil cases*. K.S.A. 60-455 applies to civil as well as criminal cases. The trial court is given a wider latitude in admitting evidence of other crimes in civil cases. See *Frame, Administrator v. Bauman*, 202 Kan. 461, 466, 449 P.2d 525 (1969).

* *sex offenses*. The court has apparently taken a more liberal view regarding admission of evidence in prosecutions for sex crimes. See *State v. Fisher*, 222 Kan. 76, 563 P.2d 1012 (1977); *State v. Gonzales*, 217 Kan. 159, 535 P.2d 988 (1975); *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974). For commentary, see Slough, *Other Vices, Other Crimes, Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. at 175-176; Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 119.

* *presentation of other crime in case-in-chief*. Evidence of other crimes admitted pursuant to K.S.A. 60-455 should be introduced in the state's case-in-chief rather than by way of cross-examination of the defendant. *State v. Harris*, 215 Kan. 961, 509 P.2d 101 (1974); *State v. Roth*, 200 Kan. 677, 438 P.2d 58 (1968).

III. ADMISSION INDEPENDENT OF K.S.A. 60-455

A. *Separate Hearing Required*. As with evidence admitted pursuant to K.S.A. 60-455, it is the better practice to determine the admissibility of evidence of other crimes to be admitted independently of that statute in advance of trial and in the absence of the jury. See discussion in section A above.

B. *Categories of Independent Admission*. There are several instances where evidence of prior crimes or civil wrongs may be introduced into evidence independently of 60-455, pursuant either to express statutory provisions or Kansas case law.

(1) *rebuttal of good character evidence*. Sections 60-446, 60-447, and 60-448 of the Kansas Code of Civil Procedure allow evidence to be introduced by the defendant regarding a trait of his or her character either as tending to prove conduct on a specified occasion or as tending to prove guilt or innocence of the offense charged. (See specifically, K.S.A. 60-447). *Only after the defendant has introduced evidence of good character, may the state*, in cross-examination or

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rebuttal, *introduce evidence of prior convictions* and bad conduct relevant to the specific character trait or the issue of guilt.

(a) *evidence of specific instances of bad conduct.* Section 60-447 allows evidence of specific instances of conduct to prove a trait to be bad only if the conduct resulted in a conviction.

(b) *character trait for care or skill.* Section 60-448 disallows the use of evidence of a character trait relating to care or skill to prove the degree of care or skill used by that person on a specified occasion.

See generally, State v. Sullivan, 224 Kan. 110, 124, 578 P.2d 1108 (1978); *State v. Bright*, 218 Kan. 476, 477-479, 543 P.2d 928 (1975); Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 105-108.

(2) *proof of habit to show specific behavior.* Evidence of habit or custom normally admissible under K.S.A. 60-449 and 60-450 to prove specific behavior is *not* admissible when the evidence introduced to show habit or custom consists of a series of similar criminal acts or civil wrongs. The two sections are not among those specifically mentioned in K.S.A. 60-455 and may not support the introduction of evidence of other crimes or civil wrongs to prove a defendant's disposition to commit crimes or civil wrongs. It should be noted that such evidence may be admissible under the *identity* exception to K.S.A. 60-455 or independently under the *character* provisions discussed above. *Cf., Slough, Other Vices, Other Crimes*, 20 Kan. L. Rev. at 413.

(3) *res gestae.* Acts done or declarations made before, during, or after the happening of the principal fact may be admissible as part of the *res gestae* where the acts are so closely connected with it as to form in reality a part of the occurrence. *State v. Gilder*, 223 Kan. 220, 228, 574 P.2d 196 (1977); *State v. Ferris*, 222 Kan. 515, 516-517, 565 P.2d 275 (1977).

(4) *relationship or continuing course of conduct between defendant and the victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455, if the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. *State v. Wood*, 230 Kan. 477, 638 P.2d 938 (1982), and *State v. Crossman*, 229 Kan. 384, 624 P.2d 461 (1981).

(5) *other crime as element of crime charged.* Evidence of a prior conviction is admissible independent of 60-455 if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles* 209 Kan. 676, 679, 498 P.2d 40 (1972). Where evidence of a prior conviction is admitted for this purpose, the trial court should give a limiting instruction as to its use by the jury. *Cf., State v. Gander*, 220 Kan. 88, 90-91, 551 P.2d 797 (1976); *State v. Martin*, 208 Kan. 950, 951-953, 495 P.2d 89 (1972). If the defendant is charged with several crimes, the trial court should instruct the jury regarding its specific application to the particular crime. Where evidence of a prior offense is relevant *solely* for the purpose of enhancing the length of the sentence imposed upon the defendant, the prior conviction should not be introduced as evidence during the trial, but should be reserved until the sentencing of the defendant. *See generally, Note, Evidence: Prior Convictions—The Duty to Provide Limiting Instructions*, 12 Washburn L. J. 111 (1972).

(6) *admissible evidence of the crime charged which discloses other crimes.* Evidence tending directly to establish the crime charged is not rendered

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inadmissible because it discloses the commission of another and separate offense. Testimony about other crimes may be admissible as a part of the background and circumstances present when the defendant made damaging admissions which connected him with the crime charged. *State v. Schlicher*, 230 Kan. 482, 639, P.2d 467 (1982); *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980), reaffirming *State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976).

(7) *rebuttal of credibility evidence*. Once the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior crimes for the purpose of impairing the defendant's credibility. K.S.A. 60-420, 60-421, 60-422. The impeachment evidence must be limited to evidence of a conviction of a crime involving dishonesty or false statement. The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Trucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Trucker v. Lower*, 200 Kan. at 5. See also, *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976).

(8) *other crimes of a witness other than a defendant*. K.S.A. 60-455 does not apply to a witness in a criminal case other than the accused, and evidence that such a witness may have committed a crime or civil wrong may not be introduced thereunder. Evidence of prior criminal convictions of a witness is subject to the restrictions found in K.S.A. 60-421 where a witness' credibility can only be impeached by crimes involving dishonesty unless that witness has introduced evidence solely for the purpose of supporting his or her credibility. *State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980).

(9) *rebuttal of entrapment defense*. If the defendant introduces evidence to establish the defense of entrapment (K.S.A. 21-3210), the state may introduce relevant evidence of the defendant's prior disposition to commit such crimes. *State v. Amodei*, 222 Kan. 140, 142-143, 563 P.2d 440 (1977); *State v. Reichenberger*, 209 Kan. 210, 495 P.2d 919 (1972). See also, Note, *Criminal Law: Kansas' Statutory Entrapment Defense in Narcotic Sales Cases*, 12 Washburn L. J. 231 (1973); Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 Washburn L. J. 64 (1972).

(10) *rebuttal of specific statement*. The state may introduce evidence of other crimes to specifically rebut a witness' incorrect testimony tending to establish a defense. *State v. Burnett*, 221 Kan. 40, 42-43, 558 P.2d 1087 (1976); *State v. Faulkner*, 220 Kan. at 158-159. The use and extent of rebuttal rests in the sound discretion of the trial court. *State v. Burnett*, 221 Kan. at 43.

IV. CONCLUSIONS AND RECOMMENDATIONS

The trial court should use great caution in admitting evidence of other crimes. There will be a great temptation by prosecutors to introduce prior crimes evidence to secure convictions. The trial court must be aware of the high degree of prejudice inherent in any evidence of other crimes. This prejudice must be weighed against the probative value of the evidence. Where the evidence is offered pursuant to K.S.A. 60-455, the other parts of the three-part test must be applied. In addition, other crimes evidence should not be admitted where the other evidence of guilt is overwhelming and the prior crimes evidence would serve only as an overkill mechanism.

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**52.07 MORE THAN ONE DEFENDANT—LIMITED
ADMISSIBILITY OF EVIDENCE**

You should give separate consideration to each defendant. Each is entitled to have his case decided on the evidence and the law which is applicable to him.

Any evidence which was limited to (name specific defendant) should not be considered by you as to any other defendant.

Notes on Use

This instruction should be given only when there is more than one defendant. See K.S.A. 22-3204, Joinder of defendants; separate trials.

Comment

In *State v. Cameron and Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975) this instruction was approved as appropriate to give in a case of multiple defendants charged in the same information.

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52.08 AFFIRMATIVE DEFENSES—BURDEN OF PROOF

The defendant claims as a defense that (*here describe the defense claimed*). Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant. If the defense asserted causes you to have a reasonable doubt as to the defendant's guilt, you should find the defendant not guilty.

Notes on Use

This instruction should be given in connection with the instruction defining the applicable defense. See *e.g.*

- 54.03 Ignorance or Mistake of Fact
- 54.04 Ignorance or Mistake of Law-Reasonable Belief
- 54.11 Intoxication—Involuntary
- 54.13 Compulsion
- 54.14 Entrapment
- 54.17 Use of Force in Defense of a Person
- 54.18 Use of Force in Defense of a Dwelling
- 54.19 Use of Force in Defense of Property Other Than a Dwelling
- 55.04 Conspiracy—Withdraw as a Defense
- 55.10 Criminal Solicitation— Defense
- 56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
- 58.02 Affirmative Defenses to Bigamy
- 59.07 Worthless Check—Defense
- 59.33-B Unlawful Hunting—Defense
- 59.59 Piracy of Sound Recordings—Defenses
- 61.04 Compensation for Past Official Acts—Defense
- 62.02 Eavesdropping—Defense of Public Utility Employee
- 62.07 Criminal Defamation—Truth as a Defense
- 62.12 Unlawful Smoking—Defense of Smoking in Designated Smoking Area
- 64.04 Unlawful Use of Weapons—Affirmative Defense
- 64.11-B Unlawful Possession of Explosives—Defense
- 65.05 Promoting Obscenity—Affirmative Defenses
- 65.10-A Dealing in Gambling Devices—Defense
- 65.12-A Possession of a Gambling Device—Defense
- 65.16 Cruelty to Animals—Defense

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52.09 CREDIBILITY OF WITNESSES

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

Notes on Use

This instruction should be given in every criminal case. See K.S.A. 22-3415, Laws applicable to witnesses. See K.S.A. 60-417, Disqualification of witness; interpreters. See also K.S.A. 60-419, 420, 412 and 422 covering necessity of knowledge or experience on the part of a witness, evidence relating to credibility, limitation on evidence of conviction of crimes and other limitations on admissibility of evidence affecting credibility.

Comment

This instruction was impliedly approved in *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976) and in *State v. Mack*, 228 Kan. 83, 89, 612 P.2d 158 (1980).

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52.10 DEFENDANT AS A WITNESS

The Committee recommends that there be no separate instruction on the defendant as a witness.

Comment

If the defendant testifies, his testimony, like that of any other witness, should be considered as set forth in PIK 2d 52.09, Credibility of Witnesses.

See PIK 2d 52.13, Defendant's Failure to Testify.

See PIK 2d 52.09, Credibility of Witnesses; and Notes on Use.

PATTERN INSTRUCTIONS FOR KANSAS

52.11 NUMBER OF WITNESSES

The Committee recommends that there be no separate instruction on the number of witnesses.

Comment

An instruction as to number of witnesses calls attention to a fact you are telling the jury not to consider.

If the court determines that such an instruction should be given because of special circumstances, the Committee suggests PIK 2d 2.21, Weighing Evidence—Number of Witnesses.

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52.12 TESTIMONY TAKEN BEFORE TRIAL

During this trial, evidence was presented by the reading of testimony of a witness taken under oath at another time and place. It is to be weighed by the same standards as other testimony.

Notes on Use

It is recommended that a similar instruction be given before any recorded testimony is read.

For authority relating to the taking and use of depositions see K.S.A. 22-3211 which provides that civil rules (K.S.A. 60-266) apply in taking depositions.

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52.13 DEFENDANT'S FAILURE TO TESTIFY

You should not consider the fact that the defendant did not testify in arriving at your verdict.

Notes on Use

For authority see K.S.A. 60-439. This instruction should not be given unless there is a specific request by the defendant.

Comment

This instruction was held to be adequate in *State v. Quinn*, 219 Kan. 831, 549 P.2d 1000 (1976).

In *State v. Perry*, 223 Kan. 230, 573 P.2d 989 (1977), the court held it was to be preferred that a trial court not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error.

The United States Supreme Court held the giving of the following instruction over the defendant's objections is constitutionally permissible:

Under the laws of this State a defendant has the option to take the stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant and this must not be considered by you in determining the question of guilt or innocence. *Lakeside v. Oregon*, 435 U.S. 333, 55 L.Ed.2d 319, 98 S. Ct. 1091 (1978).

The holding in *Perry* is in accordance with *Lakeside*. That does not, however, in any way alter the recommendation of the Committee: Don't give one unless requested by the defendant.

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52.14 EXPERT WITNESS

The Committee recommends that there be no separate instruction given on the expert as a witness.

Comment

See PIK 2d 2.50, Expert Witness and Notes on Use. The Committee believes that an expert should be considered as any other witness as set forth in PIK 2d 52.09, Credibility of Witnesses.

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52.15 IMPEACHMENT

The Committee recommends that there be no separate instruction as to impeachment.

Comment

The Committee believes that the standard instruction in PIK 2d 52.09, Credibility of Witnesses, provides adequate jury guides.

See PIK 2d 2.30, Impeachment.

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52.16 CIRCUMSTANTIAL EVIDENCE

The Committee recommends that no instruction on circumstantial evidence be given.

Comment

In *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 728 (1974), the Supreme Court stated: "This court now feels it is time to discard our former rule requiring a circumstantial evidence instruction to be given."

To give this type of instruction, however, was held to not constitute reversible error in *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

In *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981) the Supreme Court affirmed defendant's conviction although he requested this type instruction and the request was refused. The opinion notes the recommendation of the Committee.

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52.17 CONFESSION

The Committee recommends that a separate instruction on confession not be given.

Comment

State v. Stephenson, 217 Kan. 169, 535 P.2d 940 (1975) and *State v. Hardwick*, 220 Kan. 572, 552 P.2d 987 (1976) held that it was not necessary to give an instruction relating to a confession. The Committee's recommendation is noted with apparent approval in *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981).

52.18 TESTIMONY OF AN ACCOMPLICE

An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should question testimony of an accomplice if it is not supported by other evidence.

Comment

It has been held that the uncorroborated testimony of an accomplice is sufficient to convict, and that there was no duty to instruct where an instruction was not requested. When requested, the court stated in *State v. Patterson*, 52 Kan. 335, 34 Pac.784 (1893), the instruction must be given.

For complete discussion, see *State v. Wood*, 196 Kan. 599, 604, 413 P.2d 90 (1966); *State v. McLaughlin*, 207 Kan. 594, 485 P.2d 1360 (1971); and *State v. Shepherd*, 213 Kan. 498, 516 P.2d 945 (1973).

For discussion of corroborated testimony of an accomplice witness, see *State v. Parrish*, 205 Kan. 178, 468 P.2d 143 (1970).

If accomplice testimony is corroborated only in part and the defendant requests a cautionary instruction it is error to not give the instruction. This error, however, may not be reversible. *State v. Moody*, 223 Kan. 699, 576 P.2d 637 (1978).

Moody is followed in *State v. Bryant*, 227 Kan. 385, 388, 607 P.2d 66 (1980) and in *State v. Ferguson, Washington & Tucker*, 228 Kan. 522, 525, 618 P.2d 1186 (1980).

In *State v. Moore*, 229 Kan. 73, 622 P.2d 631 (1981) earlier cases are reviewed and the Supreme Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be error. Whether that error is prejudicial and reversible, however, must be determined upon the facts of the individual case." 229 Kan. at 80.

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52.19 ALIBI

The committee recommends that there be no separate instruction on alibi.

Notes on Use

For statutory authority relating to notice provisions for the introduction of alibi evidence see K.S.A. 22-3218.

Comment

The Committee's recommendation is approved in *State v. Skinner*, 210 Kan. 354, 359, 503 P.2d 168 (1972) and *State v. Murray*, 210 Kan. 748, 749, 504 P.2d 247 (1972).

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52.20 EYEWITNESS IDENTIFICATION

The law places the burden upon the state to identify the defendant. The law does not require the defendant to prove he has been wrongly identified. In weighing the reliability of eyewitness identification testimony you first should determine whether any of the following factors existed and if so the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting.
2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence.
3. Whether the witness had observed the defendant[s] on earlier occasions.
4. Whether a significant amount of time elapsed between the crime charged and any later identification.
5. Whether the witness ever failed to identify the defendant[s] or made any inconsistent identification.
6. The degree of certainty demonstrated by the witness at the time of any identification of the accused.
7. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.

Notes on Use

This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. The judge should omit from the instruction any factors that clearly do not relate to evidence introduced at trial.

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Comment

The appropriateness of this type of instruction was indicated by our Supreme Court in *Haines v. Goodlander*, 73 Kan. 183, 84 Pac. 986 (1906). In *Haines*, the Court stated that to comment by way of indicating to a jury the weight to give particular evidence would not be allowable, but “[Y]et there is no reason why the court should not in some cases refer to particular parts of the evidence and advise the jury as to the rules of law applicable to such facts.” 73 Kan. at 190-1.

State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981) sets forth “rules of law applicable to” facts attending eyewitness identifications. If “eyewitness identification is a critical part of the prosecution’s case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony.” 230 Kan. at 397.

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

The definitions and explanations in this chapter are in alphabetical order. A cross reference is provided to statutes and some instructions.

There are many terms which are defined and explained in the Kansas statutes. These statutory definitions have not been repeated here but ready reference is made to the particular statute where a definition or explanation of the term may be found.

In presenting them to the jury it is suggested that the following prefatory language be used.

“As used in these instructions the term _____ (means) (includes) _____.”

Accessory: See PIK 2d 54.05, Responsibility for Crimes of Another. The term “accessory” is not used in the Criminal Code.

Accost: To approach and speak to.

Act: K.S.A. 21-3110 (1)

Agent of a Corporation: K.S.A. 21-3206 (2)

Aggravated Juvenile Delinquency: K.S.A. 21-3611.

Another: K.S.A. 21-3110 (2)

Attempt: See K.S.A. 21-3301 (1) and PIK 2d 55.01, Attempt.

Believes: See Reasonable Belief.

Bet: K.S.A. 21-4302 (1)

Breach of Peace: A disturbance which alarms, angers or disturbs the peace and quiet of others. See PIK 2d 63.01, Disorderly Conduct.

Charge: A written statement presented to a court accusing a person of the commission of a crime and includes a complaint, information or indictment. K.S.A. 22-2202 (5); *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973).

Child Abuse: K.S.A. 21-3609; K.S.A. 1982 Supp. 38-1502 (b); PIK 2d 58.11, Abuse of a Child.

Child Neglect: K.S.A. 21-3604 and 3605; K.S.A. 1982 Supp. 38-1502 (b); PIK 2d 58.06, Nonsupport of a Child.

Compulsion: K.S.A. 21-3209 and PIK 2d 54.13, Compulsion.

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Conduct: K.S.A. 21-3110 (3)

Conduct, Wanton: K.S.A. 21-3201 (3)

Conduct, Willful: K.S.A. 21-3201 (2)

Consideration: K.S.A. 21-4302 (3) and PIK 2d 65.07, Gambling Definitions.

Conspiracy: K.S.A. 21-3302 (1).

Contraband: K.S.A. 21-3826 pertaining to contraband in a penal institution. PIK 2d 60.27, Traffic—Contraband in a Penal Institution.

Conviction: K.S.A. 21-3110 (4). See also K.S.A. 8-285 (b).

Copulation: Sexual relations.

Committed Person: K.S.A. 21-3423.

Crime: K.S.A. 21-3105.

Criminal Intent: K.S.A. 21-3201; exclusion 21-3202.

Criminal Purpose: A general intent or purpose to commit a crime when an opportunity or facility is afforded for the commission thereof. *State v. Houpt*, 210 Kan. 778, 782, 504 P.2d 570 (1972); *State v. Bagemehl*, 213 Kan. 210, 515 P.2d 1104 (1973), as the term is used in K.S.A. 21-3201.

Criminal Solicitation: PIK 2d 55.09, Criminal Solicitation.

Criminal Syndicalism: K.S.A. 21-3803.

Critical Stage: *State v. Roach*, 223 Kan. 732, 576 P.2d 1082 (1978)

Culpable Negligence: K.S.A. 21-3201 (3)

Custodial Interrogation: Questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *State v. Brunner*, 211 Kan. 596, 507 P.2d 233 (1973). Custodial interrogation under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminatory response from the suspect. *State v. Taylor*, 231 Kan. 171, 642 P.2d 989 (1982).

Deadly Weapon: A weapon dangerous to life or likely to produce bodily injury from the use made of it or with which death may easily and readily be produced. *Parman v. Lemmon*, 119 Kan. 323, 327, 244 Pac. 227 (1925).

Death: A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions

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ceased, attempts at resuscitation are considered hopeless; and in this event, death will have occurred at the time these functions ceased; or

A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before any vital organ is removed for purposes of transplantation.

These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding.

The instruction is identical to that contained in K.S.A. 77-202. The statute and the corresponding instruction were challenged as unconstitutional in *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977), on the basis of the dual standards of death and the lack of specifically enumerated criteria and approved as constitutional. In *Shaffer*, the defendant unsuccessfully challenged his conviction of first-degree murder on the bases that the victim could have been kept "alive" by artificial means and that the statute was inapplicable to criminal homicide cases.

State v. Shaffer, 229 Kan. 310, 624 P.2d 440 (1981), reaffirmed definition herein.

Deception: K.S.A. 21-3110 (5)

Defrauding an Innkeeper: K.S.A. 1982 Supp. 36-206.

Deliberately: PIK 2d 56.04, Homicide Definitions.

Deprive Permanently: K.S.A. 21-3110 (6)

Dwelling: K.S.A. 21-3110 (7)

Emergency: K.S.A. 21-4211 (2) (b)

Entice: K.S.A. 21-3509

Entrapment: K.S.A. 21-3210.

Escape: K.S.A. 21-3809 (2) PIK 2d 60.10, Escape from Custody.

Feloniously: The doing of the act with a deliberate intent to commit a crime which crime is of the grade or quality of a felony. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

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- Felony*: K.S.A. 21-3105 (1)
- Forcible Felony*: K.S.A. 21-3110 (8)
- Gambling*: K.S.A. 21-4303
- Gambling Device*: K.S.A. 21-4302 (4), PIK 2d 65.07, Gambling Definitions.
- Gambling Place*: K.S.A. 21-4302 (5), PIK 2d 65.07, Gambling Definitions.
- Gross Negligence*: K.S.A. 21-3201 (3).
- Hearing Officer*: K.S.A. 21-3110 (19) (d)
- Heat of Passion*: Any intense or vehement emotional excitement which was spontaneously provoked from the circumstances. *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); PIK 2d 56.04 (e), Homicide Definitions; *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979).
- Hypnosis*: K.S.A. 21-4007 (2)
- Intent to Defraud*: K.S.A. 21-3110 (9)
- Intentional*: K.S.A. 21-3201 (2), exclusion 21-3202.
- Intoxication or Intoxicated*: K.S.A. 21-3208.
- Jeopardy*: K.S.A. 21-3108 (1) (c)
- Judicial Officer*: K.S.A. 21-3110 (19) (c)
- Knowing or Knowingly*: K.S.A. 21-3201 (2)
- Law Enforcement Officer*: K.S.A. 21-3110 (10)
- Lewd Fondling or Touching*: In a prosecution for indecent liberties with a child (K.S.A. 21-3503 [1]), *lewd fondling or touching* may be defined as “a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the child or the offender or both.” *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977).
- Lottery*: K.S.A. 21-4302 (2)
- Maliciously*: PIK 2d 56.04, Homicide Definitions.
- Material*: K.S.A. 21-4301 (2) (b) (for obscenity)
- Merchandise*: K.S.A. 21-4403 (2) (a)
- Misdemeanor*: K.S.A. 21-3105
- Negligent Disregard*: A failure to observe, to notice and to heed that which a careful and prudent person would discern or consider as tending to endanger the safety of others. *State v. Miles*, 203 Kan. 707, 457 P.2d 166 (1969), as used in K.S.A. 8-529.

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Noxious Matter: K.S.A. 21-3733 (2)

Obscene Material: K.S.A. 21-4301 (2) (a) and K.S.A. 21-4301a(1);
See PIK 2d 65.03, Promoting Obscenity—Definitions.

Obtain: K.S.A. 21-3110 (11)

Obtains or Exerts Control: K.S.A. 21-3110 (12), *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974).

Offense: A violation of any penal statute of this state.

Overt Act: An act which constitutes a substantial step toward the completion of the crime. *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924). See PIK 2d 55.01, Attempt.

Owner: K.S.A. 21-3110 (13)

Party Line: K.S.A. 21-4211 (2) (a)

Passenger Vehicle: K.S.A. 21-3744.

Peace Officer: See Law Enforcement Officer.

Penal Institution: A penitentiary, state farm, reformatory, prison, jail, house of correction, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses. *State, ex rel., v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966).

Performance: K.S.A. 21-4301 (2) (c) (for obscenity)

Person: K.S.A. 21-3110 (14)

Personal Property: K.S.A. 21-3110 (15)

Possession: Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 152, 249 P.2d 633 (1952). Definition approved in *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977) (citing earlier approval in *State v. Neal*, 215 Kan. 737, 529 P.2d 114 [1974]). See comment under PIK 2d 64.06, Unlawful Possession of a Firearm—Felony.

Pregnancy: K.S.A. 21-3407 (3)

Premeditation: See PIK 2d 56.04, Homicide Definitions.

Presumption: An assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. K.S.A. 60-413.

Prima Facie Evidence: "As used in this instruction; 'prima facie evidence' is evidence that on its face is true, but may be overcome by evidence to the contrary." The above instruction was approved in *State v. Powell*, 220 Kan. 168, 175, 551 P.2d 902 (1976).

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Private Place: K.S.A. 21-4001 (2)

Probable Cause: Reasonable grounds. *State v. Howland*, 153 Kan. 352, 110 P.2d 801 (1941).

Property: K.S.A. 21-3110 (16).

Prosecution: K.S.A. 21-3110 (17).

Public Employee: K.S.A. 21-3110 (18).

Public Officer: K.S.A. 21-3110 (19). A list of public officers is included under this section.

Purposeful: K.S.A. 21-3201 (2)

Real Property or Real Estate: K.S.A. 21-3110 (20)

Reasonable Belief: A belief based on circumstances that would lead a reasonable person to that belief. *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

Reasonable Doubt: See PIK 2d 52.04, Reasonable Doubt. The words "reasonable doubt" are so clear in their meaning that no explanation is necessary.

Recklessness: K.S.A. 21-3201 (3)

Retailer: See K.S.A. 21-4404 pertaining to tie-in magazine sales.

Sale: K.S.A. 21-4403 (2) (c)

Scope of Authority: The performance of services for which an employee has been employed or which are reasonably incidental to his employment. See PIK 2d 7.04, Agent—Issue as to Scope of Authority.

Security Agreement: An agreement which creates or provides for a security interest. K.S.A. 84-9-105 (h) Uniform Commercial Code.

Security Interest: An interest in personal property or fixtures which secures payment or performance of an obligation. K.S.A. 84-1-201 (37) Uniform Commercial Code.

Sell: K.S.A. 21-4404 (2) (c)

Services: K.S.A. 21-3704 (2)

Sexual Abuse: K.S.A. 21-3501 et seq.; 21-3602, 3603; K.S.A. 1982 Supp. 38-1502 (c).

Sexual Intercourse: K.S.A. 21-3501 (1)

Solicit or Solicitation: K.S.A. 21-3110 (21)

Sports Contest: K.S.A. 21-4406 (2) (a)

Sports Participant: K.S.A. 21-4406 (2) (b)

State: K.S.A. 21-3110 (22)

Stolen Property: K.S.A. 21-3110 (23)

Temporarily Deprive: To take from the owner the possession, use or benefit of his property with intent to deprive the owner of

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the temporary use thereof. See PIK 2d 59.04, Unlawful Deprivation of Property.

Terror: An extreme fear that agitates body and mind. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

Terrorize: To reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

Threat: K.S.A. 21-3110 (24)

Unlawful Sexual Act: K.S.A. 21-3501 (2)

Wanton Conduct: K.S.A. 21-3201 (3)

Wanton Negligence: K.S.A. 21-3201 (3)

Wholesaler: K.S.A. 21-4404 (2) (b)

Willful Conduct: K.S.A. 21-3201 (2)

Willfully: K.S.A. 21-3201 (2) PIK 2d 56.04, Homicide Definitions.

Woman: K.S.A. 21-3501 (3)

Written Instrument: K.S.A. 21-3110 (25)

CHAPTER 54.00
PRINCIPLES OF CRIMINAL
LIABILITY

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54.01 PRESUMPTION OF INTENT

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority see *State v. Acheson*, 3 Kan. App.2d 705, 601 P.2d 375 (1979).

This instruction must not be confused with PIK 2d 54.01-A, General Criminal Intent. The above instruction is a rule of evidence and does not deal with the required element of criminal intent necessary for conviction in those cases where criminal intent is a necessary element of the offense. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

The instruction should not be given when no intent is required for the crime, that is, where the doing of the act prohibited is itself sufficient to constitute the crime, as provided by K.S.A. 21-3204. In that situation the recitals in the elements instruction provide all necessary information as to the offense and proof needed.

Comment

In *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), the Court held that from an instruction like the first sentence of prior PIK 54.01, standing alone, a jury could infer that it was incumbent upon the defendant to prove his lack of intent by some quantum of proof.

Sandstrom was not inconsistent with earlier Kansas cases holding that PIK 54.01, read as a whole, did not shift the burden to the defendant on the issue of intent. See *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), wherein the Court held PIK 54.01 valid where the jury is informed that the burden to prove criminal intent is on the prosecution beyond a reasonable doubt and that the presumption does not dispense with this burden nor nullify the presumption of innocence; and *State v. Woods*, 222 Kan. 179, 563 P.2d 1061 (1977), reaffirming *Lassley*. Nevertheless the present instruction is designed to make it crystal clear that the "presumption" is only a permissive inference, leaving the trier of fact free to consider or reject it.

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54.01-A GENERAL CRIMINAL INTENT

In order for the defendant to be guilty of the crime charged the state must prove that his conduct was intentional. Intentional means willful and purposeful and not accidental.

Intent or lack of intent, is to be determined or inferred from all of the evidence in the case.

Notes on Use

For authority see K.S.A. 21-3201 (1) and (2). This instruction is not recommended for general use. The PIK instruction defining the crime should cover either specific or general criminal intent as an element of the crime. This instruction should be used only where the crime requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

The above instruction should not be given where criminal intent is not a necessary element of the offense, as set out in K.S.A. 21-3201 (3) wanton conduct, 21-3204, absolute liability for misdemeanor and 21-3205, liability for crimes of another.

This instruction must not be confused with PIK 2d 54.01, Presumption of Intent, which is a rule of evidence and does not purport to charge the jury to find criminal intent necessary for conviction.

Comment

As to those offenses of guilt without criminal intent, in *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956), it is said: "The doing of an inhibited [sic] act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." See also *State v. Cruitt*, 200 Kan. 372, 436 P.2d 870 (1968), in which the Court said: "And where an act is made a crime by statute, without any express reference to intent, this court has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed."

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54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE

There is a presumption that a person has an intent to permanently deprive the owner of the possession, use or benefit of the property, where:

(a) that person gives false identification or fictitious name, address or place of employment in order to obtain control over property.

or

(b) That person fails to return property within seven (7) days after receiving a (registered) (certified) letter giving notice that the property had not been returned within ten (10) days of the time required by the lease or rental agreement.

This presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

The word "notice" means notice in writing. Notice will be presumed to have been given two days following deposit of the notice as registered or certified matter in the U.S. mail, addressed to the person who has leased or rented the property as it appears in the information supplied by the person at the time of the leasing or renting or his or her last known address.

Notes on Use

For authority see K.S.A. 21-3702 (1) (a) on false identification and (1) (b) on failure to return property. Notice is defined in paragraph (2). See PIK 2d Chapter 59, Crimes Against Property, for the use of this instruction.

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Comment

State v. Smith, 223 Kan. 192, 573 P.2d 985 (1977), upheld the constitutionality of a statutory presumption where it is rebuttable and governs only the burden of going forward with the evidence, not the ultimate burden of proof. The court stated: “. . . the use of a presumption to establish prima facie evidence does not destroy a defendant’s presumption of innocence, nor does it invade the province of the jury as fact finders.” It does require the defendant to go forward with evidence to rebut the presumption. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976). See Comment in PIK 2d 54.01 on the matter of shifting the burden on the defendant to produce evidence.

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**54.02 CRIMINAL INTENT—IGNORANCE OF STATUTE
OR AGE OF MINOR IS NOT A DEFENSE**

It is not a defense that the accused did not have knowledge of (the existence or constitutionality of or the scope or meaning of the terms used in the statute under which the accused is prosecuted) (the age of a minor, even though age is a material element of the crime with which he is charged).

Notes on Use

For authority, see K.S.A. 21-3202.

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54.03 IGNORANCE OR MISTAKE OF FACT

It is a defense in this case if by reason of ignorance or mistake the defendant did not have at the time the mental state which the statute requires as an element of the crime. (He may be convicted of a lesser offense if the facts were as he believed them to be and the other evidence in the case establishes such lesser offense.)

Notes on Use

For authority, see K.S.A. 21-3203 (1). If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Comment

The parenthetical material should only be given in cases where a lesser offense is included in the greater offense committed.

As provided by the authorizing statute (K.S.A. 21-3203) this should not be given in cases where there are exclusions of requirement of proof of criminal intent. See K.S.A. 21-3202 and PIK 2d 54.02, Criminal Intent-Ignorance of Statute or Age of Minor Is Not a Defense.

Likewise, this instruction has no application to and should not be given in circumstances involving statutes providing for guilt without criminal intent. See comment, PIK 2d 54.01-A, General Criminal Intent.

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**54.04 IGNORANCE OR MISTAKE OF
LAW—REASONABLE BELIEF**

It is a defense to the charge made against the defendant if he reasonably believed that his conduct did not constitute a crime and

(the crime was defined by an administrative regulation or order which was not known to him and had not been published, as provided by law, and he could not have acquired such knowledge by the exercise of ordinary care.)

(he acted in reliance upon a statute which later was determined to be invalid.)

(he acted in reliance upon an order or opinion [of the Supreme Court of Kansas] or [a United States appellate court] later overruled or reversed.)

(he acted in reliance upon an official interpretation of the [statute] [regulation] or [order] defining the crime made by a [public officer] or [agency] legally authorized to interpret such statute.)

Notes on Use

For authority, see K.S.A. 21-3203 (2). If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Comment

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the state. The term "public officer" in subparagraph (d) of K.S.A. 21-3203 (2) does not include judges and magistrates. *State v. V.F.W. Post No. 3722*, 215 Kan. 693, 527 P.2d 1020 (1974).

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54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

A person who, either before or during its commission, intentionally (aids) (abets) (advises) (hires) (counsels) (procures) another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the defendant's participation, if any, in the actual commission of the crime.

Notes on Use

For authority see K.S.A. 21-3205 (1). For a crime not intended see PIK 2d 54.06.

Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 196, 392 P.2d 863 (1964); *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968).

One who watches at a distance to prevent surprise while others commit a crime is deemed in law to be a principal and punishable as such. *State v. Neil*, 203 Kan. 473, 474, 454 P.2d 136 (1969).

See *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974), wherein it was held "to be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or to make succeed."

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**54.06 RESPONSIBILITY FOR CRIMES OF
ANOTHER—CRIME NOT INTENDED**

A person who intentionally (aids) (abets) (advises) (hires) (counsels) (procures) another to commit a crime is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the other crime was reasonably foreseeable.

Notes on Use

For authority see K.S.A. 21-3205(2).

Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 195, 392 P.2d 863 (1964); *State v. Payton*, 229 Kan. 106, 622 P.2d 651 (1981). The other crime must be reasonably foreseeable. *State v. Davis*, 4 Kan. App. 2d 210, 604 P.2d 68 (1979). See Comment to PIK 2d 54.05, Responsibility for Crimes of Another.

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**54.07 RESPONSIBILITY FOR CRIME OF
ANOTHER—ACTOR NOT PROSECUTED**

It is not a defense that (another) (others) who participated in the commission of the wrongful act constituting the crime (lacked criminal capacity) (has or has not been convicted of the crime or any lesser degree) (has been acquitted).

Notes on Use

For authority see K.S.A. 21-3205(3). PIK 2d 54.05, Responsibility for Crimes of Another and PIK 2d 54.06, Responsibility for Crimes of Another—Crime Not Intended, should be used where applicable to the particular case. This instruction makes clear that a contrary rule which prevailed at common law is not the law in the State of Kansas.

Comment

An accessory before the fact may be convicted after the trial and conviction of the principal of a higher degree of offense than the principal was convicted of, *State v. Gray*, 55 Kan. 135, 144, 145, 39 Pac. 1050 (1895).

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**54.08 CORPORATIONS—CRIMINAL RESPONSIBILITY
FOR ACTS OF AGENTS**

A corporation is responsible for acts committed by any person who is authorized to act in behalf of the corporation when acting within the scope of his authority.

Notes on Use

For authority see K.S.A. 21-3206(1) and (2).

Use PIK 2d 7.04, Agent—Issue as to Scope of Authority, where scope of authority is an issue.

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54.09 INDIVIDUAL RESPONSIBILITY FOR CORPORATION CRIME

An individual who performs criminal acts, or causes criminal acts to be performed, in the name of or on behalf of a corporation, is responsible to the same extent as if such acts were performed in his own name or on his own behalf.

Notes on Use

For authority see K.S.A. 21-3207(1).

Comment

K.S.A. 21-3207(2) provides: "An individual who has been convicted of a crime based on conduct performed by him for and on behalf of a corporation is subject to punishment as an individual upon conviction of such crime, although a lesser or different punishment is authorized for the corporation."

54.10 INSANITY—MENTAL ILLNESS OR DEFECT

The defendant has denied criminal responsibility because of lack of mental capacity at the time the offense was committed. In law, this is called insanity. The defendant is not criminally responsible for his acts if his mental capacity was such that he did not understand the nature of his acts or did not understand that what he was doing was wrong because of his mental inability to distinguish between right and wrong.

If you have a reasonable doubt as to the mental capacity of the defendant at the time of the alleged commission of the offense, then you should find the defendant not guilty because of insanity.

Notes on Use

See K.S.A. 22-3219 for plea of insanity, and notice and procedure required.

Comment

This instruction should be given where the defense of insanity is asserted under K.S.A. 22-3219 and evidence has been introduced in support of such claim.

For authority see *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960) in which the so-called M'Naghten rule is discussed and applied. This state has been firmly committed to the M'Naghten rule or "right or wrong" test of insanity. *State v. Latham and York*, 190 Kan. 411, 375 P.2d 788 (1962). Even an adjudged lunatic is criminally responsible for acts committed during a lucid interval. *Fisher v. Fraser*, 171 Kan. 472, 233 P.2d 1066 (1951). A proposed change in the rule was not adopted in the Kansas Criminal Code. See KANSAS JUDICIAL COUNCIL BULLETIN, April, 1968, page 35.

The question of defendant's insanity at the time of the alleged crime is one of fact to be tried by the jury. *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960), and *State v. Coltharp*, 199 Kan. 598, 433 P.2d 418 (1967).

In *State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), the court affirmed the M'Naghten test as being the law, by holding ". . . no other test better protects society as well as serves its need." (p. 211) the trial court's instruction on insanity in *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960) was approved by the court. For a most informative analysis of the American Law Institute test see the dissent in *Smith*, supra, (pp. 211-219).

Nonexpert witnesses who are shown to have had special opportunities to observe the defendant may give opinion evidence as to sanity. *State v. Shultz*, 225 Kan. 135, 587 P.2d 901 (1978).

In *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977) the court held that "an instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxica-

PATTERN INSTRUCTIONS FOR KANSAS

tion which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant.”

An insane person cannot be required to plead to a criminal charge and cannot be tried. *State v. English*, 198 Kan. 196, 424 P.2d 601 (1967). The test of responsibility for crime differs from that of mental competency to stand trial. These tests are stated and distinguished in *Van Dusen v. State*, 197 Kan. 718, 421 P.2d 197 (1966). See also *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970). For procedure see K.S.A. 22-3302. For verdict form see PIK 2d 68.06, Not Guilty Because of Insanity.

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54.10-A INSANITY—COMMITMENT

A person found not guilty because of insanity is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

Notes on Use

For authority, see K.S.A. 22-3428.

This instruction must be given in any case where there is reliance on the defense of insanity.

Comment

See *State v. Hamilton*, 216 Kan. 559, 534 P.2d 226 (1975).

This instruction was approved in *State v. Wright*, 219 Kan. 808, 814, 549 P.2d 958 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

54.11 INTOXICATION—INVOLUNTARY

Intoxication involuntarily produced is a defense if it renders the accused substantially incapable of knowing or understanding the wrongfulness of his conduct and of conforming his conduct to the requirements of law.

Notes on Use

For authority, see K.S.A. 21-3208(1). If this instruction is given PIK 2d 52.08, Affirmative Defenses-Burden of Proof, should be given.

Comment

Before a defendant's intoxication may be said to be involuntary he must show something more than a strong urge or compulsion to drink. *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

54.12 INTOXICATION

Voluntary intoxication is not a defense to a criminal charge, but when a particular intent or other state of mind is a necessary element of the offense charged, intoxication may be taken into consideration in determining whether the accused was capable of forming the necessary intent or state of mind.

Notes on Use

For authority, see K.S.A. 21-3208(2).

Comment

Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse for the offense, or a defense to the charge.

However, "where evidence of intoxication tends to show that the defendant was incapable of forming the particular intent to injure which is a necessary ingredient of the crime of aggravated battery he is entitled to an instruction on the lesser included offense of ordinary battery." *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

The fact of intoxication as affecting intent or state of mind is a jury question. *State v. Miles*, 213 Kan. 245, 246, 515 P.2d 742 (1973).

Where no particular intent or state of mind is a necessary element of the crime (assault with a deadly weapon) no instruction on voluntary intoxication is required. *State v. Farris*, 218 Kan. 136, 143, 542 P.2d 725 (1975).

"An instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxication which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant." *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977).

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54.13 COMPULSION

It is a defense to the charge made against the defendant if he acted under the compulsion or threat of immediate infliction of death or great bodily harm, and he reasonably believed that death or great bodily harm would have been inflicted upon him (or upon his [spouse] [parent] [child] [brother] [sister]) had he not acted as he did.

(Such a defense is not available to one who willfully or wantonly placed himself in a situation in which it was probable that he would have been subjected to compulsion or threat.)

Notes on Use

For authority, see K.S.A. 21-3209. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

This instruction is not to be used in cases of murder or voluntary manslaughter. K.S.A. 21-3209.

The second paragraph should be used only when there is some evidence indicating that the defendant willfully or wantonly placed himself in the situation indicated.

Comment

Although the statute uses the term “imminent,” the Committee feels that the word “immediate” is a better understood term. The defense of compulsion is not available if the defendant had a reasonable opportunity to escape the compulsion without committing the crime. *State v. Harrison*, 228 Kan. 558, 618 P.2d 827 (1980).

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54.14 ENTRAPMENT

The defendant can rely on the defense of entrapment when he is (induced) (persuaded) to commit a crime which he had no previous (disposition) (intention) (plan) (purpose) to commit; however, he cannot rely on the defense of entrapment when he (originated) (began) (conceived) the plan to commit the crime or when he had shown (a) (an) (predisposition) (plan) (intention) (purpose) for committing the crime and was merely afforded (an) (the) opportunity to (consummate) (carry out his intention to complete) (complete his plan to commit) the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of _____ was likely to occur and the the law enforcement officer or his agent did not mislead the defendant into believing his conduct to be lawful.

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the _____ by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the _____ by defendant.

Notes on Use

For authority see K.S.A. 21-3210. Insert the name of the article or substance sold in the blank spaces. If this instruction is given PIK 2d 52.08, Affirmative Defenses-Burden of Proof, should be given.

Comment

In discussing when the defense of entrapment is available, the Supreme Court in *State v. Jordan*, 220 Kan. 110, 112, 551 P.2d 773 (1976) stated: "The defense of entrapment arises when a law enforcement officer, or someone acting in his behalf, generates in the mind of a person who is innocent of any criminal purpose the original intent or idea to commit a crime which he had not contemplated and would not have committed but for the inducement of the law officer." *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854 (1971). A defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but he cannot rely on the defense or obtain an instruction on entrapment when the evidence establishes he had a previous intention of

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committing the crime and was merely afforded an opportunity by a law officer to complete it. *State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970).

For other cases discussing the availability of the defense of entrapment see *State v. Amodei*, 222 Kan. 140, 145, 563 P.2d 440 (1977), *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974); *State v. Smith*, 229 Kan. 533, 625 P.2d 1139 (1981).

See *United States v. Russell*, 41 U.S. 423, 36 L.Ed.2d 366 93 S.Ct. 1637, (1973).

In *State v. Farmer*, 212 Kan. 163, 510 P.2d 180 (1973), it was held: "The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged." See K.S.A. 21-3210.

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54.14-A PROCURING AGENT

The defendant is not guilty of a sale of _____ if the defendant acted only as a procuring agent for the purchaser. A procuring agent for the purchaser is a person who, by agreement with the purchaser, buys or procures an article or a substance from a third party at the request of and for the purchaser. The agreement may be written, oral or implied by the behavior of the parties.

The defendant is not a procuring agent if the defendant acted as a seller or as an agent for a seller.

Notes on Use

Insert the name of the article or substance sold in the blank space.

Comment

In *State v. Osborn*, 211 Kan. 248, 253, 505 P.2d 742 (1973), it was held that, when the procuring agent theory has been properly raised by the evidence and a request for the instruction has been made, it should be given.

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54.15 CONDONATION

It is not a defense that the (injured party) (victim) has (excused) (forgiven) (compromised and settled) (ratified) the offense committed.

Notes on Use

Use for this instruction will not ordinarily arise as evidence to support it is generally not admissible. The pretrial conference will normally provide opportunity to settle the question in advance of trial.

Comment

For authority, see *State v. Newcomer*, 59 Kan. 668, 51 Pac. 685 (1898), a statutory rape case in which the victim married the defendant; *State v. Craig*, 124 Kan. 340, 259 Pac. 802 (1927), in which a mother, owner of an undivided interest, subsequently ratified the act of arson and *State v. Dye*, 148 Kan. 421, 83 P.2d 113 (1938), in which it was held that evidence offered to show a compromise, settlement or ratification will not constitute a bar to conviction and punishment of a crime.

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54.16 RESTITUTION

It is not a defense that the defendant at the time of the trial (has restored) (intends to restore) any property taken or its value to the owner.

Comment

Our case law has principally involved cases of embezzlement. See *State v. Taylor*, 140 Kan. 663, 38 P.2d 680 (1934), and *State v. Robinson*, 125 Kan. 365, 263 Pac. 1081 (1928). In the latter case, the Court said, "When one embezzles money or property, the fact that he intends to restore it, or its value, to its owner is not a defense."

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54.17 USE OF FORCE IN DEFENSE OF A PERSON

The defendant has claimed his conduct was justified as (self-defense) (the defense of another person).

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's immediate use of unlawful force. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority see K.S.A. 21-3211. The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979). If this instruction is given PIK 2d 52.08, Affirmative Defenses-Burden of Proof, should be given.

Comment

The statute speaks of "imminent" use of force. "Immediate" is substituted as a better understood term.

In *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982) the court, relying on the Judicial Council Comments, construed K.S.A. 21-3211 as requiring the reasonableness of the defendant's belief to be measured by the objective standard of the "reasonable man" and not by the subjective standard of the defendant's idiosyncracies. The second paragraph of the instruction incorporates this concept.

The first paragraph is suggested by *State v. Bryant*, 5 Kan. App.2d 114, 612 P.2d 1255 (1980). It is are designed to assist the jury in its application of the self-defense instruction by making it clear that it is the defendant who is claiming justification.

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54.18 USE OF FORCE IN DEFENSE OF A DWELLING

The defendant has claimed his conduct was justified as a lawful defense of his dwelling.

A person is justified in the use of force to the extent it appears to him and he reasonably believes that such conduct is necessary to prevent another from unlawfully (entering into) (remaining in) (damaging) his dwelling. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority see K.S.A. 21-3212. The applicable parenthetical phrase or phrases should be selected. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Comment

See *State v. Countryman*, 57 Kan. 815, 827, 48 Pac. 137 (1897); *State v. Farley*, 225 Kan. 127, 133-4, 587 P.2d 337 (1978). See also, Comment to PIK 2d 54.17, Use of Force in Defense of a Person and cases cited.

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**54.19 USE OF FORCE IN DEFENSE OF PROPERTY
OTHER THAN A DWELLING**

A person lawfully in possession of property, other than a dwelling, is justified in (threatening to use) (using) such force to stop an unlawful interference with such property as would appear necessary to a reasonable man under the circumstances then existing.

Notes on Use

For authority see K.S.A. 21-3213. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Comment

K.S.A. 21-3213 is the only section of the crimes statute which specifically makes the “reasonable man” the standard to be used as relates to the amount of permissible force. The concept is implicit, however in K.S.A. 21-3211 (self-defense) and 21-3212 (defense of a dwelling). See *State v. Marks*, 226 Kan. 704, 712, 602 P.2d 1344 (1979); *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). See also, Comment to PIK 2d 54.17, Use of Force in Defense of a Person.

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**54.20 FORCIBLE FELON NOT ENTITLED TO USE
FORCE**

A person is not justified in using force in defense of (himself) (another) (his dwelling) if he is (attempting to commit) (committing) (escaping after the commission) of _____, a forcible felony.

Notes on Use

For authority see K.S.A. 21-3214 (1). Insert in the blank space the particular forcible felony applicable to the particular case.

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**54.21 PROVOCATION OF FIRST FORCE AS EXCUSE
FOR RETALIATION**

A person is not permitted to provoke an attack on (himself) (another person) with the specific intention to use such attack as a justification for inflicting bodily harm upon the person he provoked and then claim self-defense as a justification for inflicting bodily harm upon the person he provoked.

Notes on Use

For authority see K.S.A. 21-3214 (2). This instruction should not be confused with PIK 2d 54.22, Initial Aggressor's Use of Force. This instruction should be used with caution and limitations.

Comment

A literal reading of the statute which is the authority for this instruction would indicate that one who provokes an attack as an excuse to inflict bodily harm upon another cannot thereafter resist with force even though his own death or serious injury is imminent. The instruction was asked with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976).

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54.22 INITIAL AGGRESSOR'S USE OF FORCE

A person who initially provokes the use of force against (himself) (another) is not justified in the use of force to defend (himself) (another) unless:

1. He has reasonable ground to believe that he is in present danger of death or great bodily harm, and he has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person;
or
2. He has in good faith withdrawn and indicates clearly to the other person that he desires to withdraw and stop the use of force, but the other person continues or resumes the use of force.

Notes on Use

For authority see K.S.A. 21-3214 (3) (a) and (b).

Comment

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976).

54.23 LAW ENFORCEMENT OFFICER OR PRIVATE PERSON SUMMONED TO ASSIST—USE OF FORCE IN MAKING ARREST

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist him) need not retreat or desist from the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend (himself) (another) from bodily harm while making the arrest.

However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force:

(is necessary to prevent death or great bodily harm to [himself] [another person]).

(is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested has committed or attempted to commit _____, a felony or [is attempting to escape by use of a deadly weapon] [otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay]).

(A law enforcement officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.)

(A private person who is [summoned] [directed] by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the use of any force which he would be justified in using if the arrest were lawful.)

Notes on Use

For authority, see K.S.A. 21-3215.

The second paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The third paragraph should be used only where an invalid warrant is involved.

The fourth paragraph should be used only where an officer has requested assistance in making an arrest which proves to be unlawful. For authority see K.S.A. 21-3216(2).

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**54.24 PRIVATE PERSON'S USE OF FORCE IN MAKING
ARREST—NOT SUMMONED BY LAW
ENFORCEMENT OFFICER**

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend (himself) (another) from bodily harm while making the arrest.

(However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to [himself] [another]).

Notes on Use

For authority, see K.S.A. 21-3216 (1). See also, PIK 2d 54.23, Law Enforcement Officer or Private Person Summoned to Assist—Use of Force in Making Arrest.

Comment

Whether the degree of force employed in making a citizen's arrest is "reasonable" is a jury question. *State v. Johnson*, 6 Kan. App.2d 750, 752-3, 634 P.2d 1137, *rev. denied* 230 Kan. v (1981).

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54.25 USE OF FORCE IN RESISTING ARREST

A person is not authorized to use force to resist an arrest which he knows is being made by a (law enforcement officer) (private person summoned and directed by a law enforcement officer to make the arrest) even if the person believes that the arrest is unlawful and the arrest is, in fact, unlawful.

Notes on Use

For authority, see K.S.A. 21-3217.

Comment

See comment, Judicial Council, 1968, following K.S.A. 21-3217.

CHAPTER 55.00
ANTICIPATORY CRIMES

	PIK Number
Attempt	55.01
Attempt—Impossibility of Committing Offense—No Defense	55.02
Conspiracy	55.03
Conspiracy—Withdrawal as a Defense	55.04
Conspiracy—Defined	55.05
Conspiracy—Overt Act Defined	55.06
Conspiracy—Declarations	55.07
Conspiracy—Subsequent Entry	55.08
Criminal Solicitation	55.09
Criminal Solicitation—Defense	55.10

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55.01 ATTEMPT

- A. (The defendant is charged with the crime of an attempt to commit the crime of _____ . The defendant pleads not guilty).
- B. (If you find the defendant is not guilty of _____, you shall consider if he is guilty of an attempt to commit the crime of _____.)

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

1. That the defendant performed an act toward the commission of the crime of _____;
2. That the defendant did so with the intent to commit the crime of _____;
3. That the defendant failed to consummate its commission; and
4. That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.
The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority see K.S.A. 21-3301(1). An attempt to commit a class A felony is a class B felony. An attempt to commit a class B felony is a class C felony. An attempt to commit a class C felony is a class D felony. An attempt to commit a class D or E felony is a class E felony.

An attempt to commit a class A misdemeanor is a class B misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

If the information charges an attempted crime, omit paragraph B. However, if the attempted crime is submitted as a lesser included offense, omit paragraph A.

If the attempted crime is submitted as a lesser included offense, PIK 2d 68.09, Lesser Included Offenses, should be given.

The elements of the applicable substantive crime should be referred to or set forth in the concluding portion of the instruction.

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Comment

An attempt to commit a crime consists of three essential elements under K.S.A. 21-3301(1), namely: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate it. *State v. Cory*, 211 Kan. 528, 532, 506 P.2d 1115 (1973) and *State v. Gobin*, 216 Kan. 278, 280, 281, 531 P.2d 16 (1975).

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. On the one hand mere acts of preparation are insufficient while, on the other, if the accused has performed the final act necessary for the completion of the crime, he could be prosecuted for the crime intended and not for an attempt. The overt act lies somewhere between these two extremes and each case must depend upon its own particular facts. For cases involving this subject see *State v. Carr*, 230 Kan. 322, 327, 634 P.2d 1104 (1981); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 305, 624 P.2d 964 (1981); *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); *State v. Gobin*, 216 Kan. at 280-81; *State v. Awad*, 214 Kan. 499, 520 P.2d 1281 (1974); *State v. Cory*, 211 Kan. at 532; *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959); and *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954). The reader is further referred to 21 Am. Jur. 2d, Criminal Law, §§ 110 and 111.

The committee comment was quoted in *State v. Gobin*, supra, 216 Kan. at 281 and *State v. Sullivan & Sullivan*, 224 Kan. at 122.

The general principles for determining whether charges are multiplicitous were reviewed in *State v. Games*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). For other anticipatory crimes involving the subject of duplicitous charges see *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 (1972), *State v. Cory*, supra, *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973), and *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978).

The crime of aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977).

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**55.02 ATTEMPT—IMPOSSIBILITY OF COMMITTING
OFFENSE—NO DEFENSE**

The Committee recommends that no separate instruction be given.

Notes on Use

K.S.A. 21-3301 (2) provides that it shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible. The Committee believes that PIK 2d 55.01, Attempt is sufficient without the injection of impossibility of committing the offense into the case. For a discussion of factual impossibility see *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

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55.03 CONSPIRACY

The defendant is charged with the crime of conspiracy to commit the crime of _____. The defendant pleads not guilty.

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

1. That the defendant agreed with (another person) (others) to (commit) (assist in the commission of) the crime of _____;
2. That the defendant did so agree with the intent that the crime of _____ be committed;
3. That the defendant or any party to the agreement acted in furtherance of the agreement by _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

The definition of _____, the crime charged to be the subject of the conspiracy is as follows:

Notes on Use

For authority see K.S.A. 21-3302(1). Conspiracy to commit a class A felony is a class C felony. Conspiracy to commit a felony other than a class A felony is a class E felony. A conspiracy to commit a misdemeanor is a class C misdemeanor.

This instruction should be given in all crimes of conspiracy along with PIK 2d 55.05, Conspiracy—Defined, and PIK 2d 55.06, Conspiracy—Overt Act Defined. When the evidence warrants its submission, PIK 2d 55.04, Conspiracy—Withdrawal as a Defense, should be given.

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

Comment

In the trial of a conspiracy case a court may become involved with the conspiracy evidence rule. Under this rule statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception to the hearsay rule. In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan.App.2d 182, 577 P.2d 803 (1978), *rev. denied*, 224 Kan. iv. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*,

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201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

The conspiracy evidence rule is based on the concept that a party to an agreement to commit a crime is an agent or a partner of the other. See 3 *Wharton's Criminal Evidence* § 642.

In *Borserine* the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. Where the crime has to be established by circumstantial evidence a prosecutor must be given permission to present that proof bit by bit as best he can without too rigid enforcement of the rule. If on completion of the State's case all of the facts tend to show a conspiracy, the order of proof in which the acts of the conspiracy are shown is not important. To the same effect see *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App.2d at 198.

In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the court stated that a specific intent is essential to the crime of conspiracy. The court divided the concept of intent into two elements: (a) the intent to agree or conspire; and (b) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure*, § 85, the court recognized the obvious difficulty of proving the dual intent and concluded generally that no distinction should be made between the two specific intents. The court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases.

Conspiracy is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime, whereas, to aid and abet requires an actual participation in the act constituting the offense. See *State v. Campbell*, 217 Kan. at 769 and *State v. Rider, Edens & Lemons*, 229 Kan. 394, 625 P.2d 425 (1981).

As a general rule, conspiracy to commit a crime and the substantive crime are held to be separate and distinct offenses. Thus, conspiracy to commit burglary is not a lesser included offense of burglary. See *State v. Burnett*, 221 Kan. 40, 45, 558 P.2d 1087 (1976).

It is not required that a co-conspirator have a financial stake in the success of a conspiracy. It is only necessary that he be shown not to be indifferent to the outcome of the conspiracy. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Conspiracy is not a lesser included offense of murder. See *State v. Adams*, 223 Kan. 254, 573 P.2d 604 (1977).

The elements of conspiracy as defined in K.S.A. 21-3302 were reviewed in *State v. McQueen & Hardyway*, 224 Kan. 420, 424, 582 P.2d 251 (1978); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981); *State v. Becknell*, 5 Kan. App.2d 269, 271, 615 P.2d 795 (1980); and *State v. Small*, 5 Kan. App.2d 760, 762, 625 P.2d 1 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, supra, 205.

In *State v. Taylor*, 2 Kan. App.2d 532, 534, 583 P.2d 1033 (1978), the Court of Appeals of Kansas held that in its proof of conspiracy, the state is not limited to the overt acts alleged in the information.

To constitute a conspiracy there must be an agreement, which requires a meeting of the minds. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

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The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. at 762-63.

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55.04 CONSPIRACY—WITHDRAWAL AS A DEFENSE

It is a defense to a charge of conspiracy that the defendant in good faith withdrew from the agreement and communicated the fact of such withdrawal to any party to the agreement before any party acted in furtherance of it.

Notes on Use

For authority see K.S.A. 21-3302(2). If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

Comment

It is a jury question whether one has withdrawn from a conspiracy when conflicting evidence as to that withdrawal is presented. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

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55.05 CONSPIRACY—DEFINED

A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement.

The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all of the facts and circumstances.

Notes on Use

For authority see K.S.A. 21-3302(1) and the included Judicial Council comment; *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); *State v. Small*, 5 Kan. App.2d 760, 762, 763, 625 P.2d 1 (1981); and 16 Am. Jur.2d, Conspiracy, §§ 1, 7, and 11. This instruction should be given in all cases involving the crime of conspiracy.

Comment

In *Campbell*, the Supreme Court of Kansas emphasized that the essence of a conspiracy is the agreement to commit a crime, not simply to commit a particular act. The Court further held that the provisions of K.S.A. 21-3302 were not unconstitutionally vague and indefinite. 217 Kan. at 770.

The agreement may be express or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977) and *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

The agreement requires a meeting of the minds of at least two persons. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

55.06 CONSPIRACY—OVERT ACT DEFINED

A person may be convicted of a conspiracy only if some act in furtherance of the agreement is proved to have been committed. An act in furtherance of the agreement is any act knowingly committed by a member of the conspiracy in an effort to effect or accomplish an object or purpose of the conspiracy. The act itself need not be criminal in nature. It must, however, be an act which follows and tends towards the accomplishment of the object of the conspiracy. The act may be committed by a conspirator alone and it is not necessary that the other conspirator be present at the time the act is committed. Proof of only one act is sufficient.

Notes on Use

For authority see K.S.A. 21-3302(1); *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); and 16 Am.Jur.2d, Conspiracy §§ 7, 10, 11, and 14.

Comment

In *Campbell*, the court observed that membership in a conspiracy could be proved only by willful, knowing and intentional conduct of the accused. In other words, a person cannot unintentionally or accidentally become a member of a conspiracy.

The State is not obligated to prove that the accused has a "stake" in the outcome of the conspiracy. All that is required is that the accused not be indifferent to its outcome. *State v. Daugherty*, 221 Kan. 612, 620, 562 P.2d 42 (1977).

A conspiracy to commit a crime is not established by mere association or knowledge of acts of other parties. There must be some intentional participation in the conspiracy with a view to the furtherance of the common design and purpose. See *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977), *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App.2d 182, 577 P.2d 803 (1978), *rev. denied*, 225 Kan. 846 (1978).

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App.2d 532, 583 P.2d 1033 (1978).

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55.07 CONSPIRACY—DECLARATIONS

Declarations of one conspirator, made in furtherance of the conspiracy, may be considered by you as evidence against all co-conspirators. However, declarations of a conspirator, not in furtherance of the conspiracy, can be considered by you only as to the declarant to prove his participation in the conspiracy.

Notes on Use

For authority see *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App.2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978). This instruction should be given when there is an issue of fact as to whether or not the declarations of one conspirator were made in furtherance of the conspiracy.

Comment

The Court of Appeals has recognized the general rule that declarations of one conspirator, made in furtherance of the conspiracy, may be used against all co-conspirators on the theory that the declarant is an agent of the other conspirators. However, declarations not in furtherance of the conspiracy are admissible only as to the declarant to prove his participation in the conspiracy. *State v. Marshall & Brown-Sidorowicz* at 198-99. Also see *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981), and *State v. Roberts*, 223 Kan. 49, 574 P.2d 164 (1977).

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55.08 CONSPIRACY—SUBSEQUENT ENTRY

All of the conspirators need not enter into the agreement at the same time. If a person later joins an already formed conspiracy with knowledge of its unlawful purpose, that person may be found guilty as a conspirator.

Notes on Use

For authority see *State v. Becknell*, 5 Kan. App.2d 269, 272, 615 P.2d 795 (1980) and 16 Am.Jur.2d, Conspiracy § 10.

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55.09 CRIMINAL SOLICITATION

The defendant is charged with the crime of solicitation to commit the crime of _____, a felony. The defendant pleads not guilty.

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

1. That the defendant intentionally (commanded) (encouraged) (requested) _____ (to commit) (attempt to commit) the crime of _____, a felony; or

That the defendant intentionally (commanded) (encouraged) (requested) _____ to aid and abet in the (commission) (attempted commission) of the crime of _____, a felony, for the purpose of promoting or facilitating the felony; and,

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

The definition of _____, the felony charged to be the subject of the solicitation, is as follows:

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3303. Criminal solicitation of a class A or B felony is a class D felony. Criminal solicitation of a felony other than a class A or B felony is a class E felony.

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

Comment

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation, whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905) and 21 Am.Jur.2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act.

It should be noted that subsection (b) provides that it is immaterial “. . . that the actor fails to communicate with the person solicited to commit a

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felony if the person's conduct was designed to effect a communication." Apparently, this subsection covers the unusual situation where one might place an offer in a newspaper or use some other form of communication or utilize the concepts of agency to carry out the prohibited solicitation. In the event the provision becomes material, an appropriate paraphrase of the statute should be presented.

55.10 CRIMINAL SOLICITATION—DEFENSE

It is a defense to a charge of criminal solicitation that the defendant, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances demonstrating a complete and voluntary abandonment of the defendant's criminal plan.

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3303(c). If this instruction is given, PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

CHAPTER 56.00
CRIMES AGAINST PERSONS

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56.01 MURDER IN THE FIRST DEGREE

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

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

1. That the defendant intentionally killed _____;
2. That such killing was done maliciously;
3. That it was done deliberately and with premeditation; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3401. Murder in the first degree is a class A felony. For felony murder see PIK 2d 56.02, Murder in the First Degree—Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment in PIK 2d 56.02, for authority to instruct on both theories.

Instructions on definitions of terms should be given as defined in PIK 2d 56.04, Homicide Definitions.

Comment

“In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him.” Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1968).

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, “At the common law, homicides were of two classes only; those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter.” This distinction is retained in the present Kansas Criminal Code.

The words “maliciously” and “premeditation” are not defined in the code, but are to be given the meaning established by the decisions of the Supreme Court of Kansas.

The Committee has inserted the word “intentionally” in paragraph one of the elements. K.S.A. 21-3401 defines murder in the first degree as the “. . . killing of a human being committed maliciously, willfully, deliberately and with premeditation. . . .” The term “maliciously” is defined in PIK 2d 56.04 as “. . . willfully doing a wrongful act without just cause or excuse.” It would appear redundant to state an element of willfulness and one of malice and then define malice as willful conduct.

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Since all felonies require proof of criminal intent and the same may be established by proof that the conduct was willful, under K.S.A. 21-3201, a jury would more likely understand the term "intentional" than "willful". A definition, then, of malice and the use of the word "intentional" should suffice, and if caution abounds, the trial court may desire to define "intentional" as "willful conduct that is purposeful and not accidental."

The definition of "death" as set out in K.S.A. 77-202 applies in criminal cases. *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977).

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. For a thorough analysis on lesser included offenses see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977). See also, Barbara, *Kansas Criminal Law Handbook* (1974).

This instruction, as well as PIK 2d 56.03, 56.04 and 56.05, covering second degree murder, voluntary manslaughter and homicide definitions, were all approved in *State v. Miller*, 222 Kan. 405, 414, 565 P.2d 228 (1977).

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56.02 MURDER IN THE FIRST DEGREE—FELONY MURDER

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

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

1. That the defendant killed _____;
2. That such killing was done while (in the commission of) (attempting to commit) _____, a felony; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

The elements of _____ are (set forth in instruction number _____) (as follows: _____).

Notes on Use

For authority see K.S.A. 21-3401. Felony murder is a class A felony.

In addition to this instruction, the elements of the underlying felony should be set out. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment below for authority to instruct on both theories. The elements of the applicable underlying felony should be set forth either by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

Comment

Premeditated murder and felony murder are not separate or different offenses. The statute merely provides alternative methods of proving the deliberation and premeditation which are required for a first degree murder conviction under K.S.A. 21-3401.

A prosecution under this rule merely changes the type of proof necessary to support a conviction. Proof that the homicide was committed in the perpetration of a felony is tantamount to premeditation and deliberation which otherwise would be necessary to constitute murder in the first degree. *State v. McCowan*, 226 Kan. 752, 759, 602 P.2d 1363 (1979).

To apply the felony-murder rule, it is only necessary to establish that the accused committed a felony inherently dangerous to human life and that the killing took place during the commission of the felony. Even an accidental killing is subject to this rule if the participant in the felony could reasonably foresee or expect that a life might be taken in the perpetration of the felony. *State v. Branch and Bussey*, 223 Kan. 381, 573 P.2d 1041 (1978). *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980).

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The State may properly allege premeditated murder and felony murder in separate counts for the commission of a single homicide, and may introduce evidence on both theories but the jury must be instructed to bring in a verdict on one alternative. Conviction on both theories is improper. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

When the murder is committed during the commission of a felony the general rule is that no instructions on lesser included offenses should be given. The felonious conduct is held tantamount to the elements of deliberation and premeditation in first degree murder. But where the evidence of the underlying felony is inconclusive or reasonably in dispute, instructions must be given on lesser included offenses which are supported by the evidence. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978).

The felony-murder doctrine is not applicable in cases of felonious assault resulting in death because the assault merges with the homicide. *State v. Clark*, 214 Kan. 293, 521 P.2d 298 (1974). However, the merger doctrine does not apply where the underlying felony is aggravated burglary based upon an aggravated assault. The burglary, even though based upon the crime of assault, can properly serve as the predicate for a felony-murder conviction. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978). See also *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

For a discussion of the merger doctrine see *State v. Rueckert*, 221 Kan. 727, 733, 561 P.2d 850 (1977).

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56.03 MURDER IN THE SECOND DEGREE

- A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)
- B. (If you cannot agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.)

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

- 1. That the defendant intentionally killed _____;
- 2. That such killing was done maliciously; and
- 3. That this act was done on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3402. Murder in the second degree is a class B felony.

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 2d 68.01 and 69.01, lead-in instructions on lesser included offenses. For a definition of "maliciously" see PIK 2d 56.04, Homicide Definitions.

Comment

The Committee has inserted the word "intentionally" in paragraph one of the elements. In *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980), the court held that the trial court's failure to instruct on the intent to kill as an element of a lesser included offense of murder in the second degree was not error where a definition of "maliciously" was given as ". . . willfully doing a wrongful act without just cause or excuse," (PIK 2d 56.04, Homicide Definitions) and which was followed by a definition of "willfully" meaning "conduct that is purposeful and intentional, and not accidental."

By adding that the killing was intentional, which is a necessary intent requirement of proof, and defining "maliciously," it would appear to be sufficient and avoid additional definitions as the jury would understand the term "intentional." See Comment in PIK 2d 56.01, Murder in the First Degree.

56.04 HOMICIDE DEFINITIONS

(a) Maliciously

Maliciously means willfully doing a wrongful act without just cause or excuse.

For collection of cases dealing with definition of this term, see *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). See also, *State v. Wilson*, 215 Kan. 437, 524 P.2d 224 (1974); *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977); *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980).

(b) Deliberately and with premeditation

Deliberately and with premeditation means to have thought over the matter beforehand.

For authority, see *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560 (1887) in which it is said: Premeditation means "that there was a design or intent before the act; that is, that the accused planned, contrived and schemed beforehand to kill Sherman." See also, *State v. Johnson*, 92 Kan. 443, 143 Pac. 389 (1914), and *State v. Martinez*, 223 Kan. 536, 575 P.2d 30 (1978), for approval of this instruction.

(c) Willfully

Willfully means conduct that is purposeful and intentional and not accidental.

For authority, see K.S.A. 21-3201(2).

See also, *State v. Osborn*, 211 Kan. 248, 505 P.2d 742 (1973).

(d) Intentionally

Intentionally means conduct that is purposeful and willful and not accidental.

For authority see K.S.A. 21-3201(2). See also, *State v. Stafford*, 223 Kan. 62, 65, 573 P.2d 970 (1977).

(e) Heat of passion

"Heat of passion" means any intense or vehement emotional excitement which was spontaneously provoked from circumstances.

For authority, see *State v. McDermott*, 202 Kan.

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399, 449 P.2d 545 (1969) and *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959), and *State v. Richey*, 223 Kan. 99, 573 P.2d 973 (1977).

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56.05 VOLUNTARY MANSLAUGHTER

- A. (The defendant is charged with the crime of voluntary manslaughter. The defendant pleads not guilty.)
- B. (If you cannot agree that the defendant is guilty of murder in the second degree, you should then consider the lesser included offense of voluntary manslaughter.)

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

- 1. That the defendant killed _____ (without justification);
- 2. That it was done intentionally;
- 3. That it was done (upon a sudden quarrel) (in the heat of passion); and
- 4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3403. Voluntary manslaughter is a class C felony.

If the information charges voluntary manslaughter, omit paragraph B; but if the information charges a higher degree omit paragraph A. See PIK 2d 68.09 and 69.01, lead-in instructions on lesser included offenses. The term "without justification" should be added to the first element of the crime when the defense of self-defense is raised. See PIK 2d 56.04, Homicide Definitions, for definition of "heat of passion."

Comment

See comment PIK 2d 56.01, Murder in the First Degree, and *State v Seelke*, 221 Kan. 672, 561 P.2d 869 (1977) on the duty of the trial judge to instruct on lesser included offenses in homicide cases.

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56.06 INVOLUNTARY MANSLAUGHTER

- A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)
- B. (If you cannot agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)

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

- 1. That the defendant unintentionally killed _____.
- 2. That it was done while in the commission of
 - (a) (state misdemeanor) in a wanton manner (state allegations constituting wantonness).
 - or
 - (b) A lawful act in an unlawful manner in (state allegations constituting unlawful manner).
 - or
 - (c) A lawful act in a wanton manner in (state allegations constituting wantonness).
- 3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the word "wantonness" means conduct done under circumstances that show a realization of the imminence of danger to the person of another and of reckless disregard or complete indifference and unconcern for the probable consequences of the conduct.

Notes on Use

For authority see K.S.A. 21-3404. See 21-3201(3) for instruction on wanton conduct. Involuntary manslaughter is a class D felony. If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher degree omit paragraph A. See PIK 2d 68.09 and 69.01, lead-in instructions on lesser included offenses. Elements 2(a), 2(b), and 2(c) are alternatives. Element 2(b) should not be used where the instrument of the homicide was a vehicle; use 2(a) or 2(c).

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56.07 VEHICULAR HOMICIDE

The defendant is charged with the crime of vehicular homicide.

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

1. That _____ was killed by the operation of an (automobile) (airplane) (motorboat) (other motor vehicle);
2. That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and
3. That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances;
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3405, where the word "material" was substituted for "substantial."

Where the homicide is unintentional and caused by operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter (K.S.A. 21-3404). But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978). *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). See PIK 2d 56.06, Involuntary Manslaughter.

Vehicular homicide is a class A misdemeanor. This section applies only when death ensues within one year after the injury.

Comment

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

The substitution of "material" for "substantial" affected no change as the terms are synonymous. *Ibid*.

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's

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negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

Wanton conduct is defined elsewhere in the Criminal Code. See K.S.A. 21-3201(3). See also PIK 2d 53.00, Wanton defined, and *State v. Makin*, 223 Kan. at 746, for interpretation of "wantonness."

In *State v. Boyston*, 4 Kan. App.2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.

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56.08 ASSISTING SUICIDE

The defendant is charged with the crime of assisting suicide. The defendant pleads not guilty.

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

1. That the defendant intentionally advised, encouraged or assisted _____ in the taking of his own life; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3406.

Assisting suicide is a class E Felony.

Comment

This instruction would not be proper if there is no evidence to support a suicide as there can be no "assisting suicide" if there is no suicide. This statute contemplates some participation in the events leading up to the commission of the final overt act by the suicide victim such as obtaining or furnishing the means for bringing about the death, e.g., gun, knife, poison.

But where the accused actually performs, or actively assists in performing the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, his act constitutes murder. *State v. Cobb*, 229 Kan. 522, 526, 625 P.2d 1133 (1981) (The defendant pushed the plunger of the needle into the victim's arm, after the victim prepared the syringe containing cocaine and injected the needle into his arm. After the second time, the defendant then shot the victim. The cause of death was the bullet wound to the head).

56.09 UNINTENDED VICTIM—TRANSFERRED INTENT

When a homicidal act is directed against one other than the person killed, the responsibility of the actor is exactly as it would have been had the act been completed against the intended victim.

Notes on Use

For authority, see *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

This instruction should be given in cases where there was an unintended victim, such as in cases of mistaken identity or where a bystander is killed.

Comment

It is no defense to the crime of murder that the defendant may have mistaken the victim for some other person, or that he may have supposed himself wronged by some other person. The fact that the homicidal act was directed against a person other than the person killed does not relieve the slayer of criminal responsibility. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967). Where a person intends to kill one person but actually kills another, he is just as responsible as if he had killed the person intended.

This principle rests on the basis of "transferred intent," and is equally applicable to prosecutions for assault and battery, notwithstanding a proof of specific intent to injure is required. "The intent follows the bullet." 40 Am. Jur. 2d, Homicide, § 11, pp. 302-303. *State v. Stringfield*, 4 Kan. App.2d 559, 608 P.2d 1041 (1980).

56.10 CRIMINAL ABORTION

The Committee is of the opinion that *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973) has nullified the present abortion statute K.S.A. 21-3407(1) and thus no instruction is appropriate.

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56.11 CRIMINAL ABORTION—JUSTIFICATION

Notes on Use

See Comment to PIK 2d 56.10, Criminal Abortion.

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56.12 ASSAULT

The defendant is charged with the crime of assault.
The defendant pleads not guilty.

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3408.
Assault is a class C misdemeanor.

Comment

An assault is defined as an intentional threat or attempt to do bodily harm to another coupled with apparent ability and resulting in immediate apprehension of bodily harm. This apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

The statute does not impose any requirement of proof that the assault be established by some physical, overt act by the accused. A conviction based upon threatening words alone is proper especially in light of the definition of threat in K.S.A. 21-3110(24), meaning ". . . a communicated intent to inflict physical or other harm. . . ." *In re Geisler*, 4 Kan. App.2d 684, 610 P.2d 640 (1980).

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56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of assault of a law enforcement officer. The defendant pleads not guilty.

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
4. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
5. That _____ was engaged in the performance of his duty; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3409.

Assault of a law enforcement officer is a class A misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it PIK 2d 56.12, Assault, should be given.

Comment

See Comment PIK 2d 56.12, Assault.

56.14 AGGRAVATED ASSAULT

The defendant is charged with the crime of aggravated assault. The defendant pleads not guilty.

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
4. (a) That the defendant used a deadly weapon
or
(b) That the defendant was disguised in any manner designed to conceal identity;
or
(c) That the defendant did so with intent to commit _____, a felony; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3410.

Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, instruction on assault should be included. See PIK 2d 56.12, Assault. Aggravated assault is a Class D felony.

Comment

In *State v. Nelson*, 224 Kan. 95, 577 P.2d 1178 (1978), it was error for the trial court to omit one of the elements necessary to establish aggravated assault with a deadly weapon. This instruction was cited as being correct.

For application of the merger doctrine in felony-murder prosecution see *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979) and Comment PIK 2d 56.02, Murder in the First Degree—Felony Murder.

PATTERN INSTRUCTIONS FOR KANSAS

56.15 AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of aggravated assault on a law enforcement officer. The defendant pleads not guilty.

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
4. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
5. That _____ was engaged in the performance of his duty;
6. (a) That the defendant used a deadly weapon;
or
(b) That the defendant was disguised in any manner designed to conceal identity;
or
(c) That the defendant did so with intent to commit _____, a felony; and
7. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3411.

Assault of a law enforcement officer, as defined by K.S.A. 21-3409, and assault, as defined by 21-3408, are lesser included offenses and where the evidence warrants it, PIK 2d 56.13, Assault of a Law Enforcement Officer and 56.12 Assault, should be given.

Also, if there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his duty at the time, aggravated assault (PIK 2d 56.14) should be considered as a lesser included offense, as it constitutes a class D felony. *State v. Holloway*, 214 Kan. 636, 522 P.2d 364 (1974).

Aggravated assault on a law enforcement officer is a class C. felony.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

Proof of actual knowledge that the person assaulted was a law enforcement officer is not necessary where it is undisputed that the officer was in uniform or properly identified as an officer. *State v. Farris*, 218 Kan 136, 542 P.2d 725 (1975). This is distinguishable where the officer is not in uniform and the question of knowledge was raised in deciding what was required to establish that the officer had properly identified himself. *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

When the assault consists of an assault with a deadly weapon, a particular intent or state of mind is not an essential element of this crime. Therefore an instruction on voluntary intoxication (PIK 2d 54.12) is not required. *State v. Farris*.

See Comment PIK 2d 56.14, Aggravated Assault.

PATTERN INSTRUCTIONS FOR KANSAS

56.16 BATTERY

The defendant is charged with the crime of battery. The defendant pleads not guilty.

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

1. That the defendant intentionally touched or applied force to the person of _____.
2. That it was done in a rude, insolent or angry manner; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3412.
Battery is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of battery against a law enforcement officer. The defendant pleads not guilty.

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

1. That the defendant intentionally touched or applied force to the person of _____.
2. That it was done in a rude, insolent or angry manner;
3. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
4. That _____ was engaged in the performance of his duty; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3413.

Battery against a law enforcement officer is a class A misdemeanor. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it PIK 2d 56.16, Battery, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

56.18 AGGRAVATED BATTERY

The defendant is charged with the crime of aggravated battery. The defendant pleads not guilty.

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

1. That the defendant intentionally touched or applied force to the person of _____;
2. That it was done with intent to injure _____ (or another) and
3. That it inflicted great bodily harm upon _____;
or
that it caused a (disfigurement to) (dismemberment of) his person;
or
that it was done with a deadly weapon;
or
that it was done in a manner whereby (great bodily harm) (disfigurement) (dismemberment) or (death) could have been inflicted; and
4. That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3414.

Aggravated battery is a class C felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it PIK 2d 56.16, Battery, should be given.

Comment

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). This instruction was approved in *State v. Stringfield*, 4 Kan. App.2d 559, 608 P.2d 1041 (1980).

PATTERN INSTRUCTIONS FOR KANSAS

56.18A CRIMINAL INJURY TO PERSON

Comment

On March 25, 1977, the Supreme Court declared K.S.A. 21-3431 unconstitutional in *State v. Kirby*, 222 Kan. 1, 563 P.2d 408 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of aggravated battery against a law enforcement officer. The defendant pleads not guilty.

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

1. That the defendant intentionally touched or applied force to the person of _____;
2. That it was done with intent to injure _____ (or another); and
3. That it inflicted great bodily harm upon _____;

or

that it caused a (disfigurement to) (dismemberment of) his person;

or

that it was done with a deadly weapon;

or

that it was done in a manner whereby (great bodily harm) (disfigurement) (dismemberment) or (death) could have been inflicted;

4. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer.
5. That _____ was engaged in the performance of his duty; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority, see K.S.A. 21-3415.

Battery against a law enforcement officer, as defined by K.S.A. 21-3413, and battery, as defined by K.S.A. 21-3412 are lesser included offenses and where the evidence warrants it, PIK 2d 56.17, Battery Against a Law Enforcement Officer and 56.12, Battery should be given.

Also, if there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his duty at the time, aggravated battery (PIK 2d 56.18) should be considered as a lesser included offense, as it constitutes a class C felony. *State v. Holloway*, 214 Kan. 636, 522 P.2d 364 (1974).

Aggravated battery against a law enforcement officer is a class B felony.

Comment

See Comment PIK 2d 56.18, Aggravated Battery.

PATTERN INSTRUCTIONS FOR KANSAS

**56.20 UNLAWFUL INTERFERENCE WITH A FIREMAN
OR FIRE FIGHTER**

The defendant is charged with the crime of unlawful interference with a fireman or fire fighter. The defendant pleads not guilty.

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

1. (a) That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
(b) That he had apparent ability to cause such bodily harm;
(c) That the defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
or
that the defendant knowingly and intentionally (interfered with) _____
or
that the defendant knowingly and intentionally (obstructed) (interfered with) (impeded) the efforts of _____ to reach the location of a fire.
2. That _____ was a fireman or fire fighter engaged in the performance of his duties; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3416.

Unlawful interference with a fireman or fire fighter is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

56.21 ATTEMPTED POISONING

The defendant is charged with the crime of attempted poisoning.

The defendant pleads not guilty. To establish this charge, each of the following must be proved:

1. That the defendant mingled poison with any food, drink, or medicine;
2. That this was done with intent to kill or injure any human being; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3417.

Attempted poisoning is a class C felony.

PATTERN INSTRUCTIONS FOR KANSAS

56.22 PERMITTING DANGEROUS ANIMAL TO BE AT LARGE

The defendant is charged with the crime of permitting a dangerous animal to be at large. The defendant pleads not guilty.

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

1. That the defendant was the owner or custodian of an animal of dangerous or vicious nature;
2. That the defendant knew of such nature;
3. That the defendant (permitted the animal to go at large) (kept such animal without taking ordinary care to restrain it); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3418.

Permitting a dangerous animal to be at large is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

56.23 TERRORISTIC THREAT

The defendant is charged with the crime of terroristic threat. The defendant pleads not guilty.

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

1. That the defendant threatened to commit violence;
2. That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]);
or
That such threat was communicated in wanton disregard of the risk of causing (terror to _____) (the evacuation of a [building] [place of assembly] [facility of transportation]);
and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3419.

Terroristic threat is a class E felony.

Comment

The above instruction was approved in *State v. Knight*, 219 Kan. 863, 867, 549 P.2d 1397 (1976), when the defendant himself did the threatening and communicated the threat. However, if the threat to commit violence is allegedly made by another person and the defendant communicates the threat with the intent to terrorize, the instruction needs to be modified to so state as it is not essential to prove the crime that the defendant threaten to do the acts mentioned in the communication itself. It is sufficient if the defendant communicates the threat made by another person if he does so with the specific intent to terrorize the victim.

For definition of "threat" and "terrorize" see *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

PATTERN INSTRUCTIONS FOR KANSAS

56.24 KIDNAPPING

The defendant is charged with the crime of kidnapping. The defendant pleads not guilty.

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

1. That the defendant (took) (confined) _____ by (force) (threat) (deception);
2. That it was done with intent to hold such person:
 - (a) for ransom or as a shield or hostage;
or
 - (b) to facilitate flight or the commission of any crime;
or
 - (c) to inflict bodily injury or to terrorize the victim, or another;
or
 - (d) to interfere with the performance of any governmental or political function; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3420.
Kidnapping is a class B felony.

Comment

This instruction was approved in *State v. Glymph*, 222 Kan. 73, 75, 563 P.2d 422 (1977), and in *State v. Nelson*, 223 Kan. 572, 575 P.2d 547 (1978).

The "taking or confinement" requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping. The word "facilitate" means something more than just to make more convenient. "To facilitate" must have some significant bearing on making the commission of the crime easier. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

Where the defendant is charged with kidnapping by "deception", the state must prove that the taking or confinement was the result of the defendant knowingly and willfully making a false statement or representation, expressed or implied. *State v. Holt*, 223 Kan. 34, 574 P.2d 152 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

56.25 AGGRAVATED KIDNAPPING

The defendant is charged with the crime of aggravated kidnapping. The defendant pleads not guilty.

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

1. That the defendant (took) (confined) _____ by (force) (threat) (deception);
2. That it was done with intent to hold such person:
 - (a) for ransom or as a shield or hostage;
 - or
 - (b) to facilitate flight or the commission of any crime;
 - or
 - (c) to inflict bodily injury or to terrorize the victim, or another;
 - or
 - (d) to interfere with the performance of any governmental or political function;
3. That bodily harm was inflicted upon _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3421.

Aggravated kidnapping is a class A felony. Kidnapping as defined by 21-3420 is a lesser included offense and where the evidence warrants it PIK 2d 56.24, Kidnapping, should be given.

"Bodily harm" includes any act of physical violence even though no permanent injury results. Trivial or insignificant bruises or impressions resulting from the act itself should not be considered as "bodily harm". Unnecessary acts of violence upon the victim, and those occurring after the initial abduction would constitute "bodily harm". *State v. Sanders*, 225 Kan. 156, 587 P.2d 906 (1978); *State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975). If there is an issue as to the extent of bodily harm the substance of this paragraph should be included in the instruction.

Comment

Rape is an act of violence unnecessary to and not a part of the kidnapping itself. *State v. Barry*, 216 Kan. 609, 533 P.2d 1308 (1975). Throwing the victim into a swollen stream was sufficient to comply with the requirement of "bodily harm". *State v. Taylor*, supra.

PATTERN INSTRUCTIONS FOR KANSAS

56.26 INTERFERENCE WITH PARENTAL CUSTODY

The defendant is charged with the crime of interference with parental custody. The defendant pleads not guilty.

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

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to detain or conceal the child from _____; and
5. That this act occurred on or about _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3422.

Interference with parental custody is a class A misdemeanor.

Comment

In absence of a court order both parents have an equal right to the custody of their minor children. *State v. Al-Turck*, 220 Kan. 557, 552 P.2d 1375 (1976). Therefore if the defendant is the natural parent of the child the instruction should include reference to the custody order in favor of the custodial parent.

PATTERN INSTRUCTIONS FOR KANSAS

56.26-A AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY PARENT'S HIRING ANOTHER

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

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

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant _____, hired another person to (take) (carry away) (decoy or entice away) _____;
4. That _____ was (taken) (carried away) (decoyed or enticed away) by such other person;
5. That this was done with the intent to detain or conceal the child from _____; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3422a. Considering the various alternatives, the Committee is of the opinion that separate instructions would be more feasible and clearer to juries than one instruction with all alternative elements. PIK 2d 56.26-A is applicable where the defendant is the non-custodial parent who hires another to interfere with parental custody. PIK 2d 56.26-B, Aggravated Interference with Parental Custody by Hiree, is applicable when the person hired to interfere with parental custody is the defendant, and PIK 2d 56.26-C, Aggravated Interference with Parental Custody—Other Circumstances, would apply to any person, parent or otherwise, provided one of the elements of paragraph 5 is present.

Aggravated interference with parental custody is a Class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

K.S.A. 21-3422, Interference with Parental Custody, is a Class A misdemeanor therefore extradition was not available. The legislature made interference with parental custody a felony thereby assuring extradition.

Note that the misdemeanor charge (PIK 2d 56.26, Interference with Parental Custody) includes the element of "intent to detain or conceal such child," whereas the language of the felony offense states "when done with the intent to deprive of custody. . . ." The committee has retained the language of the respective statutes, although it would appear that "intent to deprive" and "intent to detain or conceal" are synonymous as any intent to detain or conceal implies intent to deprive.

PATTERN INSTRUCTIONS FOR KANSAS

56.26-B AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIREE

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

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

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That the defendant was hired by another to (take) (carry away) (decoy or entice) the child;
5. That this was done with the intent to deprive _____ of the custody of the child; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Comment

See PIK 2d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Notes on Use and Comment.

PATTERN INSTRUCTIONS FOR KANSAS

56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY—OTHER CIRCUMSTANCES

The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

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

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to deprive _____ of the custody of the child; and
5. That the defendant has previously been convicted of interference with parental custody.

or

That the defendant took the child outside the state without the consent of _____ (or the court).

or

That the defendant, after lawfully taking the child outside the state while exercising visitation rights, refuses to return the child at the expiration of these rights.

or

That the defendant (refuses to return) (impedes the return) of the child at the expiration of visitation rights outside the state.

6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Comment

See PIK 2d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Notes on Use and Comment.

PATTERN INSTRUCTIONS FOR KANSAS

56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON

The defendant is charged with the crime of interference with the custody of a committed person. The defendant pleads not guilty.

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

1. That _____ was a person committed to the custody of _____;
2. That the defendant knowingly (took) (enticed) _____ away from the control of his custodian without privilege to do so; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3423.

Interference with custody of a committed person is a class A misdemeanor.

Comment

The status of a committed person is usually a question of law to be determined by the Court.

PATTERN INSTRUCTIONS FOR KANSAS

56.28 UNLAWFUL RESTRAINT

The defendant is charged with the crime of unlawful restraint. The defendant pleads not guilty.

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

1. That the defendant knowingly and without legal authority restrained _____ so as to interfere substantially with his liberty; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

(A merchant, his agent or employee, who has probable cause to believe that a person has [actual possession of] [has wrongfully taken] [is about to wrongfully take] merchandise from his mercantile establishment, may detain such person [on the premises] [in the immediate vicinity thereof] in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession).

Notes on Use

For authority, see K.S.A. 21-3424.

Unlawful restraint is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

56.29 MISTREATMENT OF A CONFINED PERSON

The defendant is charged with the crime of mistreatment of a confined person. The defendant pleads not guilty.

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

1. That the defendant was (a law enforcement officer) (a person in charge of or employed by the owner or operator of [a correctional institution] [a hospital] [a nursing home]);
2. That the defendant (intentionally abused) (neglected) (ill-treated) _____;
3. That _____ was (physically disabled) (mentally ill) (detained or confined involuntarily); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3425.

Mistreatment of a confined person is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

56.30 ROBBERY

The defendant is charged with a crime of robbery. The defendant pleads not guilty.

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

1. That the defendant intentionally took property from the (person) (presence) of _____;
2. That the taking was by (threat of bodily harm to _____) (force);
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3426.

Robbery is a class C felony.

Comment

In *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973), the court, in granting a new trial, relied on the failure of the trial court to include felonious intent, "one of the necessary elements of robbery." In tracing the history of robbery, the court noted three ingredients as essential: the use of force and violence, the taking from a person of another money or other personal property, and an intent to rob or steal. (Modified in *State v. Lucas*, infra.)

In *State v. Rueckert*, 221 Kan. 727, 561 P.2d 850 (1977), the court stated that specific intent is not an element of the crime of aggravated robbery, (therefore) voluntary intoxication would not be a defense to a general intent crime, although it may be used to demonstrate the inability to form a particular state of mind necessary for a specific intent crime (*State v. Rueckert* at 732-733).

State v. McDaniel & Owens, 228 Kan. 172, 612 P.2d 1231 (1980), holds that aggravated robbery is not a specific intent crime; it requires only general criminal intent. See also *State v. Knoxsah*, 229 Kan. 36, 622 P.2d 140, (1981). The committee is of the opinion that alleging an "intention to take property" should suffice for establishing criminal intent under K.S.A. 21-3201.

In *State v. Lucas*, 221 Kan. 88, 557 P.2d 1296 (1976), the trial court failed to instruct on the intent requirement. In refusing to hold error, the court found that the defendant's use of a deadly weapon established clear proof of intent.

The ownership of property taken is not an element of robbery thus failure to allege ownership is not defective. The state is not required to allege that the property taken was not that of the defendant. Therefore, the committee has revised the above instruction to exclude "of another." See *State v. Lucas*, supra.

PATTERN INSTRUCTIONS FOR KANSAS

The word "presence" means a possession or control so immediate that violence or intimidation is essential to sever it. "A thing is in the presence of a person with respect to robbery, which is so within his control that he could, if not overcome by violence or prevented by fear, retain his possession of it." *State v. Glymph*, 222 Kan. 73, 563 P.2d 422 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

56.31 AGGRAVATED ROBBERY

The defendant is charged with the crime of aggravated robbery. The defendant pleads not guilty.

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

1. That the defendant intentionally took property from the (person) (presence) of _____;
2. That the taking was by (threat of bodily harm to _____) (force);
3. That the defendant (was armed with a deadly weapon) (inflicted bodily harm on any person in the course of such conduct); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3427.

Aggravated robbery is a class B felony. Robbery as defined by K.S.A. 21-3426 is a lesser included offense and where the evidence warrants it PIK 2d 56.30, Robbery, should be given.

Comment

See comment in PIK 2d 56.30, Robbery.

56.32 BLACKMAIL

The defendant is charged with the crime of blackmail. The defendant pleads not guilty.

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

1. That the defendant by (verbal) (written) (printed) communication
 - (a) (accused) (threatened to accuse) _____ of (a crime) (conduct which would tend to disgrace or degrade him);
 - or
 - (b) (exposed) (threatened to expose) any (fact) (report) (information) concerning _____, which would in any way subject him to the ridicule or contempt of society;
2. That the defendant threatened that such (accusation) (exposure) would be communicated to a third person or persons unless _____ (paid or delivered to the defendant or some other person some thing of value) (did some act against his will);
3. That the defendant did so with the intent to ([extort] [gain] some thing of value from _____) (compel _____ to do an act against his will).
4. That this act occurred on or about the _____ day of _____, 19 _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3428.

Blackmail is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

**56.33 DISCLOSING INFORMATION OBTAINED IN
PREPARING TAX RETURNS**

The defendant is charged with the crime of disclosing information obtained in preparing tax returns. The defendant pleads not guilty.

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

1. That the defendant was a (person, firm, corporation, association, partnership, joint venture or any employee therefor) engaged (in the business of the preparation of federal or state income tax returns) (in the business of assisting taxpayers in preparing federal or state income tax returns).
2. That defendant disclosed or used for commercial purposes any information obtained in assisting taxpayers in the preparation of federal or state income tax returns.
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, a person is engaged in the business of preparing federal or state income tax returns or in the business of assisting taxpayers in preparing such returns if he advertises or gives publicity to the effect that he prepares or assists others in the preparation of such returns or prepares or assists others in the preparation of such returns for compensation.

Notes on Use

For authority, see K.S.A. 21-3430. Disclosing information obtained in preparing tax returns is a class A misdemeanor.

Comment

The Committee suggests that this offense would more properly have been included in chapter 62.00, Crimes Involving Violations of Personal Rights, rather than in chapter 56.00, Crimes Against Persons.

PATTERN INSTRUCTIONS FOR KANSAS

**56.34 DEFENSE TO DISCLOSING INFORMATION
OBTAINED IN PREPARING TAX RETURNS**

It is a defense to the charge of disclosing information obtained in preparing tax returns that the defendant disclosed such information (with the separate written consent of the taxpayer) (under a state or federal tax law expressly authorizing him to do so) (as a necessary element in the preparation of the tax return) (pursuant to a court order).

Notes on Use

For authority, see K.S.A. 21-3430. In addition to the above defense, K.S.A. 21-3430 provides that contacting a taxpayer to obtain his written consent to disclosure does not violate this statute. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

PATTERN INSTRUCTIONS FOR KANSAS

56.35 AIRCRAFT PIRACY

The defendant is charged with the crime of aircraft piracy. The defendant pleads not guilty.

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

1. That the defendant seized an aircraft by (the use of force) (any other means) with the intent to exercise control over the aircraft;
2. That at the time of the seizure the aircraft contained a pilot and one or more other persons;
3. That the seizure was unauthorized;
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3433.
Aircraft piracy is a class A felony.

CHAPTER 57.00

SEX OFFENSES

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PATTERN INSTRUCTIONS FOR KANSAS

57.01 RAPE

The defendant is charged with the crime of rape. The defendant pleads not guilty.

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

1. That the defendant had sexual intercourse with _____;
2. That _____ was not the defendant's wife;
3. That the act of sexual intercourse was committed without the consent of _____ under circumstances when
 - (a) her resistance was overcome by (force) (fear); and
or
 - (b) she was (unconscious) (physically powerless to resist); and
or
 - (c) she was incapable of giving her consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to him; and
or
 - (d) her resistance was prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to her by the defendant or another for the purpose of preventing her resistance, unless she voluntarily consumed or allowed the administration of the substance with knowledge of its nature; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3502. Rape is a class B felony.

The statute provides four categories where the woman's resistance is overcome. The appropriate category should be selected.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

A conviction of forcible rape precludes a conviction for taking a woman for defilement under K.S.A. 21-427 (now repealed) and for assault with felonious intent under K.S.A. 21-431 (now repealed) where the offenses arise from one act of the defendant. The test of duplicity is whether each offense requires proof of an element of the crime which the other does not. *Jarrell v. State*, 212 Kan. 171, 510 P.2d 127 (1973).

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 519 P.2d 1097 (1974).

Rape is not a lesser included offense of aggravated kidnapping. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974) and *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds & Garrett*, 218 Kan. 416, 543 P.2d 967 (1975); and *State v. Adams*, 218 Kan. 495, 545 P.2d 1134 (1976).

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the Supreme Court held it was duplicitous for the same act of force which was relied on for the charges of rape and kidnapping to also provide the basis for an aggravated assault charge.

Evidence of similar crimes, with proper limiting instructions under K.S.A. 60-455, may be relevant and admissible in prosecutions for rape. See the comment under PIK 2d 52.06, Admissibility of Evidence of Other Crimes.

In *State v. Lee*, 221 Kan. 109, 558 P.2d 1096 (1976), the Supreme Court held that the word "consent", as used in PIK 57.01 was a common word that did not require further definition.

Battery is not a lesser included offense of attempted rape. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).

In *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978) the Supreme Court held that additional convictions for attempted rape and aggravated sodomy were multiple convictions for the same offense when the defendant had already been convicted on one count for both offenses.

The *corpus delicti* of the crime of rape may be proved by extrajudicial admissions and circumstantial evidence. See *State v. Higden*, 224 Kan. 720, 585 P.2d 1048 (1978).

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. See *State v. Blue*, 225 Kan. 576, 580, 592 P.2d 897 (1979).

A search warrant is required before pubic hair may be extracted from a person. *State v. Gammill*, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978).

PATTERN INSTRUCTIONS FOR KANSAS

57.02 SEXUAL INTERCOURSE—DEFINITION

Sexual intercourse means any penetration of the female sex organ by the male sex organ.

Notes on Use

For authority see K.S.A. 21-3501 (1). This instruction should be given in all rape prosecutions.

Comment

The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). See also *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936), and 65 Am. Jur. 2d, Rape § 3.

The trial court's failure to give a definition of sexual intercourse was not reversible error, because no objection was raised at trial and the instruction given was complete. *State v. James*, 217 Kan. 96, 535 P.2d 991 (1975).

An instruction defining sexual intercourse, which was a verbatim statement of PIK 57.02 and conformed with K.S.A. 21-3501 (1) was a correct statement of the law. *State v. Steward*, 219 Kan. 256, 269, 547 P.2d 773 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

The Committee recommends that no separate instruction be given.

Comment

The Committee believes PIK 2d 52.09, Credibility of Witnesses, adequately covers the credibility of the testimony of the prosecutrix. See *State v. Loomer*, 105 Kan. 410, 184 Pac. 723 (1919) and 65 Am. Jur. 2d, Rape, §§ 86 & 87.

The credibility of the prosecutrix's testimony is a question of fact for the jury. See *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973), a prosecution for rape and indecent liberties with a child; *State v. Griffin*, 210 Kan. 729, 504 P.2d 150 (1972), a prosecution for indecent liberties with a child; *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971), a prosecution for forcible rape; and *State v. Wade*, 203 Kan. 811, 457 P.2d 158 (1969), a prosecution for burglary and attempted forcible rape.

In *Nichols*, the Supreme Court approved the trial court's refusal to give a requested cautionary instruction on the testimony of a thirteen year old prosecutrix where the instructions as a whole were adequate.

The rape shield statute as contained in K.S.A. 60-447a was enacted into law by the Kansas legislature in 1976. This statute prohibits the admission into evidence of previous sexual conduct of the victim unless its relevancy has been determined at a pre-trial hearing. It requires the defendant to file a written motion within 7 days before the commencement of the trial if such inquiry will be made and requires the court to have a hearing on the relevancy of the proffered evidence. The statute was held to be constitutional in *In re Nichols*, 2 Kan. App. 2d 431, 580 P.2d 1370 (1978); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); and in *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979). Furthermore, in *State v. Cook*, 224 Kan. 132, 578 P.2d 257 (1978), the Supreme Court interpreted the provisions of K.S.A. 60-422(c) to prohibit cross-examination on sexual morality as it was not relevant to the honesty or veracity of a witness.

PATTERN INSTRUCTIONS FOR KANSAS

**57.04 RAPE, CORROBORATION OF PROSECUTRIX'S
TESTIMONY UNNECESSARY**

The Committee recommends that no separate instruction be given.

Comment

At common law the evidence of the prosecutrix was sufficient to sustain a conviction without corroboration. This was true even though the prosecutrix was an infant. Several states have modified the common law and require some corroboration by statute to sustain a conviction. See 65 Am.Jur.2d, Rape, § 96. Kansas has not modified the common law and a conviction can be had without corroboration. See *State v. Tinkler*, 72 Kan. 262, 83 Pac. 830 (1905); *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971); *State v. Robinson*, 219 Kan. 218, 220, 547 P.2d 335 (1976); and *State v. Sanders*, 227 Kan. 892, 895, 610 P.2d 633 (1980).

57.05 INDECENT LIBERTIES WITH A CHILD

The defendant is charged with the crime of indecent liberties with a child. The defendant pleads not guilty.

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

1. That the defendant had sexual intercourse with _____;

or

That the defendant submitted to lewd fondling or touching of (his) (her) person by _____, with intent to arouse or to satisfy the sexual desires of either or both;

or

That the defendant fondled or touched the person of _____ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either or both;

2. That _____ was then a child under the age of 16 years and not the spouse of the defendant; and

3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3503. If a definition of the words "lewd fondling or touching" is desired, the following is suggested: As used in this instruction the words "lewd fondling or touching" mean a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

Indecent liberties with a child is a class C felony. If claim number one is based on sexual intercourse, PIK 2d 57.02, Sexual Intercourse—Definition, should be given.

Comment

The authority statute was amended in 1975 by adding the adjective "lewd" as a modifier of the words "fondling or touching." The amendment followed *State v. Conley*, 216 Kan. 66, 531 P.2d 36 (1975) wherein the Supreme Court held that the former section of the statute was ". . . not sufficiently definite in its description of the acts or conduct forbidden when measured by common understanding and practice as to satisfy constitutional requirements of due process."

PATTERN INSTRUCTIONS FOR KANSAS

The amended section, however, covers only one of two areas of statutory vagueness. In *Conley*, supra, the court compared the original recommendation of the Judicial Council Advisory Committee on Criminal Law Revision with the statute as originally enacted and noted that the adjective "lewd" as a modifier of the words "fondling or touching" was eliminated and in lieu of the words "sex organs", the term "person" was submitted. The legislature included the adjective modifier "lewd" as the sole amendment to the section of the statute and chose not to substitute the words "sex organs" for the word "person." The term "person" is broad in scope. However, statutes in other jurisdictions with language similar to the amended Kansas statute have been upheld. See *People v. Polk*, 10 Ill. App.2d 408, 294 N.E. 2d 113 and *State v. Minns*, 80 N.M. 269, 454 P.2d 355.

The elements of the offense of indecent liberties with a child under K.S.A. 21-3503(1)(a) are stated in *State v. Owens & Carlisle*, 210 Kan. 628, 504 P.2d 249 (1972).

Evidence of similar crimes, with proper limiting instructions under K.S.A. 60-455, may be relevant and admissible in prosecutions for indecent liberties with a child. See the comment under PIK 2d 52.06, Admissibility of Evidence of Other Crimes.

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the state to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonser*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App.2d 349, 578 P.2d 1147 (1978).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

PATTERN INSTRUCTIONS FOR KANSAS

57.06 INDECENT LIBERTIES WITH A WARD

The defendant is charged with the crime of indecent liberties with a ward. The defendant pleads not guilty.

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

1. That the defendant had sexual intercourse with _____;

or

That the defendant fondled or touched the person of _____ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either or both;

or

That the defendant submitted to lewd fondling or touching of (his) (her) person by _____, with intent to arouse or to satisfy the sexual desires of either or both;

2. That _____ was then a child under the age of 16 years;

3. That defendant was the (guardian) (proprietor) (employee) of a foster home, orphanage, or other public or private institution for the care and custody of minor children, to whose charge such child was committed or entrusted by any court, probation officer, department of social and rehabilitation services or other agency acting under the color of law; and

4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3504. If a definition of the words "lewd fondling or touching" is desired, the following is suggested: As used in this instruction the words "lewd fondling or touching" mean a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

Indecent liberties with a ward is a class B felony. If claim number one is based on sexual intercourse, PIK 2d 57.02, Sexual Intercourse—Definition, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

See comment under PIK 2d 57.05, Indecent Liberties With a Child. A child, under the age of sixteen years, whose care and custody has been assigned to the proprietor of a foster home by the department of social welfare or other agency acting under the color of law is a "ward" as that term is used in K.S.A. 21-3504. See *State v. Dunham*, 213 Kan. 469, 517 P.2d 150 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

57.07 SODOMY

The defendant is charged with the crime of sodomy.
The defendant pleads not guilty.

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

1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) (a consenting adult of the opposite sex);
or
That the defendant had (oral) (anal) sexual relations with an animal;
or
That the defendant had sexual relations with an animal;
2. That there was actual penetration; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Any penetration, however slight is sufficient. [The lips constitute the entrance to, and are a part of, the mouth.]

Notes on Use

For authority see K.S.A. 21-3505. The crime of sodomy is a class B misdemeanor. Sodomy between a husband and wife or between consenting adult members of the opposite sex is not a crime.

If the crime is oral sex and there is an issue concerning penetration, the bracketed clause should be given.

Comment

The words "copulation" and "coitus" were not included in the elements of sodomy for the reason that each mean sexual intercourse. Instead the term "sexual relations" was substituted to the end that the jury would not be confused. Sexual intercourse was not substituted as it has statutory reference to other sexual offenses.

In *State v. Thompson*, 221 Kan. 165, 558 P.2d 1079 (1976), the Supreme Court stated that a defendant convicted of forcible sodomy lacks standing to challenge the constitutional validity of the consensual sodomy statute on the basis that it discriminates against consenting homosexuals.

In *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978), penetration of the defendant's male organ beyond the lips of the complaining witness was held sufficient to constitute sodomy, although the clenched teeth of the victim prevented further penetration.

Forcing a victim to commit sodomy constitutes the infliction of "bodily harm" as that term is used in K.S.A. 21-3421 for the crime of aggravated kidnapping. See *State v. Cheers*, 231 Kan. 161, 643 P.2d 154 (1982).

PATTERN INSTRUCTIONS FOR KANSAS

57.08 AGGRAVATED SODOMY

The defendant is charged with the crime of aggravated sodomy. The defendant pleads not guilty.

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

1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) (a consenting adult of the opposite sex);

or

That the defendant had (oral) (anal) sexual relations with an animal;

or

That the defendant had sexual relations with an animal;

2. That there was actual penetration;
3. That the defendant (used force or threat of force) (inflicted bodily harm upon the victim during the commission of the act); and

or

That the victim was a child under the age of 16 years;

and

4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas. Any penetration, however slight, is sufficient. [The lips constitute the entrance to, and are a part of, the mouth.]

Notes on Use

For authority see K.S.A. 21-3506. Aggravated sodomy is a class B felony.

If the crime is oral sex and there is an issue concerning penetration, the bracketed clause should be given.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

See comment under PIK 2d 57.07, Sodomy.

In a prosecution for aggravated sodomy the element of penetration was satisfied from the uncontroverted facts that the defendant was on top of the victim's back and she felt pain in her rectum. *State v. Kelly*, 210 Kan. 192, 499 P.2d 1040 (1972).

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy, and is not a crime necessarily proved if aggravated sodomy is proved. See *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

When the victim testified there was penetration in a prosecution for aggravated sodomy, and the fact was uncontroverted, the fact alone is sufficient to establish the crime was completed, and the trial court need not instruct on a lesser included offense. See *State v. Yates*, 200 Kan. 635, 638, 556 P.2d 176 (1976).

In *State v. Thompson*, 221 Kan. 165, 558 P.2d 1079 (1976), the Supreme Court held that a defendant convicted of forcible sodomy lacks standing to challenge the constitutional validity of the consensual sodomy statute on the basis that it discriminates against consenting homosexuals. The court further held that the aggravated sodomy statute, K.S.A. 21-3506, was not unconstitutional as an invalid exercise of police power, as a bill of attainder, or as providing for cruel and unusual punishment.

Evidence of crimes, with proper limiting instructions under K.S.A. 60-455, may be relevant and admissible in prosecutions for aggravated sodomy. See the comment under PIK 2d 52.06, Admissibility of Evidence of Other Crimes.

In *State v. Cameron & Bently*, 216 Kan. 644, 533 P.2d 1255 (1975), it was not error to refuse an instruction on the lesser included offense of sodomy where the evidence showed defendants were either guilty of aggravated sodomy or nothing.

To the same effect see *State v. Everson*, 229 Kan. 540, 542, 626 P.2d 1189 (1981).

In *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978), penetration of the defendant's male organ beyond the lips of the complaining witness was held sufficient to constitute the crime of sodomy, although the clenched teeth of the victim prevented further penetration. Also see *State v. Lovelace*, 227 Kan. 348, 607 P.2d 49 (1980).

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. See *State v. Blue*, 225 Kan. 576, 580 P.2d 897 (1979).

In *Blue*, the court further held that if the crime charged is aggravated sodomy, and the defense is consent, it is not error to refuse to instruct on sodomy as a lesser included offense.

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979), and *State v. Robinson, Lloyd, & Clark*, 229 Kan. 301, 624 P.2d 964 (1981).

An instruction defining venue for crimes committed in transit was approved in *State v. Lovelace*, 227 Kan. 348, 351, 607 P.2d 49 (1980).

Forcing a victim to commit sodomy constitutes the infliction of "bodily harm" as that term is used in K.S.A. 21-3421 for the crime of aggravated kidnapping. See *State v. Cheers*, 231 Kan. 161, 643 P.2d 154 (1982).

PATTERN INSTRUCTIONS FOR KANSAS

57.09 ADULTERY

The defendant is charged with the crime of adultery.
The defendant pleads not guilty.

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

1. That the defendant had sexual intercourse with _____;
2. That the defendant was then married to a person other than _____; and
or
That the defendant was not then married and knew that _____ was married; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3507. Adultery is a class C misdemeanor. PIK 2d 57.02, Sexual Intercourse—Definition, should be given.

Comment

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 519 P.2d 1097 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

57.10 LEWD AND LASCIVIOUS BEHAVIOR

The defendant is charged with the crime of lewd and lascivious behavior. The defendant pleads not guilty.

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

1. That the defendant performed an act of (sexual intercourse) (sodomy) with (_____) (an animal) with knowledge or reasonable anticipation that the participants were being viewed by others; and
or
That the defendant exposed (his) (her) sex organ in the presence of a person not (his) (her) spouse and who had not consented thereto, with the intent to arouse or gratify the sexual desires of the defendant or another; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3508. Lewd and lascivious behavior is a class B misdemeanor. If the act under claim number one is sexual intercourse, PIK 2d 57.02, Sexual Intercourse—Definition, should be given. If the act under claim number one is sodomy, PIK 2d, 57.18(b), Sex Offenses—Definitions, should be given.

Comment

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977). *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979), and *State v. Robinson, Lloyd, and Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

PATTERN INSTRUCTIONS FOR KANSAS

57.11 ENTICEMENT OF A CHILD

The defendant is charged with the crime of enticement of a child. The defendant pleads not guilty.

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

1. That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter a (vehicle) (building) (secluded place) with the intent to commit an act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior) upon or with the person of _____;
2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior) means: _____.

Notes on Use

For authority see K.S.A. 21-3509. Enticement of a child is a class D felony. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction.

Comment

See the Judicial Council comment following K.S.A. 21-3511 which distinguishes the crimes of enticement of a child, indecent solicitation of a child and aggravated indecent solicitation of a child.

PATTERN INSTRUCTIONS FOR KANSAS

57.12 INDECENT SOLICITATION OF A CHILD

The defendant is charged with the crime of indecent solicitation of a child. The defendant pleads not guilty.

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

1. That the defendant (invited) (solicited) _____ to (commit) (submit to) an act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior);
2. That _____ was then under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior) means: _____.

Notes on Use

For authority see K.S.A. 21-3510. Indecent solicitation of a child is a class A misdemeanor. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction.

Comment

See Comment PIK 2d 57.11, Enticement of a Child.

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

57.12-A SEXUAL EXPLOITATION OF A CHILD

The defendant is charged with the crime of sexual exploitation of a child. The defendant pleads not guilty.

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) a child to engage in sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium);
or
That the defendant was a (parent) (guardian) (other person having custody or control of a child) and knowingly permitted the child to (engage in) (assist another to engage in) sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium);
2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, the following words mean:

- a. "Sexually explicit conduct" means actual or simulated sexual intercourse. It includes [(genital-genital) (oral-genital) (anal-genital) (oral-anal) contact, whether between persons of the same or opposite sex] [sexual intercourse with an animal] [masturbation] [physical abuse for the purpose of sexual stimulation] [lewd exhibition of the genitals or pubic area of any person].
- b. "Promoting" means producing, directing, manufacturing, issuing, publishing, or advertising for pecuniary profit.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-3516. Sexual exploitation of a child is a class E felony. The applicable parenthetical words under element 1 of the instruction should be selected as well as the applicable bracketed phrases under the definition of sexually explicit conduct. For a definition of the word "lewd" see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

The defendant is charged with the crime of aggravated indecent solicitation of a child. The defendant pleads not guilty.

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

1. That the defendant (invited) (solicited) _____ to (commit) (submit to) the act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior);
2. That _____ was then a child under the age of 12 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (taking indecent liberties with a child) (sodomy) (lewd and lascivious behavior) means: _____.

Notes on Use

For authority see K.S.A. 21-3511. Aggravated indecent solicitation of a child is a class E felony. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction. The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

57.14 PROSTITUTION

The defendant is charged with the crime of prostitution. The defendant pleads not guilty.

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

1. That the defendant intentionally (performed for hire) (offered to perform for hire) (agreed to perform for hire) the act of (sexual intercourse) (oral sexual relations) (anal sexual relations) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of any person);
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3512. Prostitution is a class B misdemeanor. If the act under claim number one is sexual intercourse, PIK 2d 57.02, Sexual Intercourse—Definition, should be given.

Comment

In *City of Junction City v. White*, 2 Kan. App.2d 403, 580 P.2d 891 (1978), the Court of Appeals held that it was within the police power of the state to prohibit prostitution and that the right of privacy does not protect solicitation of customers by a prostitute.

57.15 PROMOTING PROSTITUTION

The defendant is charged with the crime of promoting prostitution. The defendant pleads not guilty.

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

1. That the defendant

(a) (established) (owned) (maintained) (managed) a house of prostitution; and

or

(b) participated in the (establishment) (ownership) (maintenance) (management) of a house of prostitution; and

or

(c) permitted any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; and

or

(d) procured a prostitute for a house of prostitution; and

or

(e) induced another to become a prostitute; and

or

(f) solicited a patron for a prostitute or for a house of prostitution; and

or

(g) procured a prostitute for a patron; and

or

(h) (procured transportation for) (paid for the transportation of) (transported) a person assisting or promoting that person's engaging in prostitution; and

or

(i) was employed to perform any act of [set out applicable section of (a) through (h)]; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-3513. Promoting prostitution is a class A misdemeanor. The appropriate category should be selected.

PATTERN INSTRUCTIONS FOR KANSAS

57.16 HABITUALLY PROMOTING PROSTITUTION

The defendant is charged with the crime of habitually promoting prostitution. The defendant pleads not guilty.

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

1. That the defendant promoted prostitution by _____;
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.
3. That prior to that date the defendant had been convicted of promoting prostitution.

Notes on Use

For authority see K.S.A. 21-3514. Habitually promoting prostitution is a class E felony. The applicable category from PIK 2d 57.15, Promoting Prostitution, should be included in claim number one.

PATTERN INSTRUCTIONS FOR KANSAS

57.17 PATRONIZING A PROSTITUTE

The defendant is charged with the crime of patronizing a prostitute. The defendant pleads not guilty.

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

1. That the defendant knowingly (entered) (remained) in a house of prostitution with the intent to hire a prostitute to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior); and

or

That the defendant hired a prostitute to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior) with him; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (sodomy) (lewd and lascivious behavior) means: _____.

Notes on Use

For authority see K.S.A. 21-3515. Patronizing a prostitute is a class C misdemeanor. If the act is sodomy or lewd and lascivious behavior, the applicable definition of such crime in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction. If the act is sexual intercourse, the concluding definition should be deleted.

Comment

Patronizing a prostitute is not a lesser included offense of rape or aggravated sodomy. See *State v. Blue*, 225 Kan. 576, 580, 592 P.2d 897 (1979).

57.18 SEX OFFENSES—DEFINITIONS

Unlawful sexual acts are defined as follows:

- (a) Indecent liberties with a child. “Indecent liberties with a child” means engaging in either of the following acts with a child under the age of 16: (1) the act of sexual intercourse, or (2) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both.
- (b) Sodomy. “Sodomy” means: (1) having oral or anal sexual relations between persons who are not husband and wife or consenting adult members of the opposite sex, or (2) having oral or anal sexual relations between a person and an animal, or (3) having sexual relations with an animal.
- (c) Aggravated sodomy. “Aggravated sodomy” means sodomy committed under the following circumstances: (1) When force or threat of force is used or where bodily harm is inflicted upon the victim, or (2) when the act is committed with a child under the age of sixteen years.
- (d) Lewd and lascivious behavior. “Lewd and lascivious behavior” means: (1) the commission of the act of sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others, or (2) the exposure of a sex organ in the presence of a person who is not the spouse of the offender or who has not consented thereto with intent to arouse or gratify the sexual desires of the offender or another.

Notes on Use

Authority for the definitions is contained in several statutes: indecent liberties with a child, K.S.A. 21-3503; sodomy, K.S.A. 21-3505; aggravated sodomy, K.S.A. 21-3506; and lewd and lascivious behavior, K.S.A. 21-3508.

CHAPTER 58.00
CRIMES AFFECTING FAMILY
RELATIONSHIPS AND CHILDREN

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PATTERN INSTRUCTIONS FOR KANSAS

58.01 BIGAMY

The defendant is charged with the crime of bigamy. The defendant pleads not guilty.

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

1. That the defendant entered into a marriage in Kansas while married to another; and

or

That the defendant entered into a marriage with a person in Kansas knowing that person was the spouse of another; and

or

That the defendant, after marrying in another state or country, cohabited within this state with a spouse while having another spouse living at the time of the cohabitation; and

or

That the defendant, after marrying in another state or country, cohabited within this state with a spouse while knowing such spouse was a spouse of another at the time of the cohabitation; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3601(1). Bigamy is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

58.02 AFFIRMATIVE DEFENSES TO BIGAMY

It is a defense to the charge of bigamy that at the time of the (marriage) (cohabitation) the defendant reasonably believed that the earlier marriage had been dissolved by (death) (divorce) (annulment).

This belief must have been based on circumstances which would have led a reasonable person to conclude that the earlier marriage had been dissolved.

Notes on Use

For authority see K.S.A. 21-3601(2). This instruction should be given whenever there is evidence that the defendant believed an earlier marriage was dissolved. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be used.

Comment

For discussion of “reasonable belief” see *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

PATTERN INSTRUCTIONS FOR KANSAS

58.03 INCEST

The defendant is charged with the crime of incest. The defendant pleads not guilty.

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

1. That the defendant married a person known to him to be related to him as (brother) (sister) of (the whole blood) (one-half blood) or related to him as (uncle) (aunt) (nephew) (niece) and
or
That the defendant had sexual intercourse with a person known to the defendant to be related to him as (brother) (sister) of the (whole blood) (one-half blood) or related to him as (uncle) (aunt) (nephew) (niece) and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3602. Incest is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

58.04 AGGRAVATED INCEST

The defendant is charged with the crime of aggravated incest. The defendant pleads not guilty.

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

1. That the defendant (engaged in sexual intercourse) (engaged in indecent liberties) (engaged in sodomy) (engaged in lewd and lascivious behavior) with _____, who he knew was his _____; and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3603. Aggravated incest is a class D felony. In order to constitute the crime of aggravated incest, the defendant must be a parent, an adoptive parent, a step-parent, or a grandparent. A child includes an illegitimate child, a stepchild, or an adopted child. The stepchild or adopted child must be under the age of eighteen years.

Reference should be made to chapter 57.00 for a definition of the claimed sexual intercourse or unlawful sexual act.

PATTERN INSTRUCTIONS FOR KANSAS

58.05 ABANDONMENT OF A CHILD

The defendant is charged with the crime of abandonment of a child. The defendant pleads not guilty.

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

1. That the defendant was a (parent) (guardian) of _____.

or

That the defendant was a person to whom the care and custody of _____ had been entrusted.

2. That the defendant left the child in a place where it might suffer because of neglect;
3. That the defendant left the child with intent to abandon the child;
4. That the child at the time was under the age of sixteen years; and
5. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3604. Abandonment of a child is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

58.06 NONSUPPORT OF A CHILD

The defendant is charged with the crime of nonsupport of a child. The defendant pleads not guilty.

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

1. That the defendant was a (natural parent) (adoptive parent) of _____ who was under the age of eighteen years.
2. That the defendant without just cause refused to provide for the support and maintenance of _____ who was then in necessitous circumstances; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

[To establish parentage it is only necessary that you be satisfied that the fact of parentage is more probably true than not true. Proof beyond a “reasonable doubt” as set forth in Instruction _____ herein does not apply to the issue of parentage.]

Notes on Use

For authority see K.S.A. 21-3605(1). Nonsupport of a child is a class E felony. Where parentage is in issue, the bracketed instruction should be given; otherwise it is unnecessary.

Comment

Whether the legislature believed that there was a difference between “without lawful excuse” in the nonsupport of a child provision and “without just cause” in the nonsupport of a spouse provision PIK 2d 58.07, Nonsupport of a Spouse, is not known. It is arguable that a juror might have no difficulty understanding what is meant by the term “without just cause,” but would have some difficulty in understanding the term “without lawful excuse.” Since the Committee does believe that “without just cause” is more understandable to jurors than “without lawful excuse,” and since there are no statutory “lawful excuses,” it has concluded “without just cause” should be used.

One who is outside the state may be chargeable with nonsupport of a child within this state even though he did not know the child was within this state.

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that “the children should be deemed to be in destitute or necessitous circumstances, if they would

PATTERN INSTRUCTIONS FOR KANSAS

have been in such condition had they not been provided for by someone else.” *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *State v. Knetzer*, 3 Kan. App.2d 673, 600 P.2d 160 (1979).

Evidence that the defendant failed to provide support during a period of time later than the period of time charged in the information is not admissible. *State v. Long*, 210 Kan. 436, 502 P.2d 810 (1972).

The omission from K.S.A. 21-3605(1) of the term “destitute” does not change existing case law that interprets the phrase “destitute or necessitous circumstances.” *State v. Knetzer*, *supra*.

PATTERN INSTRUCTIONS FOR KANSAS

58.07 NONSUPPORT OF A SPOUSE

The defendant is charged with the crime of nonsupport of a spouse. The defendant pleads not guilty.

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

1. That the defendant was the (wife) (husband) of _____.
2. That defendant failed to support _____, who was in necessitous circumstances.
3. That the defendant had no just cause for such failure to support; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3605(2). Nonsupport of a spouse is a class E felony.

Comment

If the support claim is founded upon a common-law marriage, an instruction should be given that common-law marriages are recognized in this state, and as to what is necessary to prove a common-law marriage. The basic elements of a common-law marriage are (1) capacity of the parties to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public. *Fleming v. Fleming*, 221 Kan. 290, 559 P.2d 329 (1977). The statute makes no reference to that type of marriage.

PATTERN INSTRUCTIONS FOR KANSAS

58.08 CRIMINAL DESERTION

The defendant is charged with the crime of criminal desertion. The defendant pleads not guilty.

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

1. That the defendant (abandoned his spouse) (willfully and without just cause failed to provide for the care, protection, or support of his spouse);
2. That his spouse was then in ill health or necessitous circumstances; and
3. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3606. Criminal desertion is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

58.09 ENCOURAGING JUVENILE MISCONDUCT

The Statute on which this instruction was based (K.S.A. 21-3607) was repealed effective July 1, 1978. [L. 1978, ch. 123 §§ 3.]

PATTERN INSTRUCTIONS FOR KANSAS

58.10 ENDANGERING A CHILD

The defendant is charged with the crime of endangering a child. The defendant pleads not guilty.

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

1. That the defendant willfully and unreasonably caused or permitted a child under the age of eighteen years to be placed in a situation in which his life, body or health might be injured or endangered; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3608. Endangering a child is a class A misdemeanor. It should be noted that by virtue of K.S.A. 21-3608(1)(c), an exception is made relative to lack of treatment or cure of disease resulting in pain, mental distress, endangerment or injury when caused by one guided by spiritual doctrines in accordance with the belief of a recognized church or religious denomination.

Comment

The provisions of K.S.A. 21-3608(1)(a) were found to be unconstitutional since they were so vague and indefinite that they failed to establish reasonably definite standards of guilt in accord with the constitutional requirements of due process of law. *State v. Meinert*, 225 Kan. 816, 594 P.2d 232 (1979). Although not determined, the constitutionality of 21-3608(1)(b) was questioned in the concurring opinion in *State v. Brooks*, 228 Kan. 562, 618 P.2d 830 (1980).

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58.11 ABUSE OF A CHILD

The defendant is charged with the crime of abuse of a child. The defendant pleads not guilty.

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

1. That the defendant willfully (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) a child under the age of eighteen years; and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3609. Abuse of a child is a class E felony.

Comment

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App.2d 726, 602 P.2d 99 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

58.12 FURNISHING INTOXICANTS TO A MINOR

The defendant is charged with the crime of furnishing intoxicants to a minor. The defendant pleads not guilty.

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

1. That the defendant directly or indirectly (sold to) (bought for) (gave or furnished to) a person under the age of twenty-one years any intoxicating liquor; and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3610. Furnishing intoxicants to a minor is a class B misdemeanor.

Comment

K.S.A. 41-102 may be referred to for a definition of intoxicating liquor. There is a related misdemeanor created by K.S.A. 41-2704, which relates to permitting a person under the age of eighteen years to buy or drink any cereal malt beverage at any place of business licensed to sell such beverages.

PATTERN INSTRUCTIONS FOR KANSAS

58.12-A FURNISHING CEREAL MALT BEVERAGE TO A MINOR

The defendant is charged with the crime of furnishing cereal malt beverage to a minor. The defendant pleads not guilty.

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

1. That the defendant directly or indirectly (bought for) (sold to) (gave) (furnished to) a person under the age of 18 years cereal malt beverage.
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3610a(a). Furnishing cereal malt beverage to a minor is a class B misdemeanor. For a definition of cereal malt beverage see K.S.A. 41-2701.

Comment

K.S.A. 21-3610a(c) exempts from prosecution under this statute the parents or legal guardians of the minor or ward.

PATTERN INSTRUCTIONS FOR KANSAS

58.13 AGGRAVATED JUVENILE DELINQUENCY

The defendant is charged with the crime of aggravated juvenile delinquency. The defendant pleads not guilty.

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

1. That the defendant is 16 or more years of age;
2. That the defendant has been adjudicated to be a delinquent or miscreant child under the Kansas Juvenile Code or a juvenile offender under the Kansas Juvenile Offenders Code;
3. That the defendant was confined in (insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.);
4. That the defendant intentionally (burned or attempted to burn) (set fire to any combustible material for the purpose of burning) a building at (insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.);

or

That the defendant intentionally (burned) (destroyed) (otherwise damaged) property belonging to the State of Kansas exceeding the value of \$100;

or

That the defendant committed an (aggravated assault) (aggravated battery) upon an (officer of) (attendant of) (employee of) (person confined in) (here insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.);

or

That the defendant intentionally (ran away) (escaped) from (here insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.) after previously having run away or escaped; and

5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3611. Aggravated juvenile delinquency is a class E felony. In case the prosecution is under K.S.A. 21-3611(3), the judge will need to instruct on the elements of aggravated assault or aggravated battery. See PIK 2d 56.14, Aggravated Assault or PIK 2d 56.18, Aggravated Battery.

Comment

A conviction of escape from the State Industrial School for Boys is a prior felony conviction within the purview of the Habitual Criminal Act, *LeVier v. State*, 214 Kan. 287, 520 P.2d 1325 (1974).

K.S.A. 1979 Supp. 21-3611 was held constitutional in *State v. Sherk*, 217 Kan. 726, 538 P.2d 1399 (1975).

A defendant may be charged under K.S.A. 21-3611 because of a second escape, although he departs from a hospital while in custody rather than from an institution or a facility. *State v. Pritchett*, 222 Kan. 719, 567 P.2d 886 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION

The defendant is charged with the crime of contributing to a child's (misconduct) (deprivation). The defendant pleads not guilty.

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

1. That _____ was a child under 18 years of age;
2. That the defendant intentionally (caused) (encouraged) _____
 - (a) to become a [(delinquent) (miscreant) (wayward) (deprived) child] [traffic offender] [truant] [child in need of care] [juvenile offender];
 - or
 - (b) to commit an act which if committed by an adult would be a (felony) (misdemeanor).
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3612. Contributing to a child's misconduct or deprivation is a class A misdemeanor, except that if the child is caused or encouraged to commit an act which, if committed by an adult, would be a felony, the offense is a class E felony.

The juvenile code as it existed in Article 8, Chapter 38 was substantially revised in 1982. Article 15, Chapter 38, K.S.A. 1982 Supp. is cited as the Kansas code for the care of children and Article 16, Chapter 38, K.S.A. 1982 Supp. is to be known as the Kansas juvenile offenders code. The conduct caused or encouraged by a defendant in a prosecution pursuant to K.S.A. 21-3612(1)(a) is described by reference to definitions appearing in all three of these codes.

For a definition of a child in need of care, see K.S.A. 1982 Supp. 38-1502 (effective January 1, 1983).

For a definition of juvenile offender, see K.S.A. 1982 Supp. 38-1602 (effective January 1, 1983).

K.S.A. 38-802 (Repealed January 1, 1983) defines the other conduct of juveniles which if caused or encouraged can be the basis for prosecution.

CHAPTER 59.00

CRIMES AGAINST PROPERTY

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PATTERN INSTRUCTIONS FOR KANSAS

59.01 THEFT

The defendant is charged with the crime of theft of property of the value of [one hundred dollars or more] [less than one hundred dollars]. The defendant pleads not guilty.

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

1. That _____ was the owner of the property;
2. That the defendant [obtained] [exerted] unauthorized control over the property,

or

That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant,

or

That the defendant obtained by threat control over property,

or

That the defendant obtained control over property knowing the property to have been stolen by another;

3. That the defendant intended to deprive _____ permanently of the use or benefit of the property.
4. That the value of the property was [one hundred dollars or more] [less than one hundred dollars]; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3701. Theft of property of the value of one hundred dollars or more is a class D felony. Theft of property of the value of less than one hundred dollars is a class A misdemeanor.

In a felony theft prosecution it is necessary to provide the jury with the alternative of finding misdemeanor theft if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS

For a definition of “deprive permanently” see Chapter 53, Definitions and Explanations of Terms.

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 to establish intent to permanently deprive, an instruction on the meaning of *prima facie* is required. See PIK 2d 54.01-B, Presumption of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

In situations where there is a question in the mind of the prosecutor as to what the evidence will disclose at trial, the correct procedure in a prosecution for theft under K.S.A. 21-3701 is to charge in the alternative under those subsections of the consolidated theft statute which may possibly be established by the evidence. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

Comment

PIK 2d 59.01 is approved in *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976).

In a prosecution for felony theft where value is in issue an instruction with respect to the element of value and a finding as to value is required. *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975), *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976), *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977).

The Committee believes that no instruction should be given relating to the circumstances of possession of goods proven to have been recently stolen. The statute defining the crime of theft as compared with what was formerly larceny does not require the elements of taking and carrying away. These were elements which the traditional instruction permitted to be inferred against the possessor by the fact of possession.

There is doubt that the principle was ever proper as an instruction. The circumstance of possession of goods recently stolen is a rule of evidence, not a rule of law. Its only application should have been in determining whether as a matter of law there was sufficient evidence to justify submitting the case to the jury. Comment noted and approved in *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

To convict a defendant of theft under K.S.A. 21-3701 (d) the State has the burden of proving that the defendant at the time he received property had a belief or reasonable suspicion from all the circumstances known to him that the property was stolen and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved, additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 2d 59.01-A should be used with 59.01 in possession of stolen property cases.

Prima facie evidence is defined as evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978) requires the State to prove in a theft by deception prosecution pursuant to K.S.A. 21-3701 (b) that the victim was deceived by reliance in whole or in part upon the false statement.

PATTERN INSTRUCTIONS FOR KANSAS

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701(b) violation are *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980) where concealment of merchandise in a toy box was deceptive because the cashier was unaware of the concealed merchandise; and *State v. Hamilton*, 6 Kan. App.2d 646, 631 P.2d 1255 (1981) where a check given after the receipt of merchandise as a false promise to pay cannot be a basis for theft by deception.

PATTERN INSTRUCTIONS FOR KANSAS

59.01-A THEFT—KNOWLEDGE PROPERTY STOLEN

Knowledge that property has been stolen by another must exist at the time control first occurs and may be proven by a showing that the defendant either knew or had a reasonable suspicion from all the circumstances known to him that the property was stolen.

Notes on Use

The instruction should be used with PIK 2d 59.01, Theft, in a prosecution for violation of K.S.A. 21-3701 (d), receiving stolen property.

State v. Bandt, 219 Kan. 816, 549 P.2d 936 (1976) requires that knowledge of the stolen character of the property exists at the time control first occurs where defendant is charged under K.S.A. 21-3701 (d).

PATTERN INSTRUCTIONS FOR KANSAS

59.02 THEFT OF LOST OR MISLAID PROPERTY

The defendant is charged with the crime of theft of lost or mislaid property. The defendant pleads not guilty.

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

1. That _____ was the owner of the property;
2. That the property was lost or mislaid;
3. That the defendant came into possession of the property;
4. That the defendant (knew) (learned) that _____ was the owner of the property;
5. That the defendant failed to take reasonable measures to restore the property to _____;
6. That the defendant intended to deprive _____ permanently of the use or benefit of the property; and
7. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3703. Theft of lost or mislaid property is a class A misdemeanor.

For definition of “deprive permanently,” see Chapter 53, Definitions and Explanations of Terms.

PATTERN INSTRUCTIONS FOR KANSAS

59.03 THEFT OF SERVICES

The defendant is charged with the crime of theft of services. The defendant pleads not guilty.

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

1. That the defendant intentionally obtained services from _____;
2. That the defendant obtained these services by [deception by means of a false statement or representation which deceived _____ who relied in whole or in part upon the false representation or statement of the defendant] [threat] [coercion] [stealth] [mechanical tampering] [use of a false token or device];
3. That the value of the services obtained was [one hundred dollars or more] [less than one hundred dollars]; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3704. Theft of services of the value of one hundred dollars or more is a class D felony. Theft of services of the value of less than one hundred dollars is a class A misdemeanor.

In the prosecution of felony theft of services it is necessary to provide the jury with the alternative of finding misdemeanor theft of services if value might be in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant.

State v. Saylor, 228 Kan. 498, 618 P.2d 1166 (1980) and *State v. Hamilton*, 6 Kan. App.2d 646, 631 P.2d 1255 (1981) are additional cases relating to the requirements of “deception” and “reliance” in theft cases.

PATTERN INSTRUCTIONS FOR KANSAS

59.04 UNLAWFUL DEPRIVATION OF PROPERTY

The defendant is charged with the crime of unlawful deprivation of property. The defendant pleads not guilty.

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

1. That _____ was the owner of the property in question;
2. That the defendant (obtained) (exerted) unauthorized control over the property without the owner's consent;
3. That the defendant intended to temporarily deprive the owner of the use or benefit of the property; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3705. Unlawful deprivation of property is a class A misdemeanor.

For definition of "temporarily deprive" see Chapter 53, Definitions and Explanations of Terms.

Comment

In 1972, K.S.A. 21-3705 was amended to permit the removal in a lawful manner of personal property unlawfully placed or left upon real property.

PATTERN INSTRUCTIONS FOR KANSAS

59.05 FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT

The defendant is charged with the crime of fraudulently obtaining execution of a document. The defendant pleads not guilty.

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

1. That the defendant intentionally caused _____ to execute a _____;
2. That the defendant did so by deception or threat;
3. That when _____ signed the _____ (he disposed of his interest in _____) (he became indebted to pay money); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3706. Fraudulently obtaining execution of a document is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.06 WORTHLESS CHECK

The defendant is charged with the crime of giving a worthless check. The defendant pleads not guilty.

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

1. That a [check] [order] [draft] was [made] [drawn] [issued] [delivered] by the defendant to _____;
or
That a [check] [order] [draft] was caused or directed to be [made] [drawn] [issued] [delivered] by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] with the [bank] [credit union] [savings and loan association] [depository] at the time of the [making] [drawing] [issuing] [delivering] of the [check] [order] [draft] for payment in full of the [check] [order] [draft] on its presentation;
3. That the defendant intended to defraud _____;
4. That the amount of the [check] [order] [draft] was [fifty dollars or more] [less than fifty dollars]; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3707. Giving a worthless check in the amount of fifty dollars or more is a class E felony. Giving a worthless check of less than fifty dollars is a class A misdemeanor.

Defenses to the charge of a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(2), then PIK 2d 59.06-A should be given and modified accordingly.

Comment

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

59.06-A STATUTORY PRESUMPTION OF INTENT TO DEFRAUD—KNOWLEDGE OF INSUFFICIENT FUNDS

Where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds there is a presumption that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with a [bank] [credit union] [savings and loan association] [depository]) where the defendant failed to pay the holder of a (check) (order) (draft) the amount due thereon and a service charge not exceeding \$3 for each (check) (order) (draft) within seven days after notice had been given to the defendant that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository).

[There is a presumption that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds where the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (draft) (order).]

The presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with the [bank] [credit union] [savings and loan association] [depository]). This burden never shifts to the defendant.

Notes on Use

For authority see K.S.A. 21-3707(2). If an issue exists as to the receipt of written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973) upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(2) which enables the State to establish a prima facie case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment in PIK 2d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976) recognizes that K.S.A. 21-3707(2) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(2). *State v. Calhoun*, supra.

PATTERN INSTRUCTIONS FOR KANSAS

59.07 WORTHLESS CHECK—DEFENSE

It is a defense to the charge of giving a worthless check, draft, or order (if it was postdated) (if the person receiving the check, draft, or order knew when he accepted it that there were not sufficient funds on deposit to cover it upon presentation.)

Notes on Use

For statutory authority, see K.S.A. 21-3707(3). If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

PATTERN INSTRUCTIONS FOR KANSAS

**59.08 HABITUALLY GIVING A WORTHLESS CHECK
WITHIN TWO YEARS**

The defendant is charged with the crime of habitually giving a worthless check. The defendant pleads not guilty.

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

1. That a [check] [order] [draft] was [made] [drawn] [issued] [delivered] by the defendant to _____;
or
That a [check] [order] [draft] was caused or directed to be [made] [drawn] [issued] [delivered] by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] with the [bank] [credit union] [savings and loan association] [depository] at the time of the [making] [drawing] [issuing] [delivering] of the [check] [order] [draft] for the payment in full of the [check] [order] [draft] on its presentation;
3. That the defendant had the intent to defraud _____;
4. That the check was drawn for less than fifty dollars (\$50.00);
5. That the defendant had been convicted twice between the _____ day of _____, 19____, and the _____ day of _____, 19____ for giving a worthless check; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For statutory authority, see K.S.A. 21-3708(a).

Habitually giving a worthless check is a class D felony.

Defenses to the charge of giving a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

The date to be placed in the first blank in element 5 should be the date of the first conviction which must be within two years immediately preceding the date of the check in question. The second date blank should be the date of the check in question. See K.S.A. 21-3708(a).

Comment

State v. Loudermilk, 221 Kan. 157, 557 P.2d 1229 (1976) recognizes that prior convictions are a necessary element of the offense.

PATTERN INSTRUCTIONS FOR KANSAS

59.09 HABITUALLY GIVING WORTHLESS CHECKS—ON SAME DAY

The defendant is charged with the crime of habitually giving worthless checks on the same day. The defendant pleads not guilty.

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

1. That two or more [checks] [orders] [drafts] were [made] [drawn] [issued] [delivered] on the _____ day of _____, by the defendant to _____;
or
That two or more [checks] [orders] [drafts] were caused or directed to be [made] [drawn] [issued] [delivered] on the _____ day of _____, by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] at the time of the [making] [drawing] [issuing] [delivering] of the [checks] [orders] [drafts] for the payment in full of the [checks] [orders] [drafts] on their presentation;
3. That the defendant had the intent to defraud _____;
4. That each of the checks was drawn for less than fifty dollars (\$50.00), but together they totaled fifty dollars (\$50.00) or more; and
5. That these acts occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3708(b).

Habitually giving worthless checks is a class D felony.

Defenses to the charge of giving a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

PATTERN INSTRUCTIONS FOR KANSAS

59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK

The defendant is charged with the crime of unlawful prosecution for worthless check.

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

1. That the defendant (filed a complaint before a judge upon which _____ was charged with the crime of giving a worthless check);
or
(gave information upon which _____ was charged with the crime of giving a worthless check);
2. That the defendant knew when he accepted it (that the [check] [draft] [order] was dated later than the date on which it was actually accepted);
or
(that _____ did not have [any] [sufficient] funds on deposit with the _____ to make the [check] [draft] [order] good);
and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3709. Causing an unlawful prosecution is a class A misdemeanor and any person convicted of the violation of this statute shall pay the taxable cost of the prosecution.

Comment

See K.S.A. 21-3707.

PATTERN INSTRUCTIONS FOR KANSAS

59.11 FORGERY-MAKING OR ISSUING A FORGED INSTRUMENT

The defendant is charged with the crime of forgery. The defendant pleads not guilty.

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

1. That the defendant knowingly made, altered or endorsed a _____ so that it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);
or
That the defendant issued or delivered a _____ which he knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (with different provisions) (by the authority of _____, who did not give such authority);
2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3710(a), (b). Forgery is a class D felony. This section should not be used for K.S.A. 21-3710(c).

For definition of intent to defraud, see K.S.A. 21-3110(9).

Comment

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a) and (b) were held to be constitutional against a claim of being vague and indefinite.

PATTERN INSTRUCTIONS FOR KANSAS

59.12 FORGERY—POSSESSING A FORGED INSTRUMENT

The defendant is charged with the crime of forgery. The defendant pleads not guilty.

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

1. That the defendant possessed a _____ which he knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);
2. That the defendant intended to issue or deliver the _____;
3. That the defendant did so with the intent to defraud; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3710(c). Forgery is a class D felony. This section should not be used for K.S.A. 21-3710(a), (b).

For definition of intent to defraud, see K.S.A. 21-3110(9).

PATTERN INSTRUCTIONS FOR KANSAS

59.13 MAKING A FALSE WRITING

The defendant is charged with the crime of making a false writing. The defendant pleads not guilty.

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

1. That the defendant (made) (caused to be made) a false _____;
2. That the defendant knew that such _____ (falsely stated or represented some material matter) (was not what it purported to be);
3. That the defendant intended to (defraud) (induce official action) based upon such _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3711. Making a false writing is a class D felony.

Comment

See Judicial Council notes, K.S.A. 21-3710.

PATTERN INSTRUCTIONS FOR KANSAS

59.14 DESTROYING A WRITTEN INSTRUMENT

The defendant is charged with the crime of destroying a written instrument. The defendant pleads not guilty.

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

1. That the defendant knowingly destroyed a _____ by (tearing) (cutting) (burning) (erasing) (obliterating) in whole or in part;
2. That the defendant did so intending to defraud;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3712. Destroying a written instrument is a class E felony.

See Judicial Council notes, K.S.A. 21-3710.

PATTERN INSTRUCTIONS FOR KANSAS

59.15 ALTERING A LEGISLATIVE DOCUMENT

The defendant is charged with the crime of altering a legislative document. The defendant pleads not guilty.

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

1. That the defendant intentionally (mutilated) (altered) (changed) _____;
2. That _____ had been introduced into the (House) (Senate) of the State of Kansas;
3. That the defendant had no legal authority to (mutilate) (alter) (change) _____;
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3713. Altering a legislative document is a class E felony.

The document in question should be referred to specifically, *i.e.*, House Bill 1211, Senate Bill 211, House Concurrent Resolution 1074, etc.

PATTERN INSTRUCTIONS FOR KANSAS

59.16 POSSESSION OF FORGERY DEVICES

The defendant is charged with the crime of possession of a forgery device. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. That the defendant (made) (possessed) a _____;
2. That the device could be used to (make) (alter) _____ in such a way that it would purport to have been made (by _____) (at another time) (with different provisions) (by authority of _____, who did not give such authority);
3. That the defendant knew of the use of the _____, and intended to (use) (aid or permit another to use) it for the purpose of (making) (altering) _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3714. Possession of forgery devices is a class E felony.

Comment

An instruction that is "essentially" in the form and substance of PIK 2d 59.16 correctly sets out the elements of the offense. *State v. Atkinson*, 215 Kan. 139, 523 P.2d 737 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

59.17 BURGLARY

The defendant is charged with the crime of burglary. The defendant pleads not guilty.

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

1. That the defendant knowingly (entered) (remained in) _____;
2. That the defendant did so without authority;
3. That the defendant had the intent to commit (theft) (_____, a felony) therein; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3715. Burglary is a class D felony.

The phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 2d 59.18, Aggravated Burglary, Notes on Use.

Comment

It should be noted that the legislature did not make "breaking" an element of this crime.

PATTERN INSTRUCTIONS FOR KANSAS

59.18 AGGRAVATED BURGLARY

The defendant is charged with the crime of aggravated burglary. The defendant pleads not guilty.

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

1. That the defendant knowingly (entered) (remained in) _____;
2. That the defendant did so without authority;
3. That the defendant had the intent to commit (theft) (_____, a felony), therein;
4. That at the time there was a human being in _____; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a class C felony.

As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App.2d 556, 630 P.2d 731 (1981). When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

Comment

It should be noted that the legislature did not make "breaking" an element of this crime.

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

59.19 POSSESSION OF BURGLARY TOOLS

The defendant is charged with the crime of possession of burglary tools. The defendant pleads not guilty.

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

1. That the defendant intentionally possessed _____, a device suitable for use in entering into (an enclosed structure) (a vehicle);
2. That the defendant did so with the intent to commit a burglary; and
3. That the defendant possessed these tools on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, burglary means to knowingly and without authority enter into or remain within any building, mobile home, tent, or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a theft or other felony therein.

Notes on Use

For statutory authority, see K.S.A. 21-3717. Possession of burglary tools is a class E felony.

Comment

Possession of burglary tools and attempt to commit a burglary are separate offenses. *State v. Cory*, 211 Kan. 528, 506 P.2d 1115 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

59.20 ARSON

The defendant is charged with the crime of arson. The defendant pleads not guilty.

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosive);
2. That the defendant did so without the consent of _____; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(a). Arson is a class C felony. This section should not be used for K.S.A. 21-3718(b).

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

59.21 ARSON—DEFRAUD AN INSURER OR LIENHOLDER

The defendant is charged with the crime of arson. The defendant pleads not guilty.

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

1. That the defendant intentionally damaged _____ by means of (fire) (explosive);
2. That _____ was an insurer of the (building) (property);
or
That _____ had an interest in the (building) (property) because he had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(b). Arson is a class C felony. This section should not be used for K.S.A. 21-3718(a).

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

59.22 AGGRAVATED ARSON

The defendant is charged with the crime of aggravated arson. The defendant pleads not guilty.

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosive);
2. That the defendant did so without the consent of _____;
3. That at said time there was a human being in the (building) (property); and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3719. Aggravated arson is a class B felony.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

A dead person is a "human being" within the meaning of K.S.A. 21-3719. *State v. Case*, 228 Kan. 733, 620 P.2d 821 (1980).

PATTERN INSTRUCTIONS FOR KANSAS

59.23 CRIMINAL DAMAGE TO PROPERTY—WITHOUT CONSENT

The defendant is charged with the crime of criminal damage to property. The defendant pleads not guilty.

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

1. That _____ was (the owner of property described as _____) (had an interest as a _____ in property described as _____);
2. That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosive;
3. That the defendant did so without the consent of _____;
4. That the property was damaged to the extent of (one hundred dollars or more) (less than one hundred dollars).
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(1)(a). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred dollars or is of the value of one hundred dollars or more and is damaged to the extent of less than one hundred dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred dollars. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

See PIK 2d Civil—Chapter 9 for instructions as to property damage and value.

Comment

Under the statute property cannot be damaged more than the total value of the property at the time the damage occurred. If the total value of the property at the time it is damaged is less than one hundred dollars, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

PATTERN INSTRUCTIONS FOR KANSAS

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than fifty dollars, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemaker*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(1)(a) is a lesser included offense of arson. Where the cause of damage is in issue a charge in the alternative may be appropriate. Cases supporting this view are *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

PATTERN INSTRUCTIONS FOR KANSAS

**59.24 CRIMINAL DAMAGE TO PROPERTY—WITH
INTENT TO DEFRAUD AN INSURER OR
LIENHOLDER**

The defendant is charged with the crime of criminal damage to property. The defendant pleads not guilty.

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

1. That the defendant intentionally (damaged) (defaced) _____ by means other than by fire or explosive;
2. That _____ was an insurer of the property;
or
That _____ had an interest in the property because he had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____;
4. That the property was damaged to the extent of (one hundred dollars or more) (less than one hundred dollars);
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(1)(b). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred dollars or is of the value of one hundred dollars or more and is damaged to the extent of less than one hundred dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred dollars. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

This section should not be used for K.S.A. 21-3720(1)(a).

See PIK 2d Civil—Chapter 9 for instructions as to property damage and value.

PATTERN INSTRUCTIONS FOR KANSAS

59.25 CRIMINAL TRESPASS

The defendant is charged with the crime of criminal trespass. The defendant pleads not guilty.

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

1. That _____ (was the owner) (had authorized control) of the property;
2. That the property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry);
or
That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;
or
That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;
or
That the defendant had been restrained and personally served by a court order from (entering into) (remaining on) the property;
3. That the defendant intentionally, without authority (entered into) (remained on) the property; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3721. Criminal Trespass is a class B misdemeanor.

Comment

Amendments to K.S.A. 21-3721 in 1979 and 1980 added the protection of property from criminal trespass by persons restrained by certain Court orders; and the protection of property from criminal trespass where the premises or property is locked, shut, or secured against passage or entry.

PATTERN INSTRUCTIONS FOR KANSAS

59.26 LITTERING—PUBLIC

The defendant is charged with the crime of littering.
The defendant pleads not guilty.

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

1. That the defendant (threw) (placed) (deposited) (left) _____ (on a public _____) (in a public _____);

or

- That the defendant introduced _____ into _____, which would tend to pollute the water;
2. That the defendant was not acting with the permission of any public officer or public employee who had authority to grant such permission; and
3. This act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(a). Littering is an unclassified misdemeanor which is punishable by a fine of not less than ten dollars or more than five hundred dollars.

PATTERN INSTRUCTIONS FOR KANSAS

59.27 LITTERING—PRIVATE PROPERTY

The defendant is charged with the crime of littering. The defendant pleads not guilty.

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

1. That the defendant (threw) (placed) (deposited) (left) _____ on private property;
2. That the defendant was not acting with the permission of _____, (the owner) (the occupant) of the property; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(b). Littering is an unclassified misdemeanor which is punishable by a fine of not less than ten dollars or more than five hundred dollars.

PATTERN INSTRUCTIONS FOR KANSAS

59.28 TAMPERING WITH A LANDMARK

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

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

1. That the defendant removed a marker designating a boundary for real estate;
or
That the defendant (defaced) (altered) marks made for the purpose of designating a boundary for real estate;
or
That the defendant (cut down) (removed) _____, which had marks upon it to designate a boundary for real estate;
or
That the defendant (altered) (removed) (damaged) or (destroyed) a public land survey corner or accessory and failed to comply with the land survey act by (state act or omission whereby K.S.A. 58-2011 was violated);
2. That the defendant did so willfully and maliciously; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 21-3724(a), (b), (c) and (f). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 1982 Supp. 21-3724(d) or (e).

When using paragraph four of claim number one the applicable act or omission should be stated.

Comment

K.S.A. 1982 Supp. 58-2005 to 58-2011 were enacted to provide for the restoration and replacement of certain land survey corners and accessories. K.S.A. 1982 Supp. 21-3724 was amended by the addition of Section (f) to provide criminal sanctions for noncompliance.

PATTERN INSTRUCTIONS FOR KANSAS

59.29 TAMPERING WITH A LANDMARK—HIGHWAY SIGN OR MARKER

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

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

1. That the defendant (broke) (destroyed) (removed) (defaced) a (milepost) (milestone) (highway sign) (road sign);
or
That the defendant (defaced) (altered) the (words) (marking) on a _____ sign;
2. That the _____ (was) (is) on a public highway or public road;
3. That the _____ was placed there by authority of the law;
4. That the defendant did so willfully and maliciously; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1982 Supp. 21-3724(d) and (e). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 1982 Supp. 21-3724 (a), (b), (c) and (f).

PATTERN INSTRUCTIONS FOR KANSAS

59.30 TAMPERING WITH A TRAFFIC SIGNAL

The defendant is charged with the crime of tampering with a traffic signal. The defendant pleads not guilty.

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

1. That the defendant intentionally (manipulated) (altered) (destroyed) (removed) a _____;
2. That the _____ was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Note on Use

For statutory authority, see K.S.A. 21-3725. Tampering with a traffic signal is a class C misdemeanor.

Comment

K.S.A. 21-3725 was amended to include railroad switching devices in 1975.

PATTERN INSTRUCTIONS FOR KANSAS

59.31 AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL

The defendant is charged with the crime of aggravated tampering with a traffic signal. The defendant pleads not guilty.

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

1. That the defendant intentionally [manipulated] [altered] [destroyed] [removed] a _____;
2. That the _____ was for the purpose of controlling or directing the movement of [motor vehicles] [railroad trains] [aircraft] [watercraft];
3. That the act of the defendant resulted in an accident [causing the death of _____] [causing great bodily injury to _____];

or

That the act of the defendant could have resulted in an accident which would have caused death or great bodily injury to a human being; and

4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3726. Aggravated tampering with a traffic signal is a class E felony.

Comment

The resulting accident need not now be a "traffic" accident, as formerly required. K.S.A. 21-3726.

PATTERN INSTRUCTIONS FOR KANSAS

59.32 INJURY TO A DOMESTIC ANIMAL

The defendant is charged with the crime of injuring a domestic animal. The defendant pleads not guilty.

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

1. That the defendant willfully and maliciously administered a poison to a _____, a domestic animal;
or
That the defendant willfully and maliciously exposed a poison in such a way that it could be taken or swallowed by any domestic animal;
or
That the defendant willfully and maliciously (killed) (maimed) (wounded) a _____, a domestic animal;
2. That the owner of the domestic animal was _____ and that he did not consent to the defendant's act; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3727. Injury to a domestic animal is a class A misdemeanor.

The cruelty or neglect of animals in custody may be prosecuted under K.S.A. 21-4310. See PIK 2d 65.15, Cruelty to Animals.

Comment

The exceptions under K.S.A. 21-4310(g) do not apply to a prosecution under K.S.A. 21-3727. *State v. Jones*, 229 Kan. 528, 625 P.2d 503 (1981).

PATTERN INSTRUCTIONS FOR KANSAS

59.33 UNLAWFUL HUNTING

The defendant is charged with the crime of unlawful hunting. The defendant pleads not guilty.

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

1. That the defendant (hunted) (fished) (shot) (pursued a bird or animal) (upon the land of another) (from a public roadway that adjoins occupied or improved land) (from a railroad right-of-way that adjoins occupied or improved land);
2. That the defendant did not have permission of _____, (the owner) (the person in possession) of the land in question; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3728. Unlawful hunting is a class C misdemeanor.

It is a defense to unlawful hunting if a person licensed to hunt follows or pursues a wounded game bird or animal on the land of another. See PIK 2d 59.33-B, Unlawful Hunting—Defense.

59.33-A UNLAWFUL, HUNTING—POSTED LAND

The defendant is charged with the crime of hunting on posted land. The defendant pleads not guilty.

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

1. That the defendant [(shot) (hunted) (pursued)] [(a bird) (an animal)] upon the land of another;
2. That _____, was [the owner] [the person lawfully in possession] of the land, and had posted the land with signs stating that hunting on the land shall be by written permission only;
3. That the defendant did not have in [his] [her] possession written permission to [(shoot) (hunt) (pursue)] [(a bird) (an animal)] from _____, [the owner] [the person in possession] of the land in question; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 32-142a. Unlawful hunting upon posted land is a class C misdemeanor.

It is a defense to a charge of unlawful hunting on posted land if a person licensed to hunt follows a wounded bird or animal on the posted land.

59.33-B UNLAWFUL HUNTING—DEFENSE

It is a defense to the charge of unlawful hunting that the defendant went upon the land of another while following or pursuing a wounded (bird) (animal).

Notes on Use

For authority, see K.S.A. 21-3728 or K.S.A. 32-142a. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

The defense of pursuit of a wounded animal or bird is permitted in situations involving unlawful hunting, as well as unlawful hunting on posted land.

PATTERN INSTRUCTIONS FOR KANSAS

59.34 UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER

The defendant is charged with the crime of unlawful use of financial card of another. The defendant pleads not guilty.

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

1. That the defendant used a _____ financial card;
2. That the cardholder _____, had not consented to the use of the financial card by the defendant;
3. That the defendant used the financial card for the purpose of obtaining _____;
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in an amount of [fifty dollars or more] [less than fifty dollars] between _____, 19____, and _____, 19____;
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(1)(a). Unlawful use of a financial card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This instruction should not be used for K.S.A. 21-3729(1)(b) or (c).

In a prosecution for the unlawful use of a financial card of another it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card of another if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 21-3729(1)(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

59.35 UNLAWFUL USE OF FINANCIAL
CARD—CANCELLED

The defendant is charged with the crime of unlawful use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

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

1. That the defendant knowingly used _____, a financial card or number which had been revoked or cancelled;
2. That the defendant had received written notice that the financial card was revoked or cancelled;
3. That the defendant used the financial card for the purpose of obtaining _____;
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in an amount of (fifty dollars or more) (less than fifty dollars) between _____, 19____, and _____, 19____; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(1)(b). Unlawful use of a financial card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 21-3729(1)(a) or (c).

In a prosecution for the unlawful use of a financial card which had been revoked or cancelled, it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which had been revoked or cancelled if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 21-3729(1)(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

**59.36 UNLAWFUL USE OF FINANCIAL
CARD—ALTERED OR NONEXISTENT**

The defendant is charged with the crime of unlawful use of a financial card which had been (use applicable term). The defendant pleads not guilty.

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

1. That the defendant used a _____ financial card that had been (falsified) (multilated) (altered);
or
That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. That the defendant used the financial card for the purpose of obtaining _____;
3. That the defendant did so with the intent to defraud;
4. That the financial card was unlawfully used in an amount of (fifty dollars or more) (less than fifty dollars) between _____, 19____, and _____, 19____; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(1)(c). Unlawful use of a credit card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 21-3729(1)(a) or (b).

In a prosecution for the unlawful use of a financial card which is altered or is nonexistent it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which is altered or is nonexistent if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in issue should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS

59.37 UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS

The defendant is charged with the crime of unlawful manufacture or disposal of false tokens. The defendant pleads not guilty.

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

1. That the defendant (manufactured for sale) (offered for sale) (gave away) false _____ calculated to be used in a coin-operated machine or equipment;
2. That the defendant did so with the intent to cheat the operator of a coin-operated machine or equipment; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3730. Unlawful manufacture or disposal of false tokens is a class B misdemeanor.

The use of a false token to obtain goods or services is theft (PIK 2d 59.01) and does not fall within the purview of this section.

PATTERN INSTRUCTIONS FOR KANSAS

59.38 CRIMINAL USE OF EXPLOSIVES

The defendant is charged with the crime of criminal use of explosives. The defendant pleads not guilty.

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

1. That the defendant (had in his possession) (manufactured) (transported) _____ which the defendant intended to use to commit a crime;

or

That the defendant delivered _____ to _____ knowing that _____ intended to commit a crime;

2. That _____ is (an explosive) (a combustible substance); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3731. Criminal use of explosive is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

**59.39 POSSESSION OR TRANSPORTATION OF
INCENDIARY OR EXPLOSIVE DEVICE**

The defendant is charged with the crime of possession or transportation of an incendiary or explosive device. The defendant pleads not guilty.

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

1. That the defendant knowingly (had in his possession) (transported) a _____ filled with _____;
2. That _____ is an (incendiary) (explosive) device equipped with a fuse, wick, or other detonating device, commonly known as a "molotov cocktail"; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3732. Possession or transportation of incendiary or explosive device is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.40 CRIMINAL USE OF NOXIOUS MATTER

The defendant is charged with the crime of criminal use of noxious matter. The defendant pleads not guilty.

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

1. That the defendant (had in his possession) (manufactured) (transported) _____ with the intent to use it for unlawful purposes;

or

That the defendant used or attempted to use _____ to injure either persons or property;

or

That the defendant placed or deposited _____ on or about the land of _____ without his consent;

2. That _____ may give off dangerous or disagreeable odors or cause distress to persons exposed thereto; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3733. Criminal use of noxious matter is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.41 IMPAIRING A SECURITY INTEREST—CONCEALMENT OR DESTRUCTION

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. That the defendant (damaged) (destroyed) (concealed) _____;
2. That _____ was security for a debt owed to _____;
3. That the defendant did so with the intent to defraud the secured party;
4. That the property subject to the security interest (is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more) (is of the value of less than fifty dollars) (is of the value of fifty dollars or more but subject to a security interest of less than fifty dollars).
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more. Impairment of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars, or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(b) or (c).

In the prosecution for impairing a security interest by concealment or destruction it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

For a discussion of the history and purpose of K.S.A. 21-3734 see *State v. Ferguson*, 221 Kan. 103, 558 P.2d 1092 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

59.42 IMPAIRING A SECURITY INTEREST—SALE OR EXCHANGE

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. That the defendant (sold) (exchanged) (disposed of) _____;
2. That defendant knew _____ was security for a debt owed to _____;
3. That the security agreement did not authorize (sale) (exchange) (disposal) of the _____;
4. That _____ did not consent in writing to the (sale) (exchange) (disposal) of the _____;
5. That the property subject to the security interest (is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more) (is of the value of less than fifty dollars) (is of the value of fifty dollars or more but subject to a security interest of less than fifty dollars); and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-2734(b). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more. Impairment of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars, or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(a) or (c).

In the prosecution for impairing a security interest by sale or exchange it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

Also see comment under PIK 2d 59.41, Impairing a Security Interest—Concealment or Destruction.

PATTERN INSTRUCTIONS FOR KANSAS

59.43 IMPAIRING A SECURITY INTEREST—FAILURE TO ACCOUNT

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. That _____ had a security interest in _____;
2. That the defendant (sold) (exchanged) (disposed) of the _____ and received _____;
3. That the security agreement made a provision that in the event of the (sale) (exchange) (disposal) of the _____ proceeds were to be given to _____;
4. That the defendant intentionally failed to account for the [(proceeds) (collateral)] [(within a reasonable time) (as specified in the security agreement)];
5. That the property subject to the security interest (is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more) (is of the value of less than fifty dollars) (is of the value of fifty dollars or more but subject to a security interest of less than fifty dollars); and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(c). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more. Impairing of a security interest is a Class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(a) or (b).

See K.S.A. 84-1-204 which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution for impairing a security interest by failure to account it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS

59.44 FRAUDULENT RELEASE OF A SECURITY AGREEMENT

The defendant is charged with the crime of fraudulent release of a security agreement. The defendant pleads not guilty.

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

1. That the defendant was shown as the secured party in a security agreement;
2. That the defendant released the security agreement;
3. That the defendant at the time of the release was not the owner and holder of the debt secured by such security agreement;
4. That the defendant intended to defraud _____, who was the owner of the security agreement; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3735: Fraudulent release of a security agreement is a class E felony.

The name of the owner and holder of the security agreement should be placed in the appropriate blank.

PATTERN INSTRUCTIONS FOR KANSAS

59.45 WAREHOUSE RECEIPT FRAUD—ORIGINAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a warehouse receipt for goods;
or
That the defendant caused or directed a warehouse receipt to be (made) (drawn) (issued) (delivered) for goods;
3. That the defendant knew that the goods shown on the receipt had not been received by him at the time he issued the receipt;
or
That the defendant knew that the goods shown on the receipt were not under his actual control at the time he issued the receipt;
or
That the defendant knew that the receipt contained a false statement; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736 (a) and (b).
Warehouse receipt fraud is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

59.46 WAREHOUSE RECEIPT FRAUD—DUPLICATE OR ADDITIONAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a duplicate or additional warehouse receipt for goods without placing on its face the word "duplicate;"

or

That the defendant caused or directed a duplicate or additional warehouse receipt to be (made) (drawn) (issued) (delivered) for goods without placing on its face the word "duplicate";

3. That the defendant knew that there was an uncancelled and outstanding receipt for the same goods; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736 (c). Warehouse receipt fraud is a class E felony.

Paragraph 3 refers to proceedings under K.S.A. 84-7-601 (1).

PATTERN INSTRUCTIONS FOR KANSAS

59.47 UNAUTHORIZED DELIVERY OF STORED GOODS

The defendant is charged with the crime of unauthorized delivery of stored goods. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant delivered goods to _____;
3. That the defendant knew that there was a negotiable receipt for the goods outstanding and uncanceled;
4. That the defendant did not have possession of the receipt at the time he delivered the goods; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3737.

Unauthorized delivery of stored goods is a class A misdemeanor.

Comment

The three exceptions contained in sub-paragraphs (a), (b) and (c) should be kept in mind. (a) in case of a lost, stolen or destroyed receipt, after proceedings as provided in K.S.A. 84-7-601 (2) or (b) in the case of delivery in good faith as provided in K.S.A. 84-7-601 (2), or (c) in the case of optional termination of storage as provided in K.S.A. 84-7-206. The burden of claiming a status of exemption and introducing evidence that the defendant was exempt is upon the defendant.

In general, the accused has the burden of introducing evidence, as a matter of defense, that he is within an exception in the statute creating the offense where such exception is not a part of the description of the offense. Accordingly, the prosecution owes no duty to prove in its case in chief that accused is not within the exception. This is a mere rule of procedure and does not relieve the state of its burden of proving guilt. 22A C.J.S., Criminal Law, Sec. 572, pages 316-317; *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 270 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932).

PATTERN INSTRUCTIONS FOR KANSAS

59.48 AUTOMOBILE MASTER KEY VIOLATION

The defendant is charged with the crime of automobile master key violation. The defendant pleads not guilty.

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

1. That the defendant (sold) (offered to sell) a motor vehicle master key to _____;
or
That the defendant possessed a motor vehicle master key;
2. That the defendant knew that the master key was designed to fit the ignition switch of more than one motor vehicle; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3738. Automobile master key violation is a class C misdemeanor.

Comment

The exceptions in subparagraph (2) should be considered. This subparagraph provides that it shall not be unlawful for the owner of two (2) or more vehicles to possess a motor vehicle master key for any or all of the motor vehicles so owned, nor shall sale of such master keys to such owner be unlawful. The burden of claiming a status of exemption and introducing evidence that the defendant was exempt is upon the defendant.

In general, the accused has the burden of introducing evidence, as a matter of defense, that he is within an exception in the statute creating the offense where such exception is not a part of the description of the offense. Accordingly, the prosecution owes no duty to prove in its case in chief that accused is not within the exception. This is a mere rule of procedure and does not relieve the state of its burden of proving guilt. 22A C.J.S. Criminal Law, Sec. 572, pages 316-317; *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932).

PATTERN INSTRUCTIONS FOR KANSAS

**59.49 POSTING OF POLITICAL PICTURES OR
ADVERTISEMENTS**

The defendant is charged with the crime of posting political (pictures) (advertisements).

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

1. That the defendant attached a political (picture) (advertisement) to a (telegraph) (utility) pole; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3739. Posting of political material is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

**59.50 OPENING, DAMAGING, OR REMOVING
COIN-OPERATED MACHINES**

The defendant is charged with the crime of (opening) (damaging) (removing) a coin-operated machine.

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

1. That the defendant knowingly (opened) (damaged) (removed) _____, a coin-operated machine;
2. That the defendant intended to obtain or exert unauthorized control over (the machine) (the goods in the machine) (the money in the machine); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3740. Opening, damaging, or removing coin-operated machines is a class A misdemeanor.

A specific description of the machine should be inserted in the blank provided in 1. above.

PATTERN INSTRUCTIONS FOR KANSAS

**59.51 POSSESSION OF TOOLS FOR OPENING,
DAMAGING, OR REMOVING COIN-OPERATED
MACHINES**

The defendant is charged with the crime of possessing tools for opening, damaging, or removing coin-operated machines.

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

1. That the defendant had in his possession a (key) (tool) (instrument) (drawing) (print) (mold of a key) (explosive) specifically designed or suitable for use in opening or breaking into a _____, a coin-operated machine;
2. That the defendant intended to obtain or exert unauthorized control over (the machine) (the goods in the machine) (the money in the machine); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3741. Possession of tools for opening, damaging, or removing coin-operated machines is a class A misdemeanor.

A specific description of the machine should be inserted in the blank provided in 1 above.

PATTERN INSTRUCTIONS FOR KANSAS

59.52 OBJECT FROM OVERPASS—DAMAGE TO VEHICLE, RESULTING IN BODILY INJURY

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

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

1. That the defendant intentionally cast an object from a bridge or an overpass onto a (street) (highway) (roadway) (railroad right-of-way);
2. That a (vehicle) (engine) was damaged and that _____ was injured as a result of the damage to the vehicle;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(d). Casting an object from an overpass causing damage to a vehicle which results in bodily injury is a class D felony.

PATTERN INSTRUCTIONS FOR KANSAS

59.53 OBJECT FROM OVERPASS—BODILY INJURY

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

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

1. That the defendant intentionally cast an object from a bridge or overpass onto a (street) (highway) (roadway) (railroad right-of-way);
2. That _____ was injured; and
3. That the act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742 (a). Casting an object from an overpass causing bodily injury is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

59.54 OBJECT FROM OVERPASS—VEHICLE DAMAGE

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

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

1. That the defendant intentionally cast an object from a bridge or an overpass onto a (street) (highway) (roadway) (railroad right-of-way);
2. That a (vehicle) (engine) (railroad car) was damaged; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742 (b). Casting an object from an overpass causing damage to a vehicle or railroad car is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.55 OBJECT FROM OVERPASS—NO DAMAGE

The defendant is charged with the crime of casting (an object) (objects) from a bridge or overpass. The defendant pleads not guilty.

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

1. That the defendant intentionally cast an object from a bridge or overpass onto a (street) (highway) (roadway) (railroad right-of-way); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742. Casting an object from an overpass is a class B misdemeanor..

PATTERN INSTRUCTIONS FOR KANSAS

59.56 SALE OF RECUT TIRES

The defendant is charged with the crime of (selling) (offering to sell) recut or regrooved tires intended for use on a passenger vehicle or of (selling) (offering to sell) a passenger vehicle equipped with recut or regrooved tires. The defendant pleads not guilty.

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

1. That the defendant intentionally (sold) (offered for sale) recut or regrooved tires for passenger vehicle, or
That the defendant intentionally (sold) (offered for sale) a passenger vehicle equipped with recut or regrooved tires; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Recut or regrooved tires are unretreaded or unrecapped tires into which new grooves have been cut or burned.

“Passenger vehicle” as used herein is any vehicle which is designed primarily to carry ten or fewer passengers, and which is not used as a truck.

Notes on Use

For authority, see K.S.A. 21-3743 and K.S.A. 21-3744.
Sale of recut tires is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.57 THEFT OF CABLE TELEVISION SERVICES

The defendant is charged with the crime of theft of cable television services. The defendant pleads not guilty.

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

1. That _____ was the owner of cable television services;
2. That the defendant obtained cable television services from _____ by means of (threat) (deception) (electrical or mechanical tampering) (electronic tampering); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3752. Theft of cable television services is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.58 PIRACY OF SOUND RECORDINGS

The defendant is charged with the crime of piracy of sound recordings. The defendant pleads not guilty.

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

1. That _____ was the owner of sound recordings;
2. That the defendant knowingly (duplicated) (caused to be duplicated) sounds recorded on (a phonograph record) (a disc) (a wire) (tapes) (films) (an article on which sounds are recorded);
3. That _____ did not consent to the defendant (duplicating) (causing to be duplicated) the sound recordings;
4. That the defendant (duplicated) (caused to be duplicated) the sound recordings with the intent to (sell) (cause to be sold) (give away as part of a promotion for any product or service) such duplicated sounds; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3748. Piracy of sound recordings is a class E felony.

Defenses to the charge of piracy of sound recordings are set forth in PIK 2d 59.59, Piracy of Sound Recordings—Defenses.

In the event that there is a dispute or issue as to ownership, then refer to the statutory definition of owner. K.S.A. 21-3748.

PATTERN INSTRUCTIONS FOR KANSAS

59.59 PIRACY OF SOUND RECORDINGS—DEFENSES

It is a defense to the charge of piracy of sound recordings if the duplication of the sound occurs by (any person in connection with or as part of a radio or television broadcast or cable television, or for the purpose of archival preservation) (any person who duplicated such sounds for personal use and without compensation for such duplication.)

Notes on Use

For authority, see K.S.A. 21-3748(3). If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

59.60 NON-DISCLOSURE OF SOURCE OF SOUND RECORDINGS

The defendant is charged with the crime of non-disclosure of source of sound recordings. The defendant pleads not guilty.

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

1. That defendant (sold) (offered for sale) (possessed for the purchase of selling) any (phonograph record) (disc) (wire) (tape) (film) (other article) on which sounds are recorded;
2. That the (outside cover) (box) (jacket) of the (insert type of sound recording) did not, clearly and conspicuously, disclose the name and address of the manufacturer of such recording and the name of the recording performer or group; and
3. This act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3750. Non-disclosure of source of sound recordings is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

59.61 DEFRAUDING AN INNKEEPER

The defendant is charged with the crime of defrauding an innkeeper. The defendant pleads not guilty.

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

1. That _____ (was the innkeeper) (was the owner) (was the manager) (had authorized control) of a (restaurant) (hotel) (boardinghouse) (apartment house) (rooming house);
2. That the defendant obtained (food) (lodging) (services) (accommodations) from _____ by means of (trick) (deception) (false representation, statement, or pretense);
3. That the defendant intended to defraud _____;
4. That the value of the (food) (lodging) (services) (accommodations) was (more than \$50.00) (\$50.00 or less); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 36-206. Defrauding an innkeeper is a class A misdemeanor if the value involved is \$50.00 or less, and a class E felony if the value involved is over \$50.00

In a prosecution for defrauding an innkeeper it is necessary to provide the jury with the alternative of finding misdemeanor fraud if the value is in issue. PIK 2d 68.11, Verdict From—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS

59.70 VALUE IN ISSUE

The State has the burden of proof as to the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check(s)) (order(s)) (draft(s)) (which the defendant allegedly [obtained] [damaged] [impaired] [gave]) (over which the defendant allegedly [obtained] [exerted] unauthorized control).

The State claims that the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check(s)) (order(s)) (draft(s)) involved herein was in the amount of _____ or more.

It is for you to determine the amount and enter it on the verdict form furnished.

Notes on Use

It is necessary to use this instruction with PIK 2d 68.11, Verdict Form—Value in Issue, when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

For authority see *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975) and *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977), *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

CHAPTER 60.00
CRIMES AFFECTING GOVERNMENTAL
FUNCTIONS

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PATTERN INSTRUCTIONS FOR KANSAS

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PATTERN INSTRUCTIONS FOR KANSAS

60.01 TREASON

The defendant is charged with the crime of treason.
The defendant pleads not guilty.

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

1. That the defendant intentionally levied war against the State of Kansas; and
or
That the defendant intentionally adhered to the enemies of the State of Kansas; and
or
That the defendant intentionally gave aid and comfort to the enemies of the State of Kansas; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3801(1). K.S.A. 21-3801(2) provides that no person shall be convicted of treason unless on the evidence of two witnesses to the overt act or confession in open court.

Treason is a class A felony.

PATTERN INSTRUCTIONS FOR KANSAS

60.02 SEDITION

The defendant is charged with the crime of sedition. The defendant pleads not guilty.

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

1. That the defendant intentionally advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

or

That the defendant knowingly (published) (sold) (distributed) a document which advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

or

That the defendant intentionally became the member of an organization knowing that the purpose of such organization was to advocate the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3802. Sedition is a Class D felony.

PATTERN INSTRUCTIONS FOR KANSAS

60.03 PRACTICING CRIMINAL SYNDICALISM

The defendant is charged with the crime of practicing criminal syndicalism. The defendant pleads not guilty.

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

1. That the defendant orally or in writing intentionally advocated or promoted criminal syndicalism; and
or

That the defendant intentionally organized or became a member of an assembly, group, or organization known to advocate or promote criminal syndicalism; and

or

That the defendant for or on behalf of another person intentionally distributed, sold, published, or publically displayed any writing which was intended to and did advocate or promote criminal syndicalism; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Criminal syndicalism” means the use of crime, malicious damage or injury to the property of an employer, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

Notes on Use

For authority see K.S.A. 21-3803. Practicing criminal syndicalism is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

**60.04 PERMITTING PREMISES TO BE USED FOR
CRIMINAL SYNDICALISM**

The defendant is charged with the crime of permitting premises to be used for criminal syndicalism. The defendant pleads not guilty.

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

1. That the defendant knowingly permitted an assembly or group of persons to use premises owned or controlled by him for the purpose of advocating or promoting criminal syndicalism; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Criminal syndicalism” means the use of crime, malicious damage or injury to the property of an employer, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

Notes on Use

For authority see K.S.A. 21-3804. Permitting premises to be used for criminal syndicalism is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.05 PERJURY

The defendant is charged with the crime of perjury.
The defendant pleads not guilty.

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

1. That the defendant willfully, knowingly, and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon his oath or affirmation legally administered by a person authorized to administer oaths; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3805. Perjury is a class D felony if the false statement is made upon the trial of a felony. Perjury is a class E felony if the false statement is made in a proceeding other than the trial of a felony charge.

Comment

In *State v. Bingham*, 124 Kan. 61, 257 Pac. 951 (1927) it was held that the question of whether false testimony is material in a perjury case is to be determined as a question of law by the trial court and not as a question of fact by the jury. In order to constitute perjury under the statute it is essential that the false testimony be on a material matter. The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; it is sufficient if they relate to collateral matters upon which evidence would have been admissible. For cases related to this subject see *State v. Elder*, 199 Kan. 607, 433 P.2d 462 (1967), *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973), and *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

PATTERN INSTRUCTIONS FOR KANSAS

60.06 CORRUPTLY INFLUENCING A WITNESS

The defendant is charged with the crime of corruptly influencing a witness. The defendant pleads not guilty.

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

1. That the defendant intentionally induced or attempted to induce a witness, _____, by (bribery) (threat) or (_____ other means _____) to absent themselves from the jurisdiction of a court; and

or

That the defendant intentionally induced or attempted to induce a witness, _____, by (bribery) (threat) or (_____ other means _____) to avoid the service of process; and

or

That the defendant intentionally deterred or attempted to deter a witness, _____, by (bribery) (threat) or (_____ other means _____) from giving evidence in a trial or other proceeding; and

or

That the defendant intentionally induced or attempted to induce a witness, _____, by (bribery) (threat) or (_____ other means _____) to testify falsely in a trial or other proceeding; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3806.

Corruptly influencing a witness is a class E felony.

Insert the name of the witness in the blank space.

If some other means than bribery or threat was used by the defendant to induce or deter a witness, the means used should be inserted in the blank space.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

It was held in *State v. Reed*, 213 Kan. 557, 559, 562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806.

In the *Reed* case the court stated that in a prosecution under 21-3806 where the state relies upon means other than bribery or threat, it should describe with particularity the "other means", in the information in order to enable the defendant to know what he is charged with and to defend against the charge.

The Committee believes that where "other means" is used it must relate to corrupt influence by the accused that is comparable to bribery or threat. A vicious or fraudulent intention to evade the prohibitions of the law seems to have been contemplated by the legislature.

PATTERN INSTRUCTIONS FOR KANSAS

60.07 COMPOUNDING A CRIME

The defendant is charged with the crime of compounding a crime. The defendant pleads not guilty.

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

1. That the defendant knew _____ had committed a crime;
2. That the defendant intentionally (accepted) (agreed to accept) anything of value as consideration for a promise not to (initiate the prosecution of _____) (aid in the prosecution of _____);
and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3807. Compounding a felony is a class E felony. Compounding a misdemeanor is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.08 OBSTRUCTING LEGAL PROCESS

The defendant is charged with the crime of obstructing legal process. The defendant pleads not guilty.

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

1. That _____ was authorized by law to serve _____;
2. That the defendant knowingly and willfully (obstructed) (resisted) (opposed) _____ in the (service) (execution) of the _____;
3. That at the time the defendant knew or should have known that _____ was authorized by law to _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

In the second blank of 1 and 2, the court should insert the name of the paper or instrument involved in the particular case such as writ, warrant, or summons.

In the second blank of 3, the court should insert the particular act the person was authorized by law to perform.

For authority see K.S.A. 21-3808.

Obstructing legal process in a felony case is a class E felony.

Obstructing legal process in a misdemeanor or a civil case is a class A misdemeanor.

Comment

In *State v. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

PATTERN INSTRUCTIONS FOR KANSAS

60.09 OBSTRUCTING OFFICIAL DUTY

The defendant is charged with the crime of obstructing official duty. The defendant pleads not guilty.

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

1. That _____ was authorized by law to _____;
2. That the defendant knowingly and willfully (obstructed) (resisted) (opposed) _____ in the _____ which was the official duty of _____;
3. That at the time the defendant knew or should have known that _____ was a law enforcement officer; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

In the second blank of 1, the court should insert the act or acts the person named in the first blank was authorized to perform.

In the second blank in 2, the court should insert the act or acts the defendant obstructed, resisted or opposed.

For authority see K.S.A. 21-3808.

Obstructing official duty in a felony case is a class E felony.

Obstructing official duty in a misdemeanor or a civil case is a class A misdemeanor.

Comment

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977), it is held that a defendant who runs from a federal officer assisting state law enforcement officials in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, prescribing obstructing official duty of a law enforcement official, it is necessary that the state prove the defendant had reasonable knowledge that the person he opposed was a law enforcement official.

PATTERN INSTRUCTIONS FOR KANSAS

60.10 ESCAPE FROM CUSTODY

The defendant is charged with the crime of escape from custody. The defendant pleads not guilty.

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

1. That the defendant was being held in custody (on a written charge of a misdemeanor) (following defendant's conviction of a misdemeanor);
2. That the defendant intentionally departed from custody without lawful authority; and

or

That the defendant intentionally failed to return to custody (following temporary leave lawfully granted) (following a court order authorizing temporary leave); and

3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction "custody" includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation or parole) (here insert any other detention for law enforcement purposes).

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3809.

Escape from custody is a class A misdemeanor.

The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

Comment

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1971), the court discussed and defines "escape" and states what constitutes "escape". The court, in this case, also stated when a person is in "lawful custody".

PATTERN INSTRUCTIONS FOR KANSAS

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the state is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

PATTERN INSTRUCTIONS FOR KANSAS

60.11 AGGRAVATED ESCAPE FROM CUSTODY

The defendant is charged with the crime of aggravated escape from custody. The defendant pleads not guilty.

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

A. 1. That the defendant was being held in custody [on a written charge of a felony] [following his conviction of a felony];

2. That the defendant intentionally departed from custody without lawful authority;

or

That the defendant intentionally failed to return to custody following [temporary leave authorized by law] [temporary leave granted by a court];

and

3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

or

B. 1. That the defendant was being held in custody [on a written charge of a crime] [following his conviction of a crime];

2. That the defendant intentionally departed from custody by use of violence or the threat of violence against any person; and

3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction “custody” includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation or parole) (any other detention for law enforcement purposes).

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-3810 and K.S.A. 1982 Supp. 21-3809.

Aggravated escape from custody is a class E felony.

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

Comment

See comment to PIK 2d 60.10.

PATTERN INSTRUCTIONS FOR KANSAS

60.12 AIDING ESCAPE

The defendant is charged with the crime of aiding escape. The defendant pleads not guilty.

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

- A. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime);
2. That the defendant intentionally assisted _____ in his escape from custody; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

or

- B. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime);
2. That the defendant supplied to _____, an object suitable for _____'s use in escaping custody;
3. That the defendant did so with intent to assist _____ in escaping custody; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

or

- C. 1. That _____ was confined in an institution (charged with a crime) (after conviction of a crime);
2. That the defendant (brought) (introduced) into the institution an object suitable for _____'s use in escaping the institution;
3. That the defendant did so with intent to assist _____ in escaping the institution; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

As used in this instruction “custody” includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation or parole) (any other detention for law enforcement purposes).

Notes on Use

For authority see K.S.A. 21-3811 and K.S.A. 1982 Supp. 21-3809.

Aiding escape in a class E felony.

“Custody” does not include general supervision of a person on probation or parole or constraint incidental to release on bail. Lawful custody is initially a question of law for the court to determine.

Comment

The instruction requires that the objects provided be “suitable,” this term includes both “adapted” and “designed.”

PATTERN INSTRUCTIONS FOR KANSAS

60.13 AIDING A FELON OR PERSON CHARGED AS A FELON

The defendant is charged with the crime of (aiding a felon) (aiding a person charged as a felon). The defendant pleads not guilty.

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

1. That the defendant knew _____ (had committed _____, a felony) (had been charged with having committed _____, a felony);
2. That the defendant knowingly harbored, concealed, or aided _____;
3. That the defendant did so with the intent that _____ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3812(a) and (b).

For venue see K.S.A. 22-2607 and K.S.A. 22-2616.

If the person allegedly aided had not been charged at the time aid was given, an issue may arise as to whether or not the person aided had in fact committed a crime. A separate instruction should be given setting forth the elements of the crime alleged to have been committed by the person aided.

Aiding a felon or person charged as a felon is a class E felony.

Comment

In *State v. Rider, Edens & Lemons*, 229 Kan. 394, 401, 625 P.2d 425 (1981), the court held that three conditions were required to render one guilty as an accessory after the fact and the same conditions are required to render one guilty of aiding a felon under K.S.A. 21-3812(a). The felony must be complete, the accused must have knowledge that the principal committed the felony, and the accused must act with the intent to enable the principal to avoid or escape from arrest, trial, conviction, or punishment for the felony. In the same case, the court further stated, "Generally any assistance or relief given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to render the person giving such assistance guilty for aiding a felon."

PATTERN INSTRUCTIONS FOR KANSAS

60.14 AIDING A PERSON CONVICTED OF OR CHARGED WITH COMMITTING A MISDEMEANOR

The defendant is charged with the crime of aiding a person (convicted of committing a misdemeanor) (charged with committing a misdemeanor). The defendant pleads not guilty.

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

1. That the defendant knew _____ (had been convicted of committing a misdemeanor) (had been charged with committing _____, a misdemeanor);
2. That the defendant knowingly harbored, concealed, or aided _____;
3. That the defendant did so with intent that _____ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3812(c).

If an issue arises in the case being tried as to whether or not the particular misdemeanor has been committed by the person allegedly aided, an instruction should be given setting forth the elements of that offense. If the person allegedly aided has been convicted, such an instruction is not necessary.

Aiding a person convicted of or charged with committing a misdemeanor is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.15 FAILURE TO APPEAR—AGGRAVATED FAILURE TO APPEAR

The defendant has been charged with the crime of (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

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

1. That the defendant had been released on an appearance bond to appear before a court;
2. That the defendant willfully failed to appear before the court at the time requested;
3. That the defendant's appearance bond was forfeited;
4. That the defendant willfully (failed to surrender himself within 30 days following the forfeiture of his appearance bond) (failed to surrender himself within 30 days after his conviction of a [felony] [misdemeanor] had become final); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3813 and K.S.A. 21-3814.

Failure to appear is a class B misdemeanor.

Aggravated failure to appear is a class E felony.

The provisions of K.S.A. 21-3813(1) do not apply to any person who forfeits a cash bond supplied pursuant to law upon an arrest for a traffic offense.

For venue see K.S.A. 22-2615.

The 30 day period following forfeiture is a question of law.

It is the opinion of the Committee that all the elements essential to an instruction for K.S.A. 21-3813, Failure to appear, and K.S.A. 21-3814, Aggravated failure to appear, are contained in this instruction.

Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers*, 225 Kan. 242, 245, 589 P.2d 981 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER

The defendant is charged with the crime of attempting to influence a judicial officer. The defendant pleads not guilty.

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

1. That _____ was a judicial officer;
2. That the defendant knew _____ was a judicial officer;
3. That the defendant communicated with _____ relative to a matter which (was before) (might have been brought before) _____;
4. That such act was done by the defendant with the intent to improperly influence _____; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3815.

Attempting to influence a judicial officer is a class E felony.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

Comment

In *State v. Torline*, 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the court stated, "The phrase, with intent improperly to influence a judicial officer, as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above cited case, the court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.

PATTERN INSTRUCTIONS FOR KANSAS

60.17 INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE

The defendant is charged with the crime of interference with the administration of justice. The defendant pleads not guilty.

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

1. That the defendant knew _____ was a judicial officer;
2. That the defendant (communicated a threat of violence to _____) (harrassed _____ by repeated abusive and defamatory communication) (picketed, paraded, or demonstrated in or near a building housing _____) (picketed, paraded or demonstrated in or near the residence or place of abode of _____);
3. That such act was done with intent to influence, impede or obstruct the findings, decision, ruling, order, judgment or decree of _____ on any matter then pending before him; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3816.

Interference with the administration of justice is a class A misdemeanor.

Comment

Nothing in K.S.A. 21-3816 shall limit or prevent the exercise by any court in this state of its power to punish for contempt.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

The Committee believes that the words "defamatory" and "abusive" are more understandable to a jury than "vituperative" as used in this section of statutes.

PATTERN INSTRUCTIONS FOR KANSAS

60.18 CORRUPT CONDUCT BY JUROR

The defendant is charged with the crime of corrupt conduct by a juror. The defendant pleads not guilty.

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

1. That the defendant had been (summoned) (sworn) as a juror;
2. (a). That the defendant intentionally promised or agreed to give a verdict for or against a party in a (civil) (criminal) proceeding; and
or
2. (a). That the defendant without authority of the court or officer received evidence or information relative to a case defendant (was) (would be) sworn to try;
(b). That defendant willfully failed immediately to disclose the evidence or information to the (court) (officer); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3817. Corrupt conduct by a juror is a class E felony.

Comment

See K.S.A. 22-3413, Juror's knowledge of material fact.

PATTERN INSTRUCTIONS FOR KANSAS

60.19 FALSELY REPORTING A CRIME

The defendant is charged with the crime of falsely reporting a crime. The defendant pleads not guilty.

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

1. That the defendant knew that _____ was a law enforcement officer;
2. That the defendant informed _____ that a crime had been committed;
3. That the defendant knew the information he gave _____ was false;
4. That the defendant intended that _____ would act on the false information given him; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3818.

False reporting a crime is a class A misdemeanor.

Law enforcement officer is defined in K.S.A. 21-3110.

PATTERN INSTRUCTIONS FOR KANSAS

**60.20 PERFORMANCE OF AN UNAUTHORIZED
OFFICIAL ACT**

The defendant is charged with the crime of performing an unauthorized official act. The defendant pleads not guilty.

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

1. That the defendant, knowing that he had no lawful authority, (conducted a marriage ceremony) (certified an acknowledgment of the execution of a document which by law might be recorded); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3819.

Performance of an unauthorized official act is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.21 SIMULATING LEGAL PROCESS

The defendant is charged with the crime of simulating legal process. The defendant pleads not guilty.

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

1. That the defendant (sent) (delivered) to _____ a document which he knew purported to be or simulated those used in courts;
2. That the defendant knew this document was not issued by a court;
3. That the defendant intended that this act would induce payment of a claim; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.
or
1. That the defendant printed, distributed, or offered for sale documents which he knew purported to be or simulated those used in courts;
2. That the defendant knew such documents would not be used by any court for any purpose; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3820.

Simulating legal process is a class A misdemeanor.

K.S.A. 21-3820 does not apply to the printing, distribution, or sale of blank forms of legal documents intended for actual use in judicial proceedings.

PATTERN INSTRUCTIONS FOR KANSAS

60.22 TAMPERING WITH A PUBLIC RECORD

The defendant is charged with the crime of tampering with a public record. The defendant pleads not guilty.

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

1. That the defendant knowingly and without lawful authority (altered) (destroyed) (defaced) (removed) (concealed) a public record; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3821.

Tampering with a public record is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.23 TAMPERING WITH PUBLIC NOTICE

The defendant is charged with the crime of tampering with public notice. The defendant pleads not guilty.

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

1. That the defendant knowingly and without lawful authority (altered) (defaced) (destroyed) (removed) (concealed) a public notice;
2. That the notice had been legally posted;
3. That the defendant did this act during the time the notice was required or authorized to remain posted; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3822.

Tampering with public notice is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.24 FALSE SIGNING OF A PETITION

The defendant is charged with the crime of false signing of a petition. The defendant pleads not guilty.

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

1. That the defendant intentionally affixed a (fictitious) (unauthorized) signature to a (petition) (memorial) (remonstrance);
2. That it was intended that such (petition) (memorial) (remonstrance) be presented to the (Legislature of the State of Kansas) (House of Representatives of the State of Kansas) (Senate of the State of Kansas) (_____, an [agency] [officer] [a political subdivision]) of the State of Kansas; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____, County, Kansas.

Notes on Use

For authority see K.S.A. 21-3823.

False signing of a petition is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.25 FALSE IMPERSONATION

The defendant is charged with the crime of false impersonation. The defendant pleads not guilty.

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

1. That the defendant knowingly and falsely represented himself to be a (public officer) (public employee) (_____ licensed to practice in the state of Kansas); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3824.

False impersonation is a class B misdemeanor.

The profession or vocation which the defendant falsely represented himself to be a member of should be placed in the blank space, such as attorney, medical doctor, or certified public accountant.

Public employee and public officer are defined in K.S.A. 21-3110.

PATTERN INSTRUCTIONS FOR KANSAS

60.26 AGGRAVATED FALSE IMPERSONATION

The defendant is charged with the crime of aggravated false impersonation. The defendant pleads not guilty.

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

- 1 That the defendant falsely (impersonated) (represented himself to be) _____;
2. That the defendant, while falsely representing himself to be _____, (became bail or surety) (acknowledged any recognizance) (executed a bond or other instrument as bail or surety for a party in a proceeding before a court or person authorized to take bail or surety) (confessed a judgment) (acknowledged the execution of an instrument which by law may be recorded) (affected the rights or interests of _____ in a legal proceeding); and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3825.

Aggravated false impersonation is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

60.27 TRAFFIC IN CONTRABAND IN A PENAL INSTITUTION

The defendant is charged with the crime of traffic in contraband in a penal institution. The defendant pleads not guilty.

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

1. That the defendant intentionally (took) (attempted to take) (sent) (attempted to send) _____ (into) (upon the grounds of) (from) (possessed _____ in) (distributed _____ within) an institution under the control of the director of penal institutions or a jail;
2. That the defendant did so without the consent of the (warden) (superintendent) (jailer) of such institution or jail; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A 21-3826.

Contraband is defined as any narcotic, synthetic narcotic, drug, stimulant, sleeping pill, barbiturate, nasal inhaler, alcoholic liquor, intoxicating beverage, firearm, ammunition, gun powder, weapon, hypodermic needle, hypodermic syringe, currency, coin, communication, or writing.

The particular contraband involved should be designated in the space in the first element of this crime.

Traffic in contraband in a penal institution is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

60.28 UNLAWFUL DISCLOSURE OF A WARRANT

The defendant is charged with the crime of unlawful disclosure of a warrant. The defendant pleads not guilty.

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

1. That the defendant intentionally disclosed the fact that a (search warrant) (warrant for arrest) had been (applied for) (issued);

or

That the defendant intentionally disclosed the content of the (affidavit) (testimony) upon which a (search warrant) (warrant for arrest) had been (applied for) (issued);

2. That such disclosure was made before the execution of the warrant and was not necessary for the execution thereof; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3827.

Unlawful disclosure of a warrant is a class B misdemeanor.

Comment

Criminal sanctions of this section may not be imposed for publishing information obtained from public records. *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 541, 543, 545, 546, 547, 548, 592 P.2d 891 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

**60.29 INTERFERENCE WITH THE CONDUCT OF
PUBLIC BUSINESS IN A PUBLIC BUILDING**

The defendant is charged with the crime of interference with the conduct of public business in a public building. The defendant pleads not guilty.

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

1. That the defendant willfully engaged in conduct at or in a public building so as to deny to any (public official) (public employee) (invitee) on such premises his right to enter, to use the facilities, or to leave such public building;

or

1. That the defendant willfully impeded any (public official) (public employee) in the lawful performance of duties or activities through the use of (restraint) (abduction) (coercion) (intimidation) (force and violence) or any threat thereof;

or

1. That the defendant willfully refused or failed to leave a public building upon being requested to do so by (the chief administrative officer) (one charged with maintaining order in such public building) at a time when the defendant was (committing) (threatening to commit) (inciting others to commit) any act which did or would if completed, disrupt, impair, interfere with, or obstruct the lawful functions being carried on in such public building;

or

1. That defendant willfully impeded, disrupted or hindered the normal proceedings of any meeting conducted by any (judicial body) (legislative body) (official at any public building) by any act of intrusion into the chamber or other areas designated for the use of the body, or official conducting such meeting or session by any act designed to intimidate, coerce or hinder any member of such body, or any official engaged in the performance of duties at such meeting or session;

or

PATTERN INSTRUCTIONS FOR KANSAS

1. That the defendant willfully impeded, disrupted or hindered by any act of intrusion into the chamber or other areas designated for the use of any executive body or official, the normal proceedings of such body or official;
2. That the defendant did so when in possession of a firearm; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority in the case of interference with the conduct of public business in a public building, see K.S.A. 21-3828.

For authority in the case of aggravated interference with the conduct of public business in a public building, see K.S.A. 21-3829.

Interference with the conduct of public business in a public building is a class A misdemeanor. Aggravated interference with the conduct of public business in a public building when in possession of any firearm is a class D felony. The last element of the instruction designated (2) should be deleted or included depending upon whether or not the state charges defendant with a misdemeanor or felony offense.

PATTERN INSTRUCTIONS FOR KANSAS

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

The defendant is charged with the crime of dealing in false identification documents. The defendant pleads not guilty.

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

1. That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ which (simulated) (purported to be) (was designed so as to cause others reasonably to believe it to be) a _____ issued by a governmental agency; and
or
That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ bearing a fictitious name or other false information; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3830.

The document which the defendant manufactured, sold, or offered for sale should be described with particularity in the blank space for the jury and the defendant to understand the nature of the charge against the defendant.

As used in this section, "identification document" means any card, certificate, or document which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be driver's license, birth certificates, and social security cards.

Unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

Dealing in false identification documents is a class A misdemeanor.

CHAPTER 61.00
CRIMES AFFECTING PUBLIC TRUSTS

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PATTERN INSTRUCTIONS FOR KANSAS

61.01 BRIBERY

The defendant is charged with the crime of bribery. The defendant pleads not guilty.

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

1. That the defendant offered, gave, or promised to give directly or indirectly to _____ a public (officer) (employee) a benefit or consideration;
2. That _____ was not legally entitled to such benefit or consideration;
3. That defendant did so with intent to influence _____ with respect to the performance of his powers and duties; and
or
1. That the defendant was a public (officer) (employee);
2. That the defendant (requested) (received) (agreed to receive) from _____ directly or indirectly a benefit or consideration;
3. That the benefit or consideration was (requested) (received) (agreed upon) with the intent that the defendant be influenced with respect to the performance of his powers or duties; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3901. The first part of the instruction is applicable when the crime charged is that of offering or giving a bribe. The name of the officer or employee sought to be influenced should be inserted in the blanks. The second part of the instruction is applicable when the crime charged is soliciting a bribe. Bribery is a class D felony. If the defendant is a public officer or employee he shall forfeit his office or employment in addition to the other penalties prescribed by law. For sports bribery, see PIK 2d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 2d 61.03, Compensation for Past Official Acts.

PATTERN INSTRUCTIONS FOR KANSAS

Comments

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780, 539 P.2d 329 (1975).

PATTERN INSTRUCTIONS FOR KANSAS

61.02 OFFICIAL MISCONDUCT

The defendant is charged with the crime of official misconduct. The defendant pleads not guilty.

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

1. That defendant was a public (officer) (employee);
2. That defendant intentionally and maliciously committed an act of misconduct as follows: _____;
3. That defendant acted or appeared to act under authority of his (office) (employment); and
or
1. That the defendant was a public (officer) (employee);
2. That defendant intentionally demanded or received a fee or reward (for the execution of any official act) (for the performance of a duty imposed by law or the terms of his employment);
3. That defendant knew that to demand or receive the fee or reward was contrary to law;
4. That defendant acted or appeared to act under authority of his (office) (employment); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3902. Official misconduct is a class A misdemeanor. In addition to the other penalty prescribed by law, a public officer or employee shall forfeit his office or employment upon conviction of official misconduct.

In element number (2) of the first part of the instruction, designate the act alleged to constitute "oppression, partiality, misconduct, or abuse of authority."

"Maliciously" is defined in PIK 2d 56.04, Homicide Definitions.

PATTERN INSTRUCTIONS FOR KANSAS

61.03 COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

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

1. That _____ was a public (officer) (employee);
2. That _____ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;
or
That _____ performed an act of official misconduct, as follows: _____.
3. That defendant (gave) (offered to give) to _____ any benefit, reward, or consideration intending it to be compensation for the act; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B misdemeanor. See PIK 2d 61.04, Compensation for Past Official Acts—Defense.

In element Number 2, designate the act alleged to constitute “official misconduct.”

PATTERN INSTRUCTIONS FOR KANSAS

**61.04 COMPENSATION FOR PAST OFFICIAL
ACTS—DEFENSE**

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were conferred on account of kinship or other personal, professional, or business relationships independent of the official status of the receiver.

or

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were trivial benefits incidental to personal, professional, or business contacts and involved no substantial risk of undermining official impartiality.

Notes on Use

For authority, see K.S.A. 21-3903. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

PATTERN INSTRUCTIONS FOR KANSAS

61.05 PRESENTING A FALSE CLAIM

The defendant is charged with the crime of presenting a false claim. The defendant pleads not guilty.

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

1. That _____ was a (public officer) (public body) authorized to allow or pay a claim;
2. That defendant knowingly presented to _____ a claim which was false in whole or in part;
3. That defendant did so with intent to defraud;
4. That the amount of the false claim presented was (fifty dollars or more) (less than fifty dollars); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, “intent to defraud” means an intention to induce another by deception to assume, create, transfer, alter, or terminate a right or obligation with reference to property.

Notes on Use

For authority, see K.S.A. 21-3904. Presenting a false claim for fifty dollars or more is a class E felony. Presenting a false claim for less than fifty dollars is a class A misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim. For verdict form depending on values see PIK 2d 68.11, Verdict Form—Value in Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

“Intend to defraud” is defined in K.S.A. 21-3110(9).

PATTERN INSTRUCTIONS FOR KANSAS

61.06 PERMITTING A FALSE CLAIM

The defendant is charged with the crime of permitting a false claim. The defendant pleads not guilty.

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

1. That defendant was a public (officer) (employee);
2. That the defendant (approved by audit) (allowed or paid) a claim made upon _____;
3. That defendant knew such claim was false or fraudulent in whole or in part;
4. That the amount of the false claim presented was (fifty dollars or more) (less than fifty dollars); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3905. Permitting a false claim for fifty dollars or more is a class E felony. Permitting a false claim for less than fifty dollars is a class A misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim.

For verdict form depending on value see PIK 2d 68.11, Verdict Form—Value in Issue.

In element number (2) designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

61.07 DISCOUNTING A PUBLIC CLAIM

The defendant is charged with the crime of discounting a public claim. The defendant pleads not guilty.

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

1. That the defendant was a public (officer) (employee);
2. That defendant in his private capacity either directly or indirectly intentionally purchased for less than full value a claim held by another against _____; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3906. Discounting a public claim is a class A misdemeanor.

In element number (2) designate the municipality, state, or subdivision against whom the claim is made.

PATTERN INSTRUCTIONS FOR KANSAS

61.08 UNLAWFUL INTEREST IN INSURANCE CONTRACT

The defendant is charged with the crime of unlawful interest in an insurance contract. The defendant pleads not guilty.

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

1. That the defendant was a public (officer) (employee);
2. That defendant (represented) (divided commissions with) any surety company or other writer of a surety bond in the writing of a (bond) (contract) subject to his approval; and
or
1. That the defendant was a public (officer) (employee);
2. That defendant (represented) (divided commissions with) an insurance company or other insurer in the writing of a policy of (fire) (casualty) (workmen's compensation) or (other) insurance which was paid for from the public fund of the political unit served by him; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3907. Unlawful interest in an insurance contract is a class B misdemeanor. In addition to the other penalties provided by law, a person convicted of an unlawful interest in an insurance contract shall forfeit his office or public employment.

PATTERN INSTRUCTIONS FOR KANSAS

61.09 UNLAWFUL PROCUREMENT OF INSURANCE CONTRACT

The defendant is charged with the crime of unlawful procurement of insurance contract. The defendant pleads not guilty.

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

1. That the defendant was a (surety company) (writer of surety bonds) (insurance company) (other insurer);
2. That defendant employed or contracted with _____, a public (officer) (employee), (to represent [it] [him] in any capacity) (to share commissions on any [surety bond] [contract] [policy of insurance] which is paid for from the public funds of the political unit served by such [officer] [employee]); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3908. Unlawful procurement of insurance contract is a class B misdemeanor. The defendant charged with this crime may be either a corporation or an individual.

PATTERN INSTRUCTIONS FOR KANSAS

61.10 UNLAWFUL COLLECTION BY A JUDICIAL OFFICER

The defendant is charged with the crime of unlawful collection by a judicial officer. The defendant pleads not guilty.

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

1. That the defendant is a judicial officer;
2. That defendant was employed to collect a claim;
3. That defendant caused or permitted an action to enforce collection of the claim to be filed in a court over which he presides; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3909. Unlawful collection by a judicial officer is a class B misdemeanor. Upon conviction of unlawful collection the judicial officer shall forfeit his office.

PATTERN INSTRUCTIONS FOR KANSAS

61.11 MISUSE OF PUBLIC FUNDS

The defendant is charged with the crime of misuse of public funds. The defendant pleads not guilty.

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

1. That the defendant was a (custodian) (person having control) of public money by virtue of his official position;
2. That defendant (used) (lent) (permitted another to use) public money in a manner he knew was not authorized by law; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, "public money" means any money or negotiable instrument which belongs to the state or any political subdivision.

Notes on Use

For authority, see K.S.A. 21-3910. Misuse of public funds is a class D felony.

PATTERN INSTRUCTIONS FOR KANSAS

61.12 UNLAWFUL USE OF STATE POSTAGE

The defendant is charged with the crime of unlawful use of State postage. The defendant pleads not guilty.

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

1. That defendant intentionally used United States postage for his personal benefit;
or
That defendant intentionally permitted _____ to use United States postage for the personal benefit of _____;
2. That the postage used was paid for with funds of the State of Kansas; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3911.

Unlawful use of State postage is an unclassified misdemeanor punishable by a fine of not less than \$50 nor more than \$500.

CHAPTER 62.00
CRIMES INVOLVING VIOLATIONS OF
PERSONAL RIGHTS

	PIK Number
Eavesdropping	62.01
Eavesdropping—Defense of Public Utility Employee	62.02
Breach of Privacy—Intercepting Message	62.03
Breach of Privacy—Divulging Message	62.04
Denial of Civil Rights	62.05
Criminal Defamation	62.06
Criminal Defamation—Truth as a Defense	62.07
Circulating False Rumors Concerning Financial Status	62.08
Exposing a Paroled or Discharged Person	62.09
Hypnotic Exhibition	62.10
Unlawfully Smoking in a Public Place	62.11
Unlawful Smoking—Defense of Smoking in Desig- nated Smoking Area	62.12

PATTERN INSTRUCTIONS FOR KANSAS

62.01 EAVESDROPPING

The defendant is charged with the crime of eavesdropping. The defendant pleads not guilty.

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

1. That the defendant knowingly and without lawful authority
 - (a) entered into a private place with intent to listen secretly to private conversations or to observe the personal conduct of any other person; and
or
 - (b) installed or used a device for hearing, recording, amplifying or broadcasting sounds originating in a private place which would not ordinarily be audible or comprehensible outside, without the consent of the person entitled to privacy therein; and
or
 - (c) installed or used a device for the interception of a (telephone) (telegraph) communication without the consent of the person in possession or control of the facilities for such communication; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, "private place" means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a public place.

Notes on Use

For authority, see K.S.A. 21-4001. Eavesdropping is a class A misdemeanor.

Comment

For extensive comment, see 1968 Judicial Council notes following K.S.A. 21-4001.

Installation or use of an electronic device to record communications transmitted by telephone, with consent of the person in possession or control of the facilities for such communication is not unlawful, and a recorded telephone conversation under these circumstances is admissible in evidence. *State v. Wigley*, 210 Kan. 472, 502 P.2d 819 (1972).

PATTERN INSTRUCTIONS FOR KANSAS

“Possession” and “control” are discussed and defined. *State v. Bowman National Security Agency, Inc.*, 231 Kan. 631, 647 P.2d 1288 (1982).

A telephone company, having reasonable grounds to suspect its billing procedures are being bypassed by electronic device, may monitor any telephone from which it reasonably believes illegal calls are being placed. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

**62.02 EAVESDROPPING—DEFENSE OF PUBLIC
UTILITY EMPLOYEE**

It is a defense to the charge of eavesdropping that the defendant was (the operator of a switchboard) (an officer) (an employee) of a public utility providing telephone communication service and that he intercepted, disclosed, or used a communication in the performance of his legitimate duties.

Notes on Use

For authority, see K.S.A. 21-4001(3). If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

62.03 BREACH OF PRIVACY—INTERCEPTING MESSAGE

The defendant is charged with the crime of breach of privacy. The defendant pleads not guilty.

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

1. That the defendant knowingly and without lawful authority intercepted a message by (telephone) (telegraph) (letter) (other means of private communication);
2. That defendant did so without the consent of either the sender or receiver; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4002. Breach of privacy is a class A misdemeanor. This offense does not apply to telephone party lines or telephone extensions.

Comment

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Privacy of communication protected hereunder not violated by electronic recording where consent of sender alone obtained; admissible evidence. *State v. Wigley*, 210 Kan. 472, 474, 476, 502 P.2d 819 (1972).

No violation hereunder by telephone company monitoring its property to protect its interests therein; search warrant based on evidence therefrom legal. *State v. Hruska*, 219 Kan. 233, 237, 238, 240, 241, 547 P.2d 732 (1976).

PATTERN INSTRUCTIONS FOR KANSAS

62.04 BREACH OF PRIVACY—DIVULGING MESSAGE

The defendant is charged with the crime of breach of privacy. The defendant pleads not guilty.

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

1. That the defendant knowingly and without lawful authority made known to a third person the existence or contents of a message by (telephone) (telegraph) (letter) (other means of private communication);
2. That defendant did so without the consent of either the sender or receiver;
3. That defendant (knew the message had been illegally intercepted by another) (illegally learned of the message in the course of his employment with the transmitting agency); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4002. Breach of privacy is a class A misdemeanor. The Committee is unaware of what the legislature intended by use of the terms “illegally intercepted” or “illegally learned” as contained in K.S.A. 21-4002. The instruction should be modified to specifically identify the claimed illegality.

This offense does not apply to telephone party lines or telephone extensions.

Comment

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Also see Comment citing cases under PIK 2d 62.03, Breach of Privacy—Intercepting Message.

PATTERN INSTRUCTIONS FOR KANSAS

62.05 DENIAL OF CIVIL RIGHTS

The defendant is charged with the crime of denial of civil rights. The defendant pleads not guilty.

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

1. That the defendant intentionally denied to _____ on account of the (race) (color) (ancestry) (national origin) (religion) of _____
 - (a) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any institution, department or agency of the (state) (any political subdivision of the state) (any municipality); and
or
 - (b) the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of (any establishment which provides lodging to transient guests for hire) (any establishment which is engaged in selling food or beverages to the public for consumption upon the premises) (any place of recreation, amusement, exhibition or entertainment which is open to the public); and
or
 - (c) the full and equal use and enjoyment of services, privileges and advantages of any facilities for the public transportation of persons or goods; and
or
 - (d) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any establishment which offers personal or professional services to members of the public; and
or
 - (e) the full and equal exercise of the right to vote in any election held pursuant to Kansas law; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority, see K.S.A. 21-4003. Denial of civil rights is a class A misdemeanor.

Comment

For comment, see 1968 Judicial Council notes to K.S.A. 21-4003. See annotation, Participation of Student in Demonstration on or near Campus as Warranting Expulsion or Suspension from School or College, 32 A.L.R. 3d 864.

PATTERN INSTRUCTIONS FOR KANSAS

62.06 CRIMINAL DEFAMATION

The defendant is charged with the crime of criminal defamation. The defendant pleads not guilty.

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

1. That the defendant communicated to another person false information tending to expose _____ to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social acceptance;

or

That the defendant communicated to another person false information tending to degrade and vilify the memory of _____, a deceased person, and to scandalize or provoke his surviving relatives and friends;

2. That such acts were done maliciously; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, an act is done “maliciously” when it is done intentionally, wrongfully, and without just cause or excuse.

Notes on Use

For authority, see K.S.A. 21-4004. Criminal defamation is a class A misdemeanor. For the instruction concerning truth as a defense to a charge of defamation, see PIK 2d 62.07 Criminal Defamation—Truth as a Defense.

PATTERN INSTRUCTIONS FOR KANSAS

**62.07 CRIMINAL DEFAMATION—TRUTH AS A
DEFENSE**

It is a defense to the charge of criminal defamation that the alleged defamatory information communicated was true.

Notes on Use

For authority, see K.S.A. 21-4004. For the instruction concerning the elements of a charge of defamation, see PIK 2d 62.06, Criminal Defamation. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

**62.08 CIRCULATION FALSE RUMORS CONCERNING
FINANCIAL STATUS**

The defendant is charged with the crime of maliciously circulating false rumors. The defendant pleads not guilty.

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

1. That the defendant circulated or caused to be circulated a false statement as follows: _____;
2. That defendant did so maliciously and without reasonable grounds for believing the false statement;
3. That defendant did so with the intent to injure the financial standing or reputation of _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4005. Circulating false rumors concerning financial status is a class A misdemeanor.

In the blank in element (1) specify the alleged false statement. In element (3) name the bank, financial or business institution, or individual alleged to be injured.

Comment

The Committee believes that the phrase "without reasonable grounds to believe" is synonymous with "without probable cause" and is more understandable to jurors. See *State v. Howland*, 153 Kan. 352, 110 P.2d 801 (1941).

PATTERN INSTRUCTIONS FOR KANSAS

62.09 EXPOSING A PAROLED OR DISCHARGED PERSON

The defendant is charged with the crime of exposing a paroled or discharged person. The defendant pleads not guilty.

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

1. That the defendant maliciously and intentionally (communicated) (or threatened to communicate) to another an oral or written statement that _____ has been charged with or convicted of a felony.
2. That defendant did so with intent to interfere with the employment or business of _____; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4006. Exposing a paroled or discharged person is a class B misdemeanor.

This offense does not apply to a person or organization furnishing such information at the request of another person or organization.

PATTERN INSTRUCTIONS FOR KANSAS

62.10 HYPNOTIC EXHIBITION

The defendant is charged with the crime of hypnotic exhibition. The defendant pleads not guilty.

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

1. That the defendant used or attempted to use a hypnotic exhibition, demonstration or performance for entertainment; and

or

1. That the defendant permitted himself to be exhibited while in a state of hypnosis; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, "hypnosis" means a condition of altered attention brought about by an individual through the use of certain physical or psychological manipulations of one person by another.

Notes on Use

For authority, see K.S.A. 21-4007. Hypnotic exhibition is an unclassified misdemeanor punishable by fine not to exceed \$50.00.

PATTERN INSTRUCTIONS FOR KANSAS

62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE

The defendant is charged with the crime of unlawfully smoking in a public place. The defendant pleads not guilty.

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

1. That the defendant smoked tobacco where a no smoking sign was posted by the (presiding officer) (chairperson) (owner) (lessee) (other person in control of the premises);
2. That the defendant smoked tobacco in any business meeting of _____;
or
2. That the defendant smoked tobacco in any _____ which is used by or is open to the public; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4008. Complete paragraph 2 of the instruction by supplying the name of the governmental body or public place specified in paragraph (1) or (2) of the statute. Unlawful smoking is an unclassified misdemeanor punishable by a fine of not more than \$25.00.

PATTERN INSTRUCTIONS FOR KANSAS

**62.12 UNLAWFUL SMOKING—DEFENSE OF SMOKING
IN DESIGNATED SMOKING AREA**

It is a defense to the charge of unlawful smoking that defendant smoked tobacco in a public place in an area designated and posted as a smoking area by the person in control of the premises.

Notes on Use

For authority, see K.S.A. 21-4008. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 2d 62.11.

CHAPTER 63.00
CRIMES AGAINST THE PUBLIC PEACE

	PIK Number
Disorderly Conduct	63.01
Unlawful Assembly	63.02
Remaining at an Unlawful Assembly	63.03
Riot	63.04
Incitement to Riot	63.05
Maintaining a Public Nuisance	63.06
Permitting a Public Nuisance	63.07
Vagrancy	63.08
Public Intoxication	63.09
Giving a False Alarm	63.10
Criminal Desecration	63.11
Desecrating a Cemetery	63.12
Desecrating a Dead Body	63.13
Harassment by Telephone	63.14
Desecration of Flags	63.15

PATTERN INSTRUCTIONS FOR KANSAS

63.01 DISORDERLY CONDUCT

The defendant is charged with the crime of disorderly conduct. The defendant pleads not guilty.

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

1. That the defendant
 - (a) engaged in brawling or fighting;
or
 - (b) disturbed an assembly, meeting, or procession, not unlawful in its character;
or
 - (c) used offensive, obscene, or abusive language or engaged in noisy conduct;
2. That the defendant acted with knowledge or reasonable cause to believe that his acts would alarm, anger, or disturb others or provoke an assault or other breach of the peace; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. Claim 1 should be limited to the specific conduct alleged to constitute the offense.

Comment

“Disturbance of the peace” is defined in *State v. Cleveland*, 205 Kan. 426, 469 P.2d 251 (1970). The use of loud and indecent language may be sufficient to constitute disturbing the peace when public tranquility is disturbed.

PATTERN INSTRUCTIONS FOR KANSAS

63.02 UNLAWFUL ASSEMBLY

The defendant is charged with the crime of unlawful assembly. The defendant pleads not guilty.

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

1. That the defendant met in a group of not less than five persons for the purpose of engaging in conduct constituting either (disorderly conduct) (a riot); and
or
1. That the defendant in a lawfully assembled group of not less than five persons agreed to engage in (disorderly conduct) (a riot); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas

Notes on Use

For authority, see K.S.A. 21-4102. Unlawful assembly is a class B misdemeanor. A definition of disorderly conduct or riot must be given with this instruction, see PIK 2d 63.01, Disorderly Conduct or PIK 2d 63.04, Riot. For instruction involving conspiracy, see PIK 2d 55.03, Conspiracy.

Comment

According to the 1968 Judicial Council notes, the gist of the offense is the assembly for an unlawful purpose. Proof of the crime does not require proof of acts to carry out the agreement.

K.S.A. 21-4102 is of questionable constitutional validity because no overt act is required to constitute the offense. Traditionally, a person is punished for criminal acts he commits not what he is thinking of committing. If an overt act is committed the crime becomes conspiracy, K.S.A. 21-3302, PIK 2d 55.03, Conspiracy.

PATTERN INSTRUCTIONS FOR KANSAS

63.03 REMAINING AT AN UNLAWFUL ASSEMBLY

The defendant is charged with the crime of remaining at an unlawful assembly. The defendant pleads not guilty.

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

1. That the defendant willfully failed to depart from the place of an unlawful assembly after being directed to leave by a law enforcement officer; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas

As used in this instruction, an unlawful assembly is a meeting of five or more persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot) or a meeting of five or more persons agreeing to engage in such conduct.

Notes on Use

For authority, see K.S.A. 21-4103. Remaining at an unlawful assembly is a class A misdemeanor. See PIK 2d 63.01, Disorderly Conduct and PIK 2d 63.04, Riot for definitions of those offenses.

Comment

See comment to PIK 2d 63.02, Unlawful Assembly. This instruction applies not only to participants in the unlawful assembly but to bystanders.

PATTERN INSTRUCTIONS FOR KANSAS

63.04 RIOT

The defendant is charged with the crime of riot. The defendant pleads not guilty.

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

- (A) 1. That the defendant used force or violence which resulted in a breach of the public peace;
 - 2. That defendant acted in a group of five or more persons;
 - 3. That defendant acted without authority of law; and
 - or
 - (B) 1. That defendant threatened to use force or violence to produce a breach of the public peace against any person or property;
 - 2. That such threat was accompanied by power or apparent power of immediate execution;
 - 3. That defendant acted in a group of five or more persons;
 - 4. That defendant acted without authority of law; and
- (4) or (5). That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4104. Riot is a class A misdemeanor. For definition of breach of the public peace, see Chapter 53.00, Definitions.

Comment

PIK 2d 63.03 through 63.05 define crimes deemed inimical to the public peace. See 1968 Judicial Council notes for differentiation between unlawful assembly, riot and incitement to riot. The distinction between riot and incitement to riot was noted in *State v. Dargatz*, 228 Kan. 322, 326-7, 614 P.2d 430 (1980), where the court approved the substance of PIK 2d 63.04, Riot and 63.05, Incitement to Riot.

PATTERN INSTRUCTIONS FOR KANSAS

63.05 INCITEMENT TO RIOT

The defendant is charged with the crime of incitement to riot. The defendant pleads not guilty.

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

1. That the defendant as a member of a group of five or more persons by words or conduct intentionally urged others to engage in a riot under circumstances which produced a clear and present danger of injury to persons or property or a breach of the public peace; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4105. Incitement to riot is a class D felony. If further definition of riot is necessary see K.S.A. 21-4104 or PIK 2d 63.04, Riot.

Comment

See Comment to PIK 2d 63.04, Riot. Incitement to riot is a specific intent crime. *State v. Dargatz*, 228 Kan. 322, 331, 614 P.2d 430 (1980). Hence in a proper case an instruction on voluntary intoxication may be appropriate. See PIK 2d 54.12, Intoxication.

PATTERN INSTRUCTIONS FOR KANSAS

63.06 MAINTAINING A PUBLIC NUISANCE

The defendant is charged with the crime of maintaining a public nuisance. The defendant pleads not guilty.

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

1. That the defendant intentionally _____;
2. That this act or omission injured or endangered the public health, safety or welfare; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4106. Maintaining a public nuisance in a class C misdemeanor.

Claim (1) should be completed by specifying the act or omission alleged to constitute the nuisance.

Comment

For examples of public nuisances, see 1968 Judicial Council notes to K.S.A. 21-4106.

PATTERN INSTRUCTIONS FOR KANSAS

63.07 PERMITTING A PUBLIC NUISANCE

The defendant is charged with the crime of permitting a public nuisance. The defendant pleads not guilty.

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

1. That some person or persons intentionally _____;
2. That this act or omission endangered the public health, safety or welfare;
3. That the defendant knowingly permitted this condition on property under his control; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas

Notes on Use

For authority, see K.S.A. 21-4107 and K.S.A. 21-4106. Permitting a public nuisance is a class C misdemeanor.

Claim (1) should be completed by specifying the act or omission alleged to constitute the nuisance. If the defendant committed the act or omission constituting the nuisance, the crime is Maintaining a Public Nuisance, PIK 2d 63.06.

Comment

For examples of public nuisances, see 1968 Judicial Council notes to K.S.A. 21-4106.

PATTERN INSTRUCTIONS FOR KANSAS

63.08 VAGRANCY

The defendant is charged with the crime of vagrancy.
The defendant pleads not guilty.

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

1. That the defendant
 - (a) engaged in _____; and
or
 - (b) was eighteen years of age or over and able to work and without lawful means of support and failed or refused to seek employment; and
or
 - (c) loitered in any community without visible means of support; and
or
 - (d) loitered on the streets or in a place open to the public with intent to solicit for immoral purposes; and
or
 - (e) derived support in whole or in part from begging; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4108. Vagrancy is a class C misdemeanor. Claim (a) should be completed by specifying the alleged unlawful occupation.

Comment

K.S.A. 21-4108 has serious constitutional deficiencies for the reasons set forth in the 1968 Judicial Council comment.

Palmer v. City of Euclid, Ohio, 402 U.S. 544, 29 L.Ed.2d 98, 91 S.Ct. 1563, (1971) held that no person should be criminally responsible for conduct he could not reasonably understand to be proscribed. The suspicious person ordinance of the city was held to be unconstitutionally vague.

PATTERN INSTRUCTIONS FOR KANSAS

63.09 PUBLIC INTOXICATION

Notes on Use

K.S.A. 21-4109, Public intoxication, was repealed in 1977.

PATTERN INSTRUCTIONS FOR KANSAS

63.10 GIVING A FALSE ALARM

The defendant is charged with the crime of giving a false alarm. The defendant pleads not guilty.

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

1. That the defendant initiated or circulated a report or warning of an impending bombing or other crime or catastrophe;

2. That the defendant knew that the report was baseless and likely to cause the evacuation of a building, place of assembly, or facility of public transportation or to cause public inconvenience or alarm; and

or

1. That the defendant transmitted in any manner to the fire department of any municipality or township a false alarm of fire;

2. That the defendant knew at the time of such transmission that there was no reasonable ground for believing that such fire existed; and

3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4110. Giving a false alarm is a class A misdemeanor. In connection with this offense, see PIK 2d 56.23, Terroristic Threat, which provides felony penalties for persons who threaten to commit violence with intent to terrorize or to cause evacuation of buildings or transportation facilities.

PATTERN INSTRUCTIONS FOR KANSAS

63.11 CRIMINAL DESECRATION

The defendant is charged with the crime of criminal desecration. The defendant pleads not guilty.

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

- (A) 1. That the defendant purposely desecrated a (public monument or structure) (any place of worship); and
or
- (B) 1. That the defendant purposely and publicly desecrated the (national flag) (state flag) (_____, which is an object venerated by the public or a substantial segment of the public); and
- 2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, “desecrate” means to deface, damage, pollute or otherwise physically mistreat in a way that will outrage the sensibilities of persons likely to observe or discover the action.

Notes on Use

For authority, see K.S.A. 21-4111. Criminal desecration is a class C misdemeanor. See also PIK 2d 59.28, Tampering with a Landmark. If the charge is based upon desecration of an object venerated by the public, specify the object in the appropriate blank.

PATTERN INSTRUCTIONS FOR KANSAS

63.12 DESECRATING A CEMETERY

The defendant is charged with the crime of desecrating a cemetery. The defendant pleads not guilty.

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

1. That the defendant knowingly and without authority of law
 - (a) destroyed, cut, mutilated or otherwise injured, tore down or removed any (tomb) (monument) (memorial) (marker) in a cemetery or any gate, door, fence, wall, post, railing or enclosure for the protection of cemetery property; and
or
 - (b) obliterated any (grave) (vault) (niche) (crypt); and
or
 - (c) destroyed, cut, broke or injured any (building) (statue) (ornament) (tree, shrub or plant) within a cemetery; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4115. Desecrating a cemetery is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

63.13 DESECRATING A DEAD BODY

The defendant is charged with the crime of desecrating a dead body. The defendant pleads not guilty.

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

1. That the defendant knowingly and without authorization of law
 - (a) opened a grave or other place of interment with intent to remove the dead body or remains of a human being or any coffin, vestment or other article interred with such body; and
or
 - (b) removed the dead body or remains of a human being, or the coffin, vestment or other article interred with such body, from the grave or other place of interment; and
or
 - (c) received the dead body or remains of a human being, knowing the same to have been disinterred unlawfully; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4112. Desecrating a dead body is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

63.14 HARASSMENT BY TELEPHONE

The defendant is charged with the crime of harassment by telephone. The defendant pleads not guilty.

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

1. That the defendant (used a telephone to) (knowingly permitted a telephone under his control to be used to)
 - (a) make any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent; and
or
 - (b) intentionally abuse, threaten or harass any person at the called number, whether or not conversation ensues; and
or
 - (c) cause the telephone of another to ring repeatedly with intent to harass any person at the called number; and
or
 - (d) make repeated telephone calls, during which conversation ensued, solely to harass any person at the called number; and
or
 - (e) play any recording on a telephone, except recordings such as weather information or sports information, when the number thereof is dialed, unless the person or group playing the recording shall identify itself or himself and state that it is a recording; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority, see K.S.A. 21-4113. Harassment by telephone is a class A misdemeanor. For a charge of refusal to yield a party line, see PIK 2d 64.13, Refusal to Yield A Telephone Party Line. For Terroristic Threat, see PIK 2d 56.23.

Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

PATTERN INSTRUCTIONS FOR KANSAS

63.15 DESECRATION OF FLAGS

The defendant is charged with the crime of desecration of flags. The defendant pleads not guilty.

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

1. That the defendant

(a) for exhibition or display placed or caused to appear upon a flag of the (United States) (State of Kansas) any (word) (figure) (mark) (picture) (design) (drawing) (advertisement); and

or

(b) exposed to public view a flag of the (United States) (State of Kansas) upon which was (printed, painted or placed) (attached or appended) a (word) (figure) (mark) (picture) (design) (drawing) (advertisement) of any nature; and

or

(c) ([exposed to public view] [manufactured] [sold] [exposed for sale] [gave away]) (had in his possession [for sale] [to give away] [for use for any purpose]) any (article of merchandise) (receptacle of merchandise) upon which is (printed) (painted) (attached) (placed) a representation of the flag of the (United States) (State of Kansas) to (advertise) (call attention to) (decorate) (mark or distinguish) such flag; and

or

(d) publicly (mutilated) (defaced) (defiled) (trampled) the flag of the (United States) (State of Kansas); and

2. This act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority, see K.S.A. 21-4114. Desecration of flags is a class A misdemeanor.

Comment

The Massachusetts flag-misuse statute was held too vague to be valid in *Smith v. Goguen*, 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242, (1974).

A New York conviction of malicious mischief for burning a flag was reversed by the United States Supreme Court in *Street v. New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969). The case is annotated at 22 L.Ed.2d 972 under the subject "Constitutionality of Statutes, Ordinances, or Administrative Provisions Prohibiting Defiance, Disrespect, Multilation, or Misuse of American Flag—Federal Cases."

In *Spence v. Washington*, 418 U.S. 405, 41 L.Ed.2d 842, 94 S.Ct. 2727 (1974) the court held that the display of a United States flag with a removable peace symbol affixed was, under the circumstances, a form of protected free speech.

CHAPTER 64.00
CRIMES AGAINST THE PUBLIC SAFETY

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PATTERN INSTRUCTIONS FOR KANSAS

64.01 UNLAWFUL USE OF WEAPONS—FELONY

The defendant is charged with the crime of unlawful use of weapons. The defendant pleads not guilty.

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

1. That defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a shotgun with a barrell less than 18 inches in length; and
or
a firearm (designed to discharge) (capable of discharging) automatically more than once by a single function of trigger; and
or
That the defendant knowingly, (possessed) (manufactured) (caused to be manufactured) (sold) (of-fered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kan-sas.

Notes on Use

For authority see K.S.A. 1982 Supp. 21-4201(g) and (h).
K.S.A. 21-4201(h) was enacted in 1982 to cover plastic-coated bullets.

Comment

K.S.A. 21-4201(g) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. The second alternative under Paragraph 1 is required by K.S.A. 21-4201(h). It should be noted that the offense under 21-4201(h) does not apply to a governmental laboratory or to solid plastic bullets.

PATTERN INSTRUCTIONS FOR KANSAS

64.02 UNLAWFUL USE OF WEAPONS—MISDEMEANOR

The defendant is charged with the crime of unlawful use of weapons. The defendant pleads not guilty.

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

1. That defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a (bludgeon) (sand-club) (metal knuckles) (switchblade knife) (knife which has a blade that opens automatically by hand pressure applied to a [button] [spring] [other device] in the handle of the knife) (knife having a blade that [opens] [falls] [is ejected] into position by [the force of gravity] [an outward thrust] [a downward thrust] [centrifugal thrust or movement]); and
or

That the defendant knowingly (carried concealed on his person) (possessed with the intention to use the same unlawfully against another) a (dagger) (dirk) (billy) (blackjack) (slung shot) (dangerous knife) (straightedged razor) (stiletto) (any dangerous or deadly weapon or instrument); and
or

That the defendant knowingly carried (on his person) (in a [land] [water] [air] vehicle, a _____) with the intent to use the same unlawfully, a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]); and
or

That the defendant knowingly carried a (pistol) (revolver) (other firearm) concealed on his person when not on his own land or abode or fixed place of business; and
or

That the defendant knowingly set a spring gun; and
or

That the defendant knowingly possessed a device or attachment designed or intended for use in silencing the report of any firearm; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-4201(a) through (f). The instruction presents six alternative situations. The appropriate one should be used. Unlawful use of weapons under any of these circumstances is a class B misdemeanor. It should be noted that under (1)(b), an ordinary pocket knife with no blade more than four (4) inches in length shall not be construed to be a dangerous knife, or a dangerous or deadly weapon or instrument.

It should be noted that under the 1981 amendment to the statute, possession of a shotgun with a barrel less than 18 inches in length is now a felony. See PIK 2d 64.01, Unlawful Use of Weapons—Felony.

Comment

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 21-4201(1)(b), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976). In *Lassley*, the court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201(1)(b), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the state to prove that the proscribed act was done willfully or knowingly.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(1)(d) is not a lesser included offense of unlawful possession of a firearm under 21-4204(1)(b). PIK 64.02 is cited.

In *State v. Hargis*, 5 Kan. App.2d 608, 609, 611, 620 P.2d 1181 (1980), the court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

In *City of Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

PATTERN INSTRUCTIONS FOR KANSAS

64.03 AGGRAVATED WEAPONS VIOLATION

The defendant is charged with the crime of aggravated weapons violation. The defendant pleads not guilty.

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

1. That the defendant (allege any of the violations listed in 64.01 and 64.02);
2. That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) within five years prior to the commission of such act; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4202.

Aggravated weapons violation is a class E felony.

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 1976.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense of unlawful possession of a firearm under K.S.A. 21-4204(1)(b).

PATTERN INSTRUCTIONS FOR KANSAS

64.04 UNLAWFUL USE OF WEAPONS—AFFIRMATIVE DEFENSE

It is a defense to the charge of (unlawful use of weapons) (aggravated weapons violation) that at the time of the commission of the act the defendant was a _____ and (used) (possessed) the weapon while acting within the scope of (his) (her) authority.

Notes on Use

For authority see K.S.A. 21-4201(2), (3), and (4) which lists persons exempt from the application of the act. There should be inserted in the blank space of the instruction a description of an exempt person under the statute. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

Comment

In *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972), which involved a charge of possession of marijuana in violation of K.S.A. 65-2502, it was held that the accused had the burden of introducing evidence as a matter of defense that he was within an exception or exemption in the statute.

State v. Lassley, 218 Kan. 758, 545 P.2d 383 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 21-4201(2). The fact that the knife may have been used in his trade was not a defense to the prescribed act of knowingly carrying a dangerous knife concealed on his person.

In *State v. Hargis*, 5 Kan. App.2d 608, 620 P.2d 1181 (1980), the court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

PATTERN INSTRUCTIONS FOR KANSAS

64.05 UNLAWFUL DISPOSAL OF FIREARMS

The defendant is charged with the crime of unlawful disposal of firearms. The defendant pleads not guilty. To establish this charge each of the following claims must be proved:

1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than twelve (12) inches long to _____;
2. That _____ was a person under eighteen (18) years of age; and
or
1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;
2. That _____ was (an habitual drunkard) (a narcotic addict); and
or
1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than twelve (12) inches long to _____;
2. That _____ was a person convicted of _____, a felony, (within five years after his release from the penitentiary) (within five years after his conviction of _____, a felony); and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4203. The appropriate alternative situation should be used. Unlawful disposal of firearms is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

64.06 UNLAWFUL POSSESSION OF A FIREARM—FELONY

The defendant is charged with the crime of unlawful possession of a firearm. The defendant pleads not guilty.

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

1. That the defendant knowingly had possession of a firearm with a barrel less than twelve inches long;
2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Possession means having custody of a firearm with the intent to control its management and use.

Notes on Use

For authority see K.S.A. 21-4204. Unlawful possession of a firearm under these circumstances is a class D felony.

Comment

K.S.A. 21-4204 makes “possession” of a firearm by a convicted felon an offense. The word “knowingly” is not used in the statute. The Committee in preparing this instruction has added the requirement that the possession of the firearm be “knowingly.” This construction of the word “possession” is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself. For example, see *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920), and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). In reaching this conclusion the committee considered K.S.A. 21-3201 which provides that a criminal intent is an essential element of every crime defined by the code. Willful conduct is conduct that is purposeful and intentional and not accidental. An exception is made in K.S.A. 21-3204 which provides for an absolute criminal liability without criminal intent if the crime is a misdemeanor and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. In view of the case law set forth above and the statutes just cited, it seems clear that in order to establish the offense of unlawful possession of a firearm, it must be proved that the possession was knowing and intentional.

K.S.A. 21-2611, which was superseded in K.S.A. 21-4204, was held to be constitutional under the attack that it was a denial of equal protection of the laws. *State v. Weathers*, 205 Kan. 329, 469 P.2d 292 1970.

PATTERN INSTRUCTIONS FOR KANSAS

The Supreme Court has consistently emphasized that the possession of a firearm proscribed by K.S.A. 21-4204 is not the innocent handling of the weapon but a willful or knowing possession of a firearm with the intent to control the use and management thereof. *State v. Farris*, 207 Kan. 785, 486 P.2d 1404 (1971); *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 (1972); *State v. Atkinson*, 215 Kan. 139, 523 P.2d 737 (1974); and *State v. Neal*, 215 Kan. 737, 529 P.2d 114 (1974).

In *Neal* it was held that the district court erred in not including an instruction defining possession when requested by the defendant. In the opinion the court cited PIK Criminal, Chapter 53, Definitions and Explanations of Terms, page 69, where possession is defined as having control over a place or thing with knowledge of and the intent to have such control.

State v. Birch, 221 Kan. 122, 558 P.2d 119 (1976), held that the failure to define possession was not reversible error since an instruction was given requiring the state to prove that the defendant "did willfully possess a firearm having a barrel less than 12 inches in length" and further instructing that "willfully means conduct that is purposeful and intentional and not accidental." In holding that this instruction was not clearly erroneous, the court observed that no objection had been lodged and no "innocent handling" of the weapon theory was presented by the defense.

In *State v. Jones*, 229 Kan. 618, 629 P.2d 181 (1981), the court held that possession and use of a firearm in self-defense was not, in itself, a defense to the charge of unlawful possession of a firearm under K.S.A. 21-4204.

In *State v. Rasler*, 216 Kan. 582, 533 P.2d 1262 (1975), the court approved the giving of PIK 64.06 and held that the specific time of the possession is not an essential element of K.S.A. 21-4204 and need not be instructed upon.

State v. Farris, 218 Kan. 136, 542 P.2d 725 (1975), holds that the admission of an entire criminal file of a district court is not a proper method of establishing a prior conviction of a felony as an element of a firearms charge under K.S.A. 21-4204(1)(b). A certified or authenticated copy of the journal entry of conviction is sufficient.

A charge of unlawful possession of a firearm (K.S.A. 21-4204) may be joined in the same information with aggravated robbery and aggravated battery counts where the offenses are based on the same transaction. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976).

There is no requirement that the firearm itself be produced for the jury's inspection to support a conviction under K.S.A. 21-4204(1)(b). *State v. Harwick*, 220 Kan. 572, 578, 552 P.2d 987 (1976).

In *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980), the court held that this section could not be used as the collateral felony for felony murder. The court reasoned that unlawful possession of a firearm, viewed in the abstract, is not an inherently dangerous felony as contemplated by the felony-murder doctrine. This case overrules *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976), and *State v. Guebara*, 220 Kan. 520, 553 P.2d 296 (1976).

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of carrying a concealed weapon (K.S.A. 21-4201[1][d]) is not a lesser included offense of unlawful possession of a firearm (K.S.A. 21-4204[1][b]). PIK 64.06 is cited.

PATTERN INSTRUCTIONS FOR KANSAS

It is unlawful for a defendant in a criminal case to possess a firearm under K.S.A. 21-4204 where the defendant has been adjudged guilty by verdict or plea in a district court, even though sentence has not yet been imposed, *State v. Holmes*, 222 Kan. 212, 563 P.2d 480 (1977), or even though an appeal from the conviction is then pending. *State v. Watie*, 223 Kan. 349, 573 P.2d 1034 (1978).

In *State v. Chiles*, 226 Kan. 140, 142, 143, 595 P.2d 1130 (1979), the court held the classifications hereunder do not invidiously discriminate between felons and misdemeanants. The distinction between lengths of barrels of firearms was held to be reasonable.

In *State v. Boster*, 4 Kan. App.2d 355, 359, 361, 606 P.2d 1035 (1980), the court held an operable automatic pistol is a firearm, even though unloaded.

See *State v. Pelyer*, 230 Kan. 780, 640 P.2d 1261 (1982), for the definition of "firearm" under K.S.A. 21-4618, the Mandatory Sentencing Act.

PATTERN INSTRUCTIONS FOR KANSAS

**64.07 UNLAWFUL POSSESSION OF A
FIREARM—MISDEMEANOR**

The defendant is charged with the crime of unlawful possession of a firearm. The defendant pleads not guilty.

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

1. That the defendant was (an habitual drunkard) (a narcotic addict);
2. That the defendant knowingly had possession of a firearm; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4204. Unlawful possession of a firearm under these circumstances is a class B misdemeanor.

Comment

See comment under PIK 2d 64.06, Unlawful Possession of a Firearm—Felony.

PATTERN INSTRUCTIONS FOR KANSAS

64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

The defendant is charged with the crime of defacing identification marks of a firearm. The defendant pleads not guilty.

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

1. That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a firearm; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4205. Defacing identification marks of a firearm is a class B misdemeanor.

Comment

It should be noted that under K.S.A. 21-4205(2) possession of any firearm upon which an identification mark shall have been intentionally altered is *prima facie* evidence that the possessor altered the same. This section does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence, hence an instruction covering this is not required.

PATTERN INSTRUCTIONS FOR KANSAS

64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES

The defendant is charged with the crime of failure to register sale of explosives. The defendant pleads not guilty.

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

1. That the defendant was the seller of an explosive or detonating substance;
2. That defendant failed to register the sale or disposition of such explosive; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

The register of sales must contain the dates of the sale or other disposition; the name, address, age, and occupation of the person to whom the explosive is sold or delivered; the kind and amount of explosive delivered; the place at which it is to be used; and for what purpose it is to be used.

Notes on Use

For authority see K.S.A. 21-4207.

Failure to register sale of explosives is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

64.10 FAILURE TO REGISTER RECEIPT OF EXPLOSIVES

The defendant is charged with the crime of failure to register receipt of explosives. The defendant pleads not guilty.

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

1. That a quantity of explosives or detonating substance was delivered to the defendant;
2. That the defendant failed to sign his name in the register of sales of explosives on the page where the record of such delivery is entered; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4208.

Failure to register receipt of explosives is a class C misdemeanor.

For form of register of sales see K.S.A. 21-4207 and PIK 2d 64.09, Failure to Register Sales of Explosives.

PATTERN INSTRUCTIONS FOR KANSAS

64.10-A DEFINITION—EXPLOSIVE

The term “explosive” is defined as any chemical compound, mixture, or device, of which the primary purpose is to function by explosion, and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

Notes on Use

For authority see K.S.A. 21-4209b.

PATTERN INSTRUCTIONS FOR KANSAS

64.11 UNLAWFUL DISPOSAL OF EXPLOSIVES

The defendant is charged with the crime of unlawful disposal of explosives. The defendant pleads not guilty.

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

1. That the defendant knowingly (sold) (gave) (transferred) (an explosive substance) (a detonating substance) to _____;
2. That _____ was (a person under 18 years of age) (an habitual drunkard) (a narcotic addict) (a person who was [convicted of _____, a felony] [released from a penal institution] within five years prior to such act); and
3. This act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4209. Unlawful disposal of explosives is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

64.11-A UNLAWFUL POSSESSION OF EXPLOSIVES

The defendant is charged with the crime of unlawful possession of explosives. The defendant pleads not guilty.

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

1. That the defendant knowingly had possession of any explosive or detonating substance;
2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4209a.

Unlawful possession of explosives is a class D felony.

PATTERN INSTRUCTIONS FOR KANSAS

**64.11-B UNLAWFUL POSSESSION OF
EXPLOSIVES—DEFENSE**

It is a defense to the charge of unlawful possession of explosives that at the time of the commission of the act the defendant was in possession of the explosive in the course of the defendant's lawful employment.

Notes on Use

For authority, see K.S.A. 21-4209a(b). If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

64.12 CARRYING CONCEALED EXPLOSIVES

The defendant is charged with the crime of carrying concealed explosives. The defendant pleads not guilty.

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

1. That the defendant knowingly carried (an explosive substance) (a detonating substance) on his person in a wholly or partly concealed manner; and
2. That this act occurred on the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4210. Carrying concealed explosives is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

64.13 REFUSAL TO YIELD A TELEPHONE PARTY LINE

The defendant is charged with the crime of refusal to yield a telephone party line. The defendant pleads not guilty.

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

1. That the defendant willfully refused to surrender immediately the use of a party line when informed that the line was needed for (an emergency call to a [fire department] [police department]) (medical aid or ambulance); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Party line” means a subscriber’s line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

“Emergency” means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential.

Notes on Use

For authority see K.S.A. 21-4211. Refusal to yield a telephone party line is a class C misdemeanor.

Harassment by telephone is covered by PIK 2d 63.14, Harassment by Telephone.

64.14 CREATING A HAZARD

The defendant is charged with the crime of creating a hazard. The defendant pleads not guilty.

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

1. That the defendant (stored) (abandoned) in a place accessible to children a container having a compartment of more than one and one-half cubic feet capacity and a (door) (lid) which (locks) (fastens) automatically when closed and which cannot be easily opened from the inside, and did fail to remove the (door) (lock) (lid) (fastening device) on such container; and

or

That the defendant (was the owner) (had in his possession) property upon which a (cistern) (well) (cesspool) was located, and knowingly failed to cover the same with protective covering of sufficient strength and quality to exclude human beings and domestic animals therefrom; and

or

That defendant (exposed) (abandoned) (left) (an explosive substance) (a dangerous substance), in a place accessible to children; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4212.

Creating a hazard is a class B misdemeanor.

The appropriate alternative situation should be used. For a similar offense see maintaining a public nuisance covered by K.S.A. 21-4106 and PIK 2d 63.06, Maintaining a Public Nuisance.

PATTERN INSTRUCTIONS FOR KANSAS

64.15 UNLAWFUL FAILURE TO REPORT A WOUND

The defendant is charged with the crime of unlawful failure to report a wound. The defendant pleads not guilty.

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

1. That the defendant treated _____ for a (bullet wound) (gunshot wound) (powder burn) caused by the discharge of a firearm;
or
That the defendant treated _____ for a wound likely to result in death and apparently inflicted by a (knife) (ice pick) (sharp or pointed instrument);
2. That the defendant failed to report the treatment of the wound to the office of the chief of police of _____ or to the office of the sheriff of _____ County, Kansas; and
3. That this act or omission occurred on or about _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4213. Unlawful failure to report a wound is a class C misdemeanor. The appropriate alternative situation should be used.

PATTERN INSTRUCTIONS FOR KANSAS

64.16 UNLAWFULLY OBTAINING
PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means. The defendant pleads not guilty.

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

1. That the defendant intentionally made, altered or signed a prescription order and the defendant was not a practitioner at the time of the commission of the act;

or

That the defendant delivered a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner;

or

That the defendant possessed a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner;

or

That the defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Pharmacist” means any natural person registered to practice pharmacy. “Practitioner” means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

“Prescription-only drug” means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend “Caution: Federal law prohibits dispensing without prescription.”

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“Prescription order” means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. “Prescription order” does not mean a drug dispensed pursuant to such an order.

Notes on Use

For authority see K.S.A. 21-4214. Obtaining a prescription-only drug by fraudulent means is a class A misdemeanor for the first offense and a class E felony for the second or subsequent offense.

Note that if a prosecution may be brought under the provisions of K.S.A. 65-4127a or 65-4127b, of the Uniform Controlled Substances Act, prosecutions may not be brought under this section.

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64.17 UNLAWFULLY OBTAINING
PRESCRIPTION-ONLY DRUG FOR RESALE

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means for resale. The defendant pleads not guilty.

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

1. [That the defendant intentionally obtained a prescription-only drug by (making) (altering) (signing) a prescription order at a time when defendant was not a practitioner] [That the defendant intentionally obtained a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner];
2. That the defendant [intentionally sold the prescription-only drug so obtained] [intentionally offered for sale the prescription-only drug so obtained] [intentionally possessed with intent to sell the prescription-only drug so obtained]; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Pharmacist” means any natural person registered to practice pharmacy. “Practitioner” means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

“Prescription-only drug” means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend “Caution: Federal law prohibits dispensing without prescription.”

“Prescription order” means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. “Prescription order” does not mean a drug dispensed pursuant to such an order.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-4215. Obtaining a prescription-only drug by fraudulent means for resale is a class C felony. The appropriate alternative situation should be used.

The provisions of this section are not applicable to prosecutions involving prescription-only drugs which could be brought under the Uniform Controlled Substances Act and to which the provisions of K.S.A. 65-4127a or 65-4127b, and amendments thereto, would be applicable. See PIK 2d 67.13-67.16.

PATTERN INSTRUCTIONS FOR KANSAS

**64.18 SELLING BEVERAGE CONTAINERS WITH
DETACHABLE TABS**

The defendant is charged with selling beverage containers with detachable tabs. The defendant pleads not guilty.

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

1. That the defendant intentionally sold or offered for sale at retail in this State a metal beverage container designed and constructed so that a part of the container was detachable in opening the container; and
 2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.
- “Beverage container” means any sealed can containing beer, cereal malt beverages, mineral waters, soda water, and similar soft drinks intended for human consumption.

Notes on Use

For authority see K.S.A. 21-4216.

Selling beverage containers with detachable tabs is a class C misdemeanor.

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

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65.01 PROMOTING OBSCENITY

The defendant is charged with the crime of promoting obscenity. The defendant pleads not guilty.

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

1. That the defendant knowingly or recklessly (manufactured) (issued) (sold) (gave) (provided) (lent) (mailed) (delivered) (transmitted) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) obscene material; and

or

That the defendant knowingly or recklessly possessed obscene material with intent to (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) the same; and

or

That the defendant knowingly or recklessly (offered) (agreed) to (manufacture) (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) obscene material; and

or

That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which is obscene or which contributed to its obscenity; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4301. Promoting obscenity is a class A misdemeanor for the first and second offenses. For the third and subsequent offenses committed within two years after a previous conviction, this offense is a class E felony.

Comment

For definition of "recklessness" see K.S.A. 21-3201(3).

The statutory definition of obscenity as originally contained in K.S.A. 21-4301(2)(a)(1974) was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77

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S.Ct. 1304 (1967). In June of 1973 the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller* the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* holds that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejects the standard that the work must be utterly without redeeming social value. The opinion also rejects any interpretation of the First Amendment which requires the application of national standards when determining if material is obscene.

In March 1976 in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, the Kansas Supreme Court interpreted the prior obscenity statute and construed the word "obscenity" in accordance with the standards mandated by *Miller* as a word of constitutional meaning in upholding the constitutionality of the statute. In response to these decisions, the legislature in 1976 amended 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself. Under the circumstances PIK 65.01, as it is contained in the original volume, is entirely appropriate to be used under the new statute. Changes necessitated by the new statutory definition of "obscenity" will be taken care of in the definition section, PIK 2d 65.03.

In *State v. Allen*, 1 Kan. App.2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 (the prior obscenity statute). It held that the decision in *State v. Motion Picture Entitled "The Bet"*, supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974. The definition of "obscene" as it existed in 21-4301 prior to 1976 was found to be unconstitutionally overbroad.

In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976) the court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to enhance punishment.

K.S.A. 1979 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

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65.02 PROMOTING OBSCENITY TO A MINOR

The defendant is charged with the crime of promoting obscenity to a minor. The defendant pleads not guilty.

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

1. That the defendant knowingly and recklessly (allege any of the four violations listed in PIK 2d 65.01, Promoting Obscenity);
2. That _____ (the recipient of the obscene material) (a member of the audience of such obscene performance) was a minor child under the age of 18 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4301a. The first offense is a class A misdemeanor; a second offense within two years is a class E felony; a third or subsequent offense within two years is a class D felony.

Comment

See the comment under PIK 2d 65.01, Promoting Obscenity, in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 13, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) and the decision of the Supreme Court of Kansas in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

PIK 2d 65.02 contains the basic elements of the offense of promoting obscenity to a minor which are essentially the same under both the old statute and the statute enacted in 1976. With the exception of a minor change in a word in section 4 of 21-4301a, the statute was not changed except to modify the definition of the word "obscene."

K.S.A. 1977 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

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65.03 PROMOTING OBSCENITY—DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

Any material or performance is “obscene” if the average person, applying contemporary community standards, would find that the dominant theme of the material or performance, taken as a whole, appeals to the prurient interest; that the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and that the material or performance, taken as a whole, lacks serious literary, educational, artistic, political, or scientific value.

“Material” means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or other manner.

“Performance” means any play, motion picture, dance, or other exhibition performed before any audience.

“Prurient interest” means an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex.

Notes on Use

For authority see K.S.A. 21-4301 and K.S.A. 21-4301a. It should be noted that the definition of “obscenity” is the same whether applied to adults under K.S.A. 21-4301 or to minors under K.S.A. 21-4301a.

Comment

See the comments under PIK 2d 65.01, Promoting Obscenity, and 65.02, Promoting Obscenity to a Minor. This instruction, which defines the term “obscene”, complies with the definition of the word “obscenity” as required by *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), and *State v. Motion Picture Entitled “The Bet”*, 219 Kan. 64, 71, 547 P.2d 760 (1976). The statutory definition has been expanded somewhat to include the language used in the cases.

A jury may not understand the meaning of the term “prurient interest.” The definition of prurient interest is adopted from *State v. Great American Theater*, 227 Kan. 633, 608 P.2d 951 (1980).

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65.04 PROMOTING OBSCENITY—PRESUMPTION OF KNOWLEDGE AND RECKLESSNESS FROM PROMOTION

If you find that defendant promoted obscene materials by emphasizing their prurient or sexually provocative aspects, you may find that defendant did so knowingly or recklessly, but you are not required to do so if you are persuaded by the evidence that the contrary is true.

Notes on Use

For authority see K.S.A. 21-4301 and 21-4301a.

In the statute the words “prurient appeal or sexually provocative aspects” are used. See *State v. Great American Theater*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word “prurient” is discussed.

65.05 PROMOTING OBSCENITY—AFFIRMATIVE DEFENSES

- (a) (It is a defense to the charge of promoting obscenity that the persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same.)
or
- (b) (It is a defense to the charge of promoting obscenity that the defendant was a projectionist, or assistant projectionist, having no financial interest in the show or in its place of presentation other than regular employment as a projectionist or assistant projectionist and the motion picture was shown commercially to the general public.)
or
- (c) (It is a defense to the charge of promoting obscenity that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.)
or
- (d) (It is a defense to the charge of promoting obscenity to minors that the defendant had reasonable cause to believe that the minor involved was 18 years old or over and such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such minor was 18 years old or more.)
or
- (e) (It is a defense to the charge of promoting obscenity to minors that the allegedly obscene material was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher,

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instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.)

Notes on Use

For authority see K.S.A. 21-4301 and K.S.A. 21-4301a.

In a particular case an appropriate instruction should be given pertaining to the applicable affirmative defenses.

Paragraphs (d) and (e) may apply only where minors are involved. Paragraphs (a), (b), and (c) may apply in any obscenity case.

If this instruction is given PIK 2d 58.02, Affirmative Defenses—Burden of Proof, should be given.

Comment

K.S.A. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language “or other similar [justification]” found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

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65.06 GAMBLING

The defendant is charged with the crime of gambling. The defendant pleads not guilty.

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

1. That the defendant (made a bet) (entered or remained in a gambling place with intent [to make a bet] [to participate in a lottery] [to play a gambling device]); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4303. Gambling is a class B misdemeanor. PIK 2d 65.07, Gambling Definitions, should be given with this instruction.

65.06-A ILLEGAL BINGO OPERATION

The defendant is charged with the crime of illegal bingo operation. The defendant pleads not guilty.

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

- (1) That the defendant (managed) (operated) (conducted) a game of bingo;
- (2) That the defendant did so in violation of a (statute) (regulation) which provides as follows:
(Include here the specific statute or regulation which the state contends the defendant failed to comply with)
- (3) That the act occurred on the _____ day of _____, 19____, in _____ County, Kansas.

“Bingo” means a game in which each participant must pay a charge and a prize or prizes are awarded to the winner or winners in which each participant receives one or more cards each of which is marked off into twenty-five (25) squares arranged in five (5) horizontal rows of five (5) squares each and five (5) vertical rows of five (5) squares each, with each square being designated by number, letter or combination of numbers and letters, and only the center square designated with the word “free” with no two (2) cards being identical, with the players covering squares as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters, or combinations of numbers and letters corresponding to the system used for designating the squares, with the winner of each game being the player or players first properly covering a predetermined and announced pattern of squares upon the card being used by such player or players.

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Notes on Use

For authority see K.S.A. 21-4303a. An illegal bingo operation is a class A misdemeanor. The definition of bingo set forth in the instruction is that contained in K.S.A. 79-4701(a).

Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, element (2) of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), the Supreme Court construed K.S.A. 79-4701 *et seq.*, to permit a class A private club to fall within the definition of a bona fide fraternal organization, thereby making the club eligible for a bingo license.

PATTERN INSTRUCTIONS FOR KANSAS

65.07 GAMBLING—DEFINITIONS

Certain terms used in the preceding instruction are defined as follows:

(A “bet” is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.)

(A “lottery” is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance.)

(“Consideration” means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.)

(A “gambling device” is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.)

(A “gambling place” is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices.)

Notes on Use

For authority see K.S.A. 21-4302. This instruction contains the statutory definitions applicable to gambling offenses. All statutory definitions are provided, any of which may be used in an appropriate case.

K.S.A. 21-4302(1)(a), (b), (c), and (d) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited to contracts of

PATTERN INSTRUCTIONS FOR KANSAS

indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the state of Kansas by an organization licensed by the state of Kansas to manage, operate or conduct games of bingo.

K.S.A. 21-4302(3) declares that the term "consideration" shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the state of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate, or conduct bingo games under the laws of the state of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

Comment

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program, does not involve valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 49-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization thus making the club eligible for a bingo license.

In *State v. Thirty-six Pinball Machines*, 222 Kan. 416, 565 P.2d 236 (1977), the court construed the term "gambling devices" in K.S.A. 21-4302(4) and held that a pinball machine which is played by means of a spring-loaded plunger and metallic balls and which "pays off" only in free replays is capable of innocent use and is not a gambling device *per se*. The court stated that it is the actual use to which a pinball machine is put which determines whether it is possessed and used as a gambling device.

PATTERN INSTRUCTIONS FOR KANSAS

65.08 COMMERCIAL GAMBLING

The defendant is charged with the crime of commercial gambling. The defendant pleads not guilty.

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

1. That defendant intentionally (operated) (received all or part of the earnings of) a gambling place; and
or
That the defendant intentionally (received, recorded, or forwarded bets or offers to bet) (possessed facilities with intent to receive, record, or forward bets); and
or
That the defendant for gain intentionally became a custodian of any thing of value bet or offered to be bet; and
or
That the defendant intentionally (conducted a lottery) (possessed facilities with intent to conduct a lottery); and
or
That the defendant intentionally (set up for use) (collected the proceeds of) a gambling device; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4304.

Commercial gambling is a class E felony. Appropriate definitions in PIK 2d 65.07, Gambling Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS

**65.09 PERMITTING PREMISES TO BE USED FOR
COMMERCIAL GAMBLING**

The defendant is charged with the crime of permitting premises to be used for commercial gambling. The defendant pleads not guilty.

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

1. That the defendant intentionally granted the use or allowed the continued use of a place as a gambling place; and

or

That the defendant intentionally permitted another to set up a gambling device for use in a place under the defendant's control; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4305.

Permitting premises to be used for commercial gambling is a class B misdemeanor. Appropriate definitions in PIK 2d 65.07, Gambling—Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS

65.10 DEALING IN GAMBLING DEVICES

The defendant is charged with the crime of dealing in gambling devices. The defendant pleads not guilty.

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

1. That the defendant intentionally (manufactured) (transferred) (possessed with intent to transfer) a gambling device or sub-assembly or essential part thereof; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4306.

Dealing in gambling devices is a class E felony. Appropriate definitions in PIK 2d 65.07, Gambling—Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS

65.10-A DEALING IN GAMBLING DEVICES—DEFENSE

It is a defense to this charge that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.

Notes on Use

For authority see K.S.A. 21-4306. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

**65.11 DEALING IN GAMBLING
DEVICES—PRESUMPTION FROM POSSESSION**

If you find that defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, you may find that defendant had possession with intent to transfer the same, but you are not required to do so if you are persuaded by the evidence that the contrary is true.

Notes on Use

For authority see K.S.A. 21-4306 (2).

PATTERN INSTRUCTIONS FOR KANSAS

65.12 POSSESSION OF A GAMBLING DEVICE

The defendant is charged with the crime of possession of a gambling device. The defendant pleads not guilty.

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

1. That the defendant knowingly possessed or had custody or control as (owner) (lessee) (agent) (employee) (bailee) of a gambling device; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4307.

Possession of a gambling device is a class B misdemeanor. Appropriate definitions in PIK 2d 65.07, Gambling—Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS

**65.12-A POSSESSION OF A GAMBLING
DEVICE—DEFENSE**

It is a defense to this charge that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.

Notes on Use

For authority see K.S.A. 21-4306. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

65.13 INSTALLING COMMUNICATION FACILITIES FOR GAMBLERS

The defendant is charged with the crime of installing communication facilities for gamblers. The defendant pleads not guilty.

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

1. That the defendant installed communication facilities in a place which he knew was a gambling place; and
or
That the defendant installed communication facilities knowing that they would be used principally for the purpose of transmitting information to be used in making or settling bets; and
or
That the defendant knowing that communication facilities were being used principally for the purpose of transmitting information to be used in making or settling bets, allowed their continued use; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4308.

Installing communication facilities for gamblers is a class E felony. Appropriate definitions in PIK 2d 65.07, Gambling—Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS

65.14 FALSE MEMBERSHIP CLAIM

The defendant is charged with the crime of false membership claim. The defendant pleads not guilty.

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

1. That the defendant intentionally misrepresented himself to be a member of _____ a (fraternal) (veteran's) organization; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4309.

False membership claim is a class C misdemeanor.

Insert the name of the organization in which the defendant claimed membership in the blank space in the first element of this crime.

PATTERN INSTRUCTIONS FOR KANSAS

65.15 CRUELTY TO ANIMALS

The defendant is charged with the crime of cruelty to animals. The defendant pleads not guilty.

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

1. That the defendant

(a) intentionally (killed) (injured) (maimed) (tortured) (mutilated) (the animal); and

or

(b) had physical custody of _____ and (acted) (failed to act) causing pain and suffering to the animal; and

or

(c) (abandoned) (left) _____ without making provisions for its proper care; and

or

(d) had physical custody of _____ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) as needed for the health or well-being of that kind of animal; and

2. That the act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4310. Cruelty to animals is a class B misdemeanor. The act or acts of cruelty specified in (1) (a), (b), (c), or (d) appropriate to the case should be used in the instruction.

Comment

K.S.A. 21-4310 was completely revised in 1977. The new statute eliminates the term "cruel mistreatment" and replaces it with specified acts of cruelty. K.S.A. 21-4313 defines "animal." K.S.A. 21-4311 provides for the taking into custody and disposition of a mistreated animal. K.S.A. 21-4312 creates a new crime of unlawful disposition of animals. It has been included as a new offense in PIK 2d 65.17, Unlawful Disposition of Animals.

It was held in *State, ex rel. v. Clabome*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute 21-4310.

PATTERN INSTRUCTIONS FOR KANSAS

65.16 CRUELTY TO ANIMALS—DEFENSE

The statute making cruelty to animals a criminal offense is not applicable to (list here any relevant exceptions contained in K.S.A. 21-4310).

Notes on Use

K.S.A. 21-4310(2) provides eight specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

65.17 UNLAWFUL DISPOSITION OF ANIMALS

The defendant is charged with the crime of unlawful disposition of animals. The defendant pleads not guilty.

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

1. That the defendant (raffled) (gave as a prize or premium) (used as an advertising device or promotional display) living (rabbits) (chickens) (ducklings) (goslings); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Unlawful disposition of animals does not include the giving of the described animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

Notes on Use

For authority see K.S.A. 21-4312. Unlawful disposition of animals is a class C misdemeanor. In each case the appropriate act and animal should be selected depending on the facts. The exception is contained in the statute and, if applicable, should be included in the instruction.

PATTERN INSTRUCTIONS FOR KANSAS

65.18 UNLAWFUL CONDUCT OF PIT DOG FIGHTING

The defendant is charged with the crime of unlawful conduct of pit dog fighting. The defendant pleads not guilty.

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

1. That the defendant caused for (amusement) (gain), a dog to (fight with) (injure) another dog; and
or
that the defendant knowingly permitted a dog to (fight with) (injure) another dog, for (amusement) (gain), on premises under the defendant's (ownership) (charge) (control); and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 21-4315. Unlawful conduct of pit dog fighting is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

**65.19 ATTENDING THE UNLAWFUL CONDUCT OF
PIT DOG FIGHTING**

The defendant is charged with the crime of attending the unlawful conduct of pit dog fighting. The defendant pleads not guilty.

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

1. That the defendant knowingly attended a pit dog fight; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction pit dog fight means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.

Notes on Use

For authority, see K.S.A. 1982 Supp. 21-4315. Attending the unlawful conduct of pit dog fighting is a class C misdemeanor.

CHAPTER 66.00
CRIMES AGAINST BUSINESS

	PIK Number
Racketeering	66.01
Debt Adjusting	66.02
Deceptive Commercial Practices	66.03
Tie-in Magazine Sale	66.04
Commercial Bribery	66.05
Sports Bribery	66.06
Receiving a Sports Bribe	66.07
Tampering With a Sports Contest	66.08
Knowingly Employing an Alien Illegally Within the Territory of the United States	66.09

PATTERN INSTRUCTIONS FOR KANSAS

66.01 RACKETEERING

The defendant is charged with the crime of racketeering. The defendant pleads not guilty.

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

1. That _____ was (the owner of) (the proprietor of) (a person having a financial interest in) a business;
2. That the defendant (demanded) (solicited) (received) from _____ a thing of value by means of a (threat) (promise) that the defendant would (cause the competition of _____ to be diminished or eliminated); and
or
(cause the price of goods or services sold in the business of _____ to be increased, decreased, or maintained at a stated level); and
or
(protect [the property used in the business of _____] [the person of _____] [the family of _____] from injury or violence); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4401.

Racketeering is a class D felony. The name of the victim should be placed in the blank spaces in paragraphs (1) and (2).

PATTERN INSTRUCTIONS FOR KANSAS

66.02 DEBT ADJUSTING

The defendant is charged with the crime of debt adjusting. The defendant pleads not guilty.

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

1. That the defendant engaged in the business of making contracts with a debtor whereby said debtor agreed to pay defendant a certain amount of money periodically and defendant agreed for a consideration to distribute such money among his creditors; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4402.

Debt adjusting is a class B misdemeanor.

The provisions of this statute do not apply to debt adjusting incidental to the lawful practice of law in Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

66.03 DECEPTIVE COMMERCIAL PRACTICES

The defendant is charged with the crime of deceptive commercial practices. The defendant pleads not guilty.

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

1. That the defendant (used deception) (knowingly misrepresented a material fact) in connection with the sale of merchandise as follows: _____;
2. That the defendant intended that _____ should rely on such false representations whether or not such person was misled, deceived or damaged thereby; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction certain terms are defined as follows:

“Merchandise” means any objects, wares, goods, commodities, intangibles, real estate or services.

“Sale” means any sale, offer for sale, or attempt to sell any merchandise for any consideration.

Notes on Use

For authority see K.S.A. 21-4403.

Deceptive commercial practices is a class B misdemeanor.

The term “person” is defined in section 2 (b) of the act and has not been included in the instruction since the status of the person deceived would normally be a question of law. The section excludes application of the act to owners or publishers of newspapers, magazines, or other printed matter or owners or operators of radio or television stations where they had no knowledge of the intent, design or purpose of the advertisement.

In paragraph (1) the deceptive commercial practice should be described with particularity.

In paragraph (2) the name of the victim should be placed in the blank space.

Comment

It was held in *State v. Kliever*, 210 Kan. 820, 504 P.2d 580 (1972), that where a person is charged with unlawfully turning back the odometer on a motor vehicle as defined in K.S.A. 8-611 (b), he cannot also be charged with a deceptive commercial practice under K.S.A. 21-4403 for the same wrongdoing.

PATTERN INSTRUCTIONS FOR KANSAS

66.04 TIE-IN MAGAZINE SALE

The defendant is charged with the crime of tie-in magazine sale. The defendant pleads not guilty.

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

1. That the defendant was a wholesaler of magazines or other periodicals;
2. That the defendant (sold) (delivered) on consignment for sale magazines or other periodicals to a retailer;
3. That such (sale) (delivery) was conditioned on the requirement that such retailer agree to purchase or receive on consignment for sale magazines or periodicals of another kind or name; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction certain terms are defined as follows:

“Retailer” means a person who sells magazines or periodicals at retail.

“Wholesaler” means a person who sells or distributes or delivers on consignment for sale or who offers to sell or distribute or deliver on consignment for sale magazines or other periodicals to a retailer.

“Sell” in addition to its ordinary meaning, means offer to sell, distribute, deliver or sell on consignment.

Notes on Use

For authority see K.S.A. 21-4404.

Tie-in magazine sale is a class B misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

66.05 COMMERCIAL BRIBERY

The defendant is charged with the crime of commercial bribery. The defendant pleads not guilty.

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

1. That _____ was (an agent or employee of _____) (a person acting in a fiduciary capacity as _____) ([a lawyer] [a physician] [an accountant] [an appraiser] [a professional adviser] employed by _____) (an [officer] [director] [partner] [manager] of _____, a [corporation] [partnership] [unincorporated association]) (an [arbitrator] [adjudicator] [referee]);
2. That defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) a benefit as consideration for (knowingly violating) (agreeing to violate) a duty of fidelity or trust; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4405.

Commercial bribery is a class E felony.

The instruction presents alternative situations, the appropriate one of which should be used in the instruction in a particular case.

PATTERN INSTRUCTIONS FOR KANSAS

66.06 SPORTS BRIBERY

The defendant is charged with the crime of sports bribery. The defendant pleads not guilty.

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

1. That _____ was a (sports participant) (sports official);
2. That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence him not to give his best efforts as a sports participant in a sports contest; and

or

That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence him to perform his duties improperly as a sports official; and

3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction certain terms are defined as follows:

“Sports contest” means any professional or amateur sports or athletic game or contest viewed by the public.

“Sports participant” means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

“Sports official” means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority see K.S.A. 21-4406. Sports bribery is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

66.07 RECEIVING A SPORTS BRIBE

The defendant is charged with the crime of receiving a sports bribe. The defendant pleads not guilty.

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

1. That the defendant, a sports participant, (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that defendant would thereby be influenced not to give his best efforts in a sports contest; and

or

That the defendant, a sports official, (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that defendant would perform his duties improperly as a sports official; and

2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction certain terms are defined as follows:

“Sports contest” means any professional or amateur sports or athletic game or contest viewed by the public.

“Sports participant” means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

“Sports official” means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority see K.S.A. 21-4407. Receiving a sports bribe is a class A misdemeanor. The definitions contained in the instruction are the same as those in K.S.A. 21-4406 as set forth in PIK 2d 66.06, Sports Bribery.

PATTERN INSTRUCTIONS FOR KANSAS

66.08 TAMPERING WITH A SPORTS CONTEST

The defendant is charged with the crime of tampering with a sports contest. The defendant pleads not guilty.

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

1. That the defendant (sought to influence _____, a [sports participant] [sports official]) (tampered with an animal or equipment involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages governing such contest);
2. That the defendant had the intent to influence the outcome of such contest; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction certain terms are defined as follows:

“Sports contest” means any professional or amateur sports or athletic game or contest viewed by the public.

“Sports participant” means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

“Sports official” means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority see K.S.A. 21-4408. Tampering with a sports contest is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

**66.09 KNOWINGLY EMPLOYING AN ALIEN
ILLEGALLY WITHIN THE TERRITORY OF THE
UNITED STATES**

The defendant is charged with the crime of knowingly employing an alien illegally within the territory of the United States. The defendant pleads not guilty.

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

- (1) That the defendant employed _____ who performed work for defendant within the state of Kansas;
- (2) That during the time _____ was so employed he was an alien illegally within the territory of the United States;
- (3) That during the time of the employment the defendant knew _____ was illegally within the territory of the United States; and
- (4) That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

(The statute making the employment of an alien illegally within the territory of the United States an offense is not applicable to aliens who have entered the United States illegally and thereafter have been permitted to remain within the United States, temporarily or permanently, pursuant to federal law.)

Notes on Use

For authority see K.S.A. 21-4409.

Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor.

If it becomes applicable under the evidence, the last paragraph may be given.

The statute does not state what constitutes permission to remain within the United States. The committee is of the opinion that the statute should be liberally construed to include cases where an alien has been permitted to remain within the United States by inaction of federal immigration authorities in addition to cases where the immigration authorities have affirmatively acted to permit the alien to remain the United States.

CHAPTER 67.00

	PIK Number
Narcotics, Generally—Except Marijuana [Repealed]	67.01
Possession of Marijuana With Intent to Sell [Repealed]	67.02
Dispensing Marijuana [Repealed]	67.03
Possession of Marijuana [Repealed]	67.04
Unauthorized Possession of Narcotics Lawfully Pre- scribed for Person [Repealed]	67.05
Unauthorized Possession of Narcotics Lawfully Pre- scribed for Animal [Repealed]	67.06
Narcotics Fraud, Deceit, Forgery, Concealment [Re- pealed]	67.07
False Narcotics Order [Repealed]	67.08
Obtaining Narcotics by False Representation [Re- pealed]	67.09
False or Forged Prescription [Repealed]	67.10
False or Forged Label [Repealed]	67.11
Hypnotic, Somnifacient, or Stimulating Drugs [Re- pealed]	67.12
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PATTERN INSTRUCTIONS FOR KANSAS

67.01-67.12

The first edition of *PIK Criminal* contained instructions 67.01 through 67.12. The statutes on which those instructions were based were repealed effective July 1, 1972. Thus, they are not included in this second edition.

PATTERN INSTRUCTIONS FOR KANSAS

67.13 NARCOTIC DRUGS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to a narcotic drug known as _____. The defendant pleads not guilty.

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

1. That the defendant (manufactured) (possessed) (had under his or her control) (possessed with the intent to sell) (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a narcotic drug known as _____;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4127a. The statute specifically relates to “any opiates, opium, or narcotic drugs.”

If a defendant is charged with either sale or delivery, this instruction should be given.

K.S.A. 21-3201 provides that as used in the Kansas Criminal Code, “the terms ‘knowing,’ ‘intentional,’ ‘purposeful,’ and ‘on purpose’ are included within the term ‘willful.’”

K.S.A. 65-4101 defines the terms “administer” in paragraph (a), “deliver” or “delivery” in paragraph (g), “dispense” in paragraph (h), “distribute” in paragraph (j), “manufacture” in paragraph (n), and “person” in paragraph (s).

If a definition of “possession” is necessary, see chapter 53.

A sale under the Uniform Controlled Substances Act has a broader meaning than “sale” usually has. Sale under the act means selling for money, and also includes barter, exchange, or gift, or any offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession. K.S.A. 65-4127a; *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act, specifically defines the term “narcotic drug” in K.S.A. 65-4101(p). The section includes “opium and opiate” under the definition and K.S.A. 65-4101(q) presents a detailed definition of “opiate.” The committee believes that for convenience a court should refer to the substance in question under the generic term “narcotic drug” and insert the name of the specific drug in the appropriate blank. There will be occasions when a court should include the definitions, either in the same or in additional instructions.

PATTERN INSTRUCTIONS FOR KANSAS

A violation of K.S.A. 65-4127a is a class C felony; upon conviction for a second offense, such person shall be guilty of a class B felony; and upon conviction for a third or subsequent offense, such person shall be guilty of a class A felony, punishable by life imprisonment.

It should be noted that K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation either of federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas. This statute and the preceding one are both silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction. A Kansas conviction after a conviction in another jurisdiction would not seem to be a conviction for a second offense because K.S.A. 65-4127 relates to convictions under the Kansas Uniform Controlled Substances Act.

Comment

K.S.A. 65-4127a qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any complaint, information, indictment, or other pleading, or in any trial, hearing, or other proceeding under the act it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the person must shoulder the burden of proof to rebut the presumption.

The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101[e]), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See for example, K.S.A. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 1982 Supp. 65-4123, and K.S.A. 65-4138.

The committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense instruction, together with appropriate comment relative to a similar procedural setting, see PIK 2d 64.04, Unlawful Use of Weapons—Affirmative Defense.

PATTERN INSTRUCTIONS FOR KANSAS

67.13-A NARCOTIC DRUGS—SALE DEFINED

A sale under the Uniform Controlled Substances Act has a broader meaning than “sale” usually has. Sale under the act means selling for money, and also includes barter, exchange, or gift, or an offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession.

Notes on Use

For authority, see *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

**67.14 POSSESSION OF CONTROLLED STIMULANTS,
DEPRESSANTS AND HALLUCINOGENIC DRUGS
WITH INTENT TO SELL**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant possessed a (stimulant) (depressant) (hallucinogenic drug) known as _____;
2. That the defendant did so with the intent to sell it; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 65-4127b(b). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are included. For example, it refers to K.S.A. 65-4105(d) relative to the hallucinogenic drugs involved, with subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among others.

A violation of K.S.A. 1982 Supp. 65-4127b(b) is a class C felony.

Comment

The Committee notes that the only substance incorporated under K.S.A. 1982 Supp. 65-4127b(b) that is defined in the "definitions" section of the uniform act is "marihuana." See K.S.A. 65-4101(o), where marihuana is defined in terms of the plant *cannabis*.

K.S.A. 1982 Supp. 65-4127b(b) qualifies the acts specified as unlawful with the premise, "[e]xcept as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any complaint, information, indictment, or other pleading, or in any trial, hearing, or other proceeding under the act, it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the accused must shoulder the burden of proof to rebut the presumption.

PATTERN INSTRUCTIONS FOR KANSAS

The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-4101[e]) may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 1982 Supp. 65-4123, and K.S.A. 65-4138.

An instruction that is “substantially” in the form of PIK 2d 67.14 correctly sets out the elements of the offense. Syl. ¶ 1, *State v. Guillen*, 218 Kan. 272, 543 P.2d 934 (1975).

A definition of “intent to sell” is not necessary, as the phrase “was not used in any technical sense nor in any way different from its ordinary use in common parlance.” *State v. Guillen*, supra.

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

The Committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense pattern, together with appropriate comment relative to a similar procedural setting, see PIK 2d 64.04, Unlawful Use of Weapons—Affirmative Defense.

PATTERN INSTRUCTIONS FOR KANSAS

**67.15 SELLING OR OFFERING TO SELL
CONTROLLED STIMULANTS, DEPRESSANTS,
AND HALLUCINOGENIC DRUGS**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant (sold) (offered to sell) (a stimulant) (a depressant) (a hallucinogenic drug) known as _____;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 65-4127b(b). The section refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are involved. For example, it refers to K.S.A. 1982 Supp. 65-4105(d) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

A violation of K.S.A. 1982 Supp. 65-4127b(b) is a class C felony.

See Notes on Use to PIK 2d 67.13, Narcotic Drugs.

Comment

See the comment to PIK 2d, 67.14, Possession of Controlled Stimulants, Depressants, and Hallucinogenic Drugs with Intent to Sell.

Delivery is not a lesser included offense of sale. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976).

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

**67.16 MANUFACTURE, POSSESSION, OR
DISPENSATION OF CONTROLLED STIMULANTS,
DEPRESSANTS, AND HALLUCINOGENIC DRUGS**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant (manufactured) (possessed) (had under his control) (prescribed) (administered) (delivered) (distributed) (compounded) (a stimulant) (a depressant) (a hallucinogenic drug) known as _____;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 65-4127b(a). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are included. For example, it refers to K.S.A. 1982 Supp. 65-4105(d) relative to the hallucinogenic drugs involved, which includes such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among others.

A violation of K.S.A. 1982 Supp. 65-4127b(a) is a class A misdemeanor, "except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony." "Prior conviction of possession of narcotics is not an element of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and thus to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." Syl. ¶ 1, *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1975).

K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation of either federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas. Both this statute and K.S.A. 1982 Supp. 65-4127b(a) are silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction. A Kansas conviction would appear not to be a conviction for a second offense because K.S.A. 65-4127a relates to convictions under the Kansas Uniform Controlled Substances Act.

PATTERN INSTRUCTIONS FOR KANSAS

K.S.A. 21-3201 provides that as used in the Kansas Criminal Code, “the terms ‘knowing,’ ‘intentional,’ ‘purposeful,’ and ‘on purpose’ are included within the term ‘willful.’”

K.S.A. 65-4101 defines the term “administer” in paragraph (a), “deliver” or “delivery” in paragraph (g), “dispense” in paragraph (h), “distribute” in paragraph (j), “manufacture” in paragraph (n), and “person” in paragraph (s). When appropriate, definitions should be given.

Comment

As discussed in the comment to PIK 2d 67.01, Narcotic Drugs, K.S.A. 21-3204 provides that no criminal intent is necessary if the crime is a misdemeanor “and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.” Although the unauthorized manufacturing, possessing, controlling, prescribing, administering, delivering, distributing, dispensing, or compounding of a substance covered by K.S.A. 1982 Supp. 65-4127b(a) constitutes a class A misdemeanor for a first offense, the committee does not find that the statute defining the offense “clearly indicates a legislative purpose to impose absolute liability for the conduct described.” The statute does provide that, upon conviction of a second or subsequent offense, a person shall be guilty of a class D felony. The committee does not believe the legislature intended that no criminal intent is necessary for a first conviction but that criminal intent is essential for a second or subsequent conviction. Any other view would mean that a first conviction would have to be established as a condition precedent to the formation of the element of criminal intent on a second prosecution. Nothing in the statute indicates such a position.

PATTERN INSTRUCTIONS FOR KANSAS

67.17 SIMULATED CONTROLLED SUBSTANCES AND DRUG PARAPHERNALIA—USE OR POSSESSION WITH INTENT TO USE

The defendant is charged with the crime of (using) (possession with intent to use) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant (used) (possessed with the intent to use) any (simulated controlled substance) (drug paraphernalia);
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4152. A violation of K.S.A. 65-4152 is a class A misdemeanor.

An instruction defining “drug paraphernalia” should be given. K.S.A. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as “drug paraphernalia” should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

An instruction defining “simulated controlled substance” should be given. K.S.A. 65-4150(e).

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the “Model Drug Paraphernalia Act” drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

PATTERN INSTRUCTIONS FOR KANSAS

**67.18 POSSESSION OR MANUFACTURE OF
CONTROLLED SUBSTANCE OR DRUG
PARAPHERNALIA**

The defendant is charged with the crime of (delivering) (possession with intent to deliver) (manufacturing with the intent to deliver) (causing to be delivered within Kansas) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant knowingly (delivered) (possessed with the intent to deliver) (manufactured with the intent to deliver) (caused to be delivered within Kansas)
 - (a) a simulated controlled substance; and
 - or
 - (b) drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance; and
2. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see 1982 Supp. 65-4153.

A violation of K.S.A. 1982 Supp. 65-4153 is a class A misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered within this state drug paraphernalia or a simulated controlled substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the drug paraphernalia or simulated controlled substance is delivered is guilty of a class E felony.

An instruction defining "drug paraphernalia" should be given. K.S.A. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

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An instruction defining “simulated controlled substance” should be given. K.S.A. 65-4150(e).

When paragraph 1(b) is given, any inapplicable words should be stricken.

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the “Model Drug Paraphernalia Act” drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

PATTERN INSTRUCTIONS FOR KANSAS

67.19 PROMOTION OF SIMULATED CONTROLLED SUBSTANCES OR DRUG PARAPHERNALIA

The defendant is charged with the crime of promotion to sell (a simulated controlled substance) (objects designed or intended for use as drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant placed or caused to be placed an advertisement in (name of the newspaper, magazine or other publication) (a handbill) distributed in Kansas, or received by mail in Kansas, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, was to promote the sale of
 - (a) a simulated controlled substance; and
 - or
 - (b) objects designed or intended for use as drug paraphernalia; and
2. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4154. Violation of K.S.A. 65-4154 is a class A misdemeanor.

An instruction defining "drug paraphernalia" should be given. K.S.A. 65-4150(e). Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by the evidence.

An instruction defining "simulated controlled substance" should be given. K.S.A. 65-4150(e).

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland*

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Park, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

PATTERN INSTRUCTIONS FOR KANSAS

**67.20 REPRESENTATION THAT A NONCONTROLLED
SUBSTANCE IS A CONTROLLED SUBSTANCE**

The defendant is charged with the crime of knowingly delivering or causing to be delivered a noncontrolled substance under circumstances that it would appear to be (name the controlled substance). The defendant pleads not guilty.

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

1. That the defendant knowingly delivered or caused to be delivered in Kansas a substance which was not (name the controlled substance); and
2. (a) that the defendant made an express representation that the substance delivered was (name the controlled substance); and
or
(b) that the substance delivered was of such nature or appearance that the recipient would be able to distribute it as (name the controlled substance); and
or
(c) that the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4155. Violation of K.S.A. 65-4155 is a class A misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this state a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the delivery is made is guilty of a class E felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 1982 Supp. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 65-4155(b).

PATTERN INSTRUCTIONS FOR KANSAS

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND
VERDICT FORMS

	PIK Number
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68.01 CONCLUDING INSTRUCTION

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

PATTERN INSTRUCTIONS FOR KANSAS

68.02 GUILTY VERDICT—GENERAL FORM

We, the jury, find defendant guilty of _____.

Presiding Juror

Notes on Use

The form should be completed by the court by specifying the particular offense with which defendant is charged. If two or more defendants are tried jointly, separate verdict forms must be provided by adding the name of each defendant to the form. For forms for separate counts see PIK 68.08, Multiple Counts—Verdict Forms. For forms for lesser included offenses see PIK 68.10, Lesser Included Offenses—Verdict Forms.

K.S.A. 22-3421 provides that the verdict shall be written, signed by the presiding juror, and read by the clerk to the jury, and inquiry made as to whether it is their verdict. If the verdict is defective in form only it may be corrected by the court with the assent of the jury.

Comment

A typewritten verdict form which merely requires that it be signed and dated by the presiding juror must conform to the evidence and the offense charged. *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961).

If a verdict is not in proper form when returned by the jury, the Court may direct the jury to correct the verdict and may send them back to the jury room for that purpose. *State v. Carrithers*, 79 Kan. 401, 99 Pac. 614 (1909).

In *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973), the Supreme Court considered the question of whether or not special questions could be submitted to the jury in a criminal case. The court held that in view of the differences in our civil and criminal statutes relating to verdicts, it is apparent that the legislature intended to preserve the power of a jury to return a verdict in a criminal prosecution in the teeth of the law and the facts. The case held that special questions may not be submitted to the jury in a criminal prosecution. The only proper verdicts are “guilty” or “not guilty” of the charges.

PATTERN INSTRUCTIONS FOR KANSAS

68.03 NOT GUILTY VERDICT—GENERAL FORM

We, the jury, find the defendant not guilty of

_____.

Presiding Juror

Notes on Use

See notes on use and comment to PIK 2d 68.02, Guilty Verdict—General Form.

PATTERN INSTRUCTIONS FOR KANSAS

68.04 PUNISHMENT—CLASS A FELONY

Comment

The jury choice of a sentence of death or life imprisonment in a class A felony under 21-4501(a) is no longer constitutionally permissible. *State v. Randol*, 212 Kan. 461, 513 P.2d 248 (1973).

PATTERN INSTRUCTIONS FOR KANSAS

68.05 VERDICTS—CLASS A FELONY

Comment

Unless a new death penalty is enacted, the verdict in a class A felony is no different than any other felony.

See comment to PIK 2d 68.04.

PATTERN INSTRUCTIONS FOR KANSAS

68.06 NOT GUILTY BECAUSE OF INSANITY

We, the jury, find defendant not guilty because of insanity.

Presiding Juror

Notes on Use

See K.S.A. 1982 Supp. 22-3428 in regard to acquittal on the ground of insanity at the time of the commission of the alleged crime, and commitment of defendant to the state security hospital.

See K.S.A. 1982 Supp. 22-3302 concerning proceedings to determine competency to stand trial. See also, PIK 2d 54.10, Insanity—Mental Illness or Defect and PIK 2d 54.10-A, Insanity—Commitment.

Comment

Mental competency at the time of the commission of an offense—if raised—is to be determined by the trier of facts upon a trial. Mental competency to stand trial—if raised—is another matter and is to be determined by the Court under K.S.A. 1982 Supp. 22-3302. *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970).

PATTERN INSTRUCTIONS FOR KANSAS

68.07 MULTIPLE COUNTS—VERDICT INSTRUCTION

Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the presiding juror.

Notes on Use

This instruction should be given when separate offenses are charged in more than one count and defendant can be convicted of any one or all.

See PIK 2d 68.08, Multiple Counts—Verdict Forms.

Cited with approval in *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).

PATTERN INSTRUCTIONS FOR KANSAS

68.08 MULTIPLE COUNTS—VERDICT FORMS

1. We, the jury, find defendant guilty of
(. . . crime charged count 1 . . .).

Presiding Juror

We, the jury, find defendant not guilty of
(. . . crime charged count 1 . . .).

Presiding Juror

2. We, the jury, find defendant guilty of
(. . . crime charged count 2 . . .).

Presiding Juror

We, the jury, find defendant not guilty of
(. . . crime charged count 2 . . .).

Presiding Juror

Notes on Use

This form may be used when the defendant is charged with multiple counts in the same information. The verdict form may be expanded for additional counts and should be completed by specifying the crime charged in each count. The Committee recommends that the verdicts as to each count be submitted on a separate form.

Comment

Each count of an indictment is a separate offense, hence consistency in the verdicts is not necessary. *Speers v. United States*, 387 F.2d 698 (10th Cir. 1967).

A trial court may properly retry an accused on a theft charge, where the original trial on theft and burglary charged in two separate counts in the same information resulted in an acquittal of the burglary charge and a mistrial on the theft charge due to the inability of the jury to reach a verdict; not double jeopardy; jury verdicts need not be consistent. *In re Shotwell & Crades*, 4 Kan. App.2d 382, 607 P.2d 83 (1980).

PATTERN INSTRUCTIONS FOR KANSAS

68.09 LESSER INCLUDED OFFENSES

The offense of (. . . principal offense charged . . .) with which defendant is charged includes the lesser offense(s) of (. . . lesser included offense or offenses . . .).

You may find defendant guilty of (. . . principal offense charged . . .)
or (. . . first lesser included offense . . .)
or (. . . second lesser included offense . . .)
or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only.

Your presiding juror should sign the appropriate verdict form. The other verdict forms are to be left unsigned.

Notes on Use

For authority, see K.S.A. 21-3109.

This instruction should be given when the evidence presents circumstances from which a lesser included offense or offenses may be inferred. The instruction should be completed by specifying the principal offense and each lesser included offense. See PIK 2d 68.10. Lesser Included Offenses—Verdict Forms.

Some deviation from this form may be used as a lead-in for the elements instruction for the lesser included offenses. For example, see PIK 2d 69.01 Illustrative Sets of Instructions, instruction numbers three, four and five.

Comment

Failure to instruct the jury on some lesser degree of the crime charged is not ground for reversal if the evidence at the trial excludes a theory of guilty on a lesser offense. *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971).

The trial court has an affirmative duty to instruct on lesser included offenses where required by the evidence even in the absence of a request by counsel. The evidence requires such instruction under circumstances where the accused might reasonably have been convicted of a lesser offense if the instruction had been given. *State v. Mason*, 208 Kan. 39, 490 P.2d 418 (1971); *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972). Where defendant was charged with aggravated battery, it was error not to instruct on the lesser included offense of battery under the facts and circumstances shown by the evidence. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973). However, the possession of marijuana is not a lesser included offense in a prosecution for the unlawful sale of marijuana. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

To constitute a lesser included offense, all elements necessary to prove the lesser offense must be present and be elements of the greater offense. Second degree murder is a lesser included offense under murder in the first degree. *State v. Carpenter*, 215 Kan. 573, 527 P.2d 1333 (1974).

The duty of the trial court to instruct on lesser degrees of crime in homicide cases is stated and applied in *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). See "The Doctrine of Lesser Included Offense in Kansas," 15 Washburn L.J. 40 (1976).

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68.10 LESSER INCLUDED OFFENSES—VERDICT FORMS

We, the jury, find defendant guilty of (. . . principal offense charged . . .).

Presiding Juror

We, the jury, find defendant guilty of (. . . lesser included offense . . .).

Presiding Juror

We, the jury, find defendant not guilty.

Presiding Juror

Notes on Use

The guilty verdict forms should be completed by specifying the main charge and the lesser included offense. The court should submit one verdict form of guilty of the main charge, guilty of each lesser included offense, and one form of verdict of not guilty in event the jury fails to find defendant guilty of either the principal charge or of a lesser included offense.

The Committee recommends that each verdict be submitted on a separate form.

Comment

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

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68.11 VERDICT FORM—VALUE IN ISSUE

We, the jury, find the defendant guilty of _____
and find the [value of] [damage to] [amount of] the
[property] [services] [money or its equivalent] [commu-
nication services] [check(s)] [order(s)] [draft(s)] (which
the defendant [obtained] [damaged] [impaired] [gave])
(over which the defendant allegedly [obtained] [exerted]
unauthorized control) to be:

_____ dollars (\$_____) or more

Less than _____ dollars (\$_____)

(Place an X in the appropriate square.)

Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 2d 68.03, Not Guilty Verdict—General Form, must be used with this form.

See Comments and Notes on Use PIK 2d 59.70, Value in Issue.

68.12 DEADLOCKED JURY

This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

Also, there is no reason to believe that the case would ever be submitted to twelve people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

These matters are mentioned now because some of them may not have been in your thoughts.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.

The giving of this instruction at this time in no way means it is more important than any other instruction. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.

You may now retire and continue your deliberations in such manner as may be determined by your good judgment as reasonable people.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

This instruction is a modification of PIK 2d 10.20 suggested for use in civil cases when there is apparent failure of a jury to reach a verdict. The instruction can be given in substance with the other instructions at the conclusion of the case. If it is used after the jury has commenced deliberations, it should be done so with caution. The Committee recommendation that PIK 10.20 not be given in criminal cases in the 1968 Supplement to PIK is modified in conformity to these notes and comment.

Comment

It was held there was no error in giving PIK 10.20 in *State v. Oswald*, 197 Kan. 251, 417 P.2d 261 (1966). "However," said the Court, "as a word of caution, this instruction quite properly could have been given at the time of the original charge." The practice of lecturing a jury in a criminal case after reported disagreement was not commended. Oral comments accompanying this instruction were held to be coercive and prejudicial error in *State v. Earsery*, 199 Kan. 208, 428 P.2d 794 (1967), but their effect, standing alone in that case, was not determined. A belated instruction was criticized, but, under attending circumstances indicating that the judge's remarks had no immediate coercive effect, the instruction was held not to be reversible error in *State v. Basker*, 198 Kan. 242, 424 P.2d 535 (1967).

In *Bush v. State*, 203 Kan. 494, 454 P.2d 429 (1969) PIK 10.20 was submitted to the jury after it had deliberated for some time and failed to reach a verdict. The holding in *State v. Earsery*, supra, to the effect that PIK 10.20 standing alone would not constitute prejudicial error is discussed.

In *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015 (1971) the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward."

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law—Jury Instructions—The Allen Charge," 6 Washburn L.J. 517 (1967).

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68.13 POSTTRIAL COMMUNICATION WITH JURORS

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Notes on Use

See Rules of Supreme Court Rule No. 169. Under this rule, the Court shall give the substance of the above instruction upon completion of the jury trial and before discharge of the jury.

Supreme Court Rule No. 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized if possible.

CHAPTER 69.00
ILLUSTRATIVE SETS
OF INSTRUCTIONS

	PIK Number
Murder in the First Degree With Lesser Included Offenses	69.01
Theft With Two Participants	69.02

69.01 MURDER IN THE FIRST DEGREE WITH LESSER INCLUDED OFFENSES

Summary of the Facts and Issues

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of July 5, 1982, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Other witnesses testified Smith and Green were having a heated argument immediately prior to the shooting. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun. There was no evidence in the case that John Green had a weapon in his possession or that he had made any threats against Wilbur Smith.

An Outline of Suggested Instructions in Sequence Follows:

- | | |
|----------------|--|
| Instruction 1. | PIK 2d 51.02, Consideration and Binding Application of Instructions. |
| Instruction 2. | PIK 2d 56.01, Murder in the First Degree. |
| Instruction 3. | PIK 2d 68.09, Lesser Included Offenses. |
| Instruction 4. | PIK 2d 56.03, Murder in the Second Degree. |
| Instruction 5. | PIK 2d 56.05, Voluntary Manslaughter. |
| Instruction 6. | PIK 2d 56.06, Involuntary Manslaughter. |
| Instruction 7. | PIK 2d 56.04, Homicide Definitions. |

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- Instruction 8. PIK 2d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
- Instruction 9. PIK 2d 54.01, Presumption of Intent.
- Instruction 10. PIK 2d 51.05, Rulings of the Court.
- Instruction 11. PIK 2d 51.06, Statements and Arguments of Counsel.
- Instruction 12. PIK 2d 52.09, Credibility of Witnesses.
- Instruction 13. PIK 2d 68.01, Concluding Instruction.
- Verdict Forms. PIK 2d 68.10, Lesser Included Offenses—Verdict Forms.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1

Members of the jury: It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.

(PIK 2d 51.02)

Instruction No. 2

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

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

1. That the defendant intentionally killed John Green;
2. That such killing was done maliciously;
3. That it was done deliberately and with premeditation; and
4. That this act occurred on or about the 5th day of July, 1982, in Douglas County, Kansas.

(PIK 2d 56.01)

Instruction No. 3

The offense of murder in the first degree with which the defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter. You may find the defendant guilty of murder in the first degree, or murder in

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the second degree or voluntary manslaughter or involuntary manslaughter or not guilty. When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only. Your presiding juror should then sign the appropriate verdict form. The other verdict forms are to be left unsigned.

(PIK 2d 68.09)

Instruction No. 4

If you cannot agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.

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

1. That the defendant intentionally killed John Green;
2. That such killing was done maliciously; and
3. That this act was done on or about the 5th day of July, 1982, in Douglas County, Kansas.

(PIK 2d 56.03)

Instruction No. 5

If you cannot agree that the defendant is guilty of murder in the second degree you should then consider the lesser included offense of voluntary manslaughter.

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

1. That the defendant killed John Green;
2. That it was done intentionally;
3. That it was done in the heat of passion; and
4. That this act occurred on or about the 5th day of July, 1982, in Douglas, County, Kansas.

(PIK 2d 56.05)

Instruction No. 6

If you cannot agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.

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

1. That the defendant unintentionally killed John Green;

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2. That it was done while in the commission of the unlawful act of shooting a firearm within the city of Lawrence, Kansas, under circumstances that show a realization of the imminence of danger to the person of another and a reckless disregard or complete indifference and unconcern for the probable consequences of the conduct.
3. That this act occurred on or about the 5th day of July, 1982, in Douglas County, Kansas.

The act of shooting a firearm in the city of Lawrence, Kansas, is against the ordinances of such city and is unlawful.

(PIK 2d 56.06)

Instruction No. 7

As used in these instructions the following words and phrases are defined as indicated:

“Maliciously” means willfully doing a wrongful act without just cause or excuse.

“Deliberately and with premeditation” means to have thought over the matter beforehand.

“Intentionally” means conduct that is purposeful and willful and not accidental.

“Heat of passion” means any intense or vehement emotional excitement which was spontaneously provoked from circumstances.

(PIK 2d 56.04)

Instruction No. 8

The law places the burden upon the State to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must assume that the defendant is innocent unless you are convinced from all of the evidence in the case that he is guilty.

You should evaluate the evidence admitted in this case and determine the innocence or guilt of the defendant entirely in accordance with these instructions. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant not guilty. If you have no

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reasonable doubt as to the truth of any of them, you should find the defendant guilty.

(PIK 2d 52.02)

Instruction No. 9

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 2d 54.01)

Instruction No. 10

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 2d 51.05)

Instruction No. 11

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 2d 51.06)

Instruction No. 12

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

Instruction No. 13

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

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Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19____.

VERDICT FORMS

We, the jury, find defendant guilty of first degree murder.

Presiding Juror

We, the jury, find defendant guilty of second degree murder.

Presiding Juror

We, the jury, find defendant guilty of voluntary manslaughter.

Presiding Juror

We, the jury, find defendant guilty of involuntary manslaughter.

Presiding Juror

We, the jury, find defendant not guilty.

Presiding Juror

(PIK 2d 68.10)

69.02 THEFT WITH TWO PARTICIPANTS

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 5, 1982, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

- | | |
|----------------|--|
| Instruction 1. | PIK 2d 51.02, Consideration and Binding Application of Instructions.
PIK 2d 51.05, Rulings of the Court.
PIK 2d 51.06, Statements and Arguments of Counsel.
PIK 2d 52.09, Credibility of Witnesses. |
| Instruction 2. | PIK 2d 59.01, Theft. |
| Instruction 3. | PIK 2d 59.70, Value in Issue. |

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Instruction 4.	PIK 2d 54.05, Responsibility for Crimes of Another.
Instruction 5.	PIK 2d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
Instruction 6.	PIK 2d 54.01, Presumption of Intent.
Instruction 7.	PIK 2d 68.01, Concluding Instruction.
Verdict Forms.	PIK 2d 68.11, Verdict of Guilty and Finding of Value of Property. PIK 2d 68.03, Not Guilty Verdict.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.

(PIK 2d 51.02)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

(PIK 2d 51.05)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

(PIK 2d 51.06)

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

(PIK 2d 52.09)

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Instruction No. 2

The defendant is charged with the crime of theft of property of the value of one hundred dollars or more. The defendant pleads not guilty.

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

1. That Acme Department Store was the owner of the property;
2. That the defendant exerted unauthorized control over the property;
3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;
4. That the value of the property was one hundred dollars or more; and
5. That this act occurred on or about the 5th day of July, 1982, in Sedgwick County, Kansas.

(PIK 2d 59.01)

Instruction No. 3

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in the amount of one hundred dollars or more.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 2d 59.70)

Instruction No. 4

A person who, either before or during its commission intentionally aids another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the defendant's participation, if any, in the actual commission of the crime.

(PIK 2d 54.05)

Instruction No. 5

The law places the burden upon the State to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must

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assume that the defendant is innocent unless you are convinced from all of the evidence in the case that he is guilty.

You should evaluate the evidence admitted in this case and determine the innocence or guilt of the defendant entirely in accordance with these instructions. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant not guilty. If you have no reasonable doubt as to the truth of any of them, you should find the defendant guilty.

(PIK 2d 52.02)

Instruction No. 6

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 2d 54.01)

Instruction No. 7

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19____.
(PIK 2d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

One hundred dollars (\$100) or more

Less than one hundred dollars (\$100)

(Place an × in the appropriate square.)

Presiding Juror

(PIK 2d 68.11)

We, the jury find the defendant not guilty of

_____.

Presiding Juror

(PIK 2d 68.03)

CHAPTER 70.00
SELECTED MISDEMEANORS

	PIK Number
Traffic Offenses—Driving Under the Influence of Alcohol or Drugs	70.01
Driving While Intoxicated—If Chemical Test Used	70.02
Transporting Liquor In an Opened Container	70.03
Reckless Driving	70.04
Violation of City Ordinance	70.05
Operating an Aircraft While Under the Influence of Intoxicating Liquor or Drugs	70.06
Operating an Aircraft While Under the Influence—If Chemical Test Used	70.07

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70.01 TRAFFIC OFFENSE—DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

The defendant is charged with the crime of operating a vehicle while under the influence of alcohol or drugs, or a combination thereof. The defendant pleads not guilty.

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

1. That the defendant drove a vehicle;
2. That the defendant while driving was under the influence of alcohol or any drug, or a combination of alcohol and any drug, and the control of (his) (her) mental or physical function was thereby impaired to the extent that (he) (she) was incapable of safely driving a vehicle; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 8-1567.

Comment

As to what is a "vehicle" under similar statutes, see 66 A.L.R.2d 1146.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved, and when applicable the jury should be so instructed. K.S.A. 1982 Supp. 8-1567(b).

The word "operate" as used in K.S.A. 1982 Supp. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980).

If the evidence is limited to either alcohol or drug use, reference to the other substance should be deleted from the instruction.

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70.02 DRIVING WHILE INTOXICATED—IF CHEMICAL TEST USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. (If a test shows there was .10 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that [he] [she] was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.) (If a test shows there was less than .10 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of [alcohol] [drugs] [a combination of alcohol and drugs].)

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

Notes on Use

For authority, see K.S.A. 1982 Supp. 8-1005 and K.S.A. 8-1006. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used.

Comment

The constitutionality of a presumption is described in the comment to PIK 2d 54.00 and 54.01-B.

The Committee believes that "prima facie" evidence as used in K.S.A. 1982 Supp. 8-1005 creates a presumption, and the suggested instruction is worded accordingly. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

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70.03 TRANSPORTING LIQUOR IN AN OPENED CONTAINER

The defendant is charged with the crime of transporting alcoholic liquor in an opened container. The defendant pleads not guilty.

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

1. That the defendant transported a container of alcoholic liquor in a vehicle upon a highway or street;
2. That the container had been opened;
3. That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;
4. That the defendant knew or had reasonable cause to know he was transporting an opened container of alcoholic liquor; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1982 Supp. 41-804. A person convicted of this offense shall be punished by a fine of not more than two hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition, the court shall suspend the defendant's license or impose conditions on the privilege of operating a motor vehicle.

"Highway" and "street" are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

Comment

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), held that a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

PATTERN INSTRUCTIONS FOR KANSAS

70.04 RECKLESS DRIVING

The defendant is charged with the crime of reckless driving. The defendant pleads not guilty.

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

1. That the defendant was driving a vehicle;
2. That the defendant was driving in a reckless manner;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, the term "reckless" means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a reckless disregard or complete indifference and unconcern for the probable consequences of such conduct.

Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than ninety days, or by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than ten days nor more than six months, or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment.

Comment

"Reckless" is defined as an indifference to whether or not wrong is done. To be reckless, the conduct must show disregard of or indifference to the consequences under circumstances involving danger to life or safety of others, although no harm was intended. *Montgomery v. Barton*, 212 Kan. 368, 370, 510 P.2d 1187 (1973).

See also *Hanson v. Swain*, 172 Kan. 105, 238 P.2d 517 (1951), and *Bailey v. Resner*, 168 Kan. 439, 214 P.2d 323 (1950).

PATTERN INSTRUCTIONS FOR KANSAS

70.05 VIOLATION OF CITY ORDINANCE

The ordinance of the City of _____, Kansas, makes it unlawful for any person to (state offense charged) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

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

1. (List the
2. _____ various elements
3. _____ of the offense)
4. That this act occurred on or about the _____ day of _____, 19____, within the City of _____, Kansas.

Notes on Use

The elements of the applicable substantive crime should be set forth in the concluding portion of the instruction.

PATTERN INSTRUCTIONS FOR KANSAS

70.06 OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS

The defendant is charged with the crime of operating an aircraft while under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The defendant pleads not guilty.

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

1. That the defendant was operating an aircraft; and
2. (a) that the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug), and the control of (his) (her) mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely operating an aircraft;
or
(b) that the defendant had .10 percent or more by weight of alcohol in (his) (her) blood as shown by chemical analysis of (his) (her) blood, breath or urine.
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 3-1001 and K.S.A. 3-1002. A first conviction of this offense is punishable by imprisonment of not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Second and subsequent convictions shall be punishable by imprisonment for not less than thirty days nor more than one year, and, in the discretion of the court, a fine of not more than five hundred dollars. K.S.A. 3-1003. In addition, pursuant to K.S.A. 3-1003(b), the court may order the defendant not to operate an aircraft for any purpose.

If the blood alcohol level is .10 percent or more, the element of "under the influence of intoxicating liquor" is satisfied.

Comment

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and when applicable the jury should be so instructed. K.S.A. 3-1003.

PATTERN INSTRUCTIONS FOR KANSAS

70.07 OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE—IF CHEMICAL TEST IS USED

The law of the state of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) may be taken to determine the amount of alcohol in the defendant's blood at the time the alleged offense occurred. If the test shows there was less than .10 percent by weight of alcohol in the defendant's blood, it shall be presumed the defendant was not under the influence of intoxicating liquor.

You are further instructed that evidence derived from a (blood) (breath) (urine) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The evidence established by the test is not conclusive, but it should be considered by you along with all the other evidence in this case.

Notes on Use

For authority, see K.S.A. 3-1004 and K.S.A. 3-1005.

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