1975 SUPPLEMENT

PATTERN INSTRUCTIONS FOR KANSAS

THIS SUPPLEMENT CONTAINS NEW AND REVISED INSTRUCTIONS, NOTES ON USE AND COMMENTS, TOGETHER WITH APPROPRIATE TABLES AND INDEX

PREPARED BY

Committee on Pattern Jury Instructions
Kansas District Judges' Association
Under Sponsorship of
The Kansas Judicial Council

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COMMITTEE ON PATTERN JURY INSTRUCTIONS

Serving as
Advisory Committee on Jury Instructions
Kansas Judicial Council

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Supplemental Foreword

The preparation and publication of this supplement to *Pattern Instructions for Kansas—Criminal* has been made possible by the committee on Pattern Jury Instructions of the Kansas District Judges' association serving as the Advisory Committee on Jury Instructions to the Kansas Judicial Council.

The *Pattern Instructions for Kansas—Criminal* supplement has been prepared by the willing and tireless work of District Court Judges: Barbara, Bryan, Musser, Walton, Woleslagel; Justice Prager, of the Kansas Supreme Court; Professor Shurtz of the University of Kansas School of Law and prior to his appointment as Chief Judge of United States Court of Military Appeals, Albert B. Fletcher, Jr.

The Bench and Bar of the state owe a debt of gratitude to these men who have devoted their learning, experience and their valuable leisure time to this worthwhile effort to improve the administration of criminal justice in Kansas.

A grant of federal assistance to the Judicial Council under the provisions of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, through the generosity of the Governor's Committee on Criminal Administration has made it possible to defray ninety percent of the cost of printing and the distribution of this useful supplement.

ALFRED G. SCHROEDER, *Chairman,*
The Kansas Judicial Council

Preface

Since the original publication of PIK—Criminal in 1971 the Kansas Legislature has amended several sections of the Criminal Code and the Kansas Supreme Court has considered a significant number of the code provisions and the original PIK—Criminal instructions. At the request of the Kansas Judicial Council, the Committee has prepared this supplement containing some new instructions and several revised instructions. The notes on use and comment are updated to reflect statutory changes and significant Supreme Court decisions.

The objective of the Committee is to make the law applicable in a given case understandable to jurors. However, the trial judge must analyze the issues applicable to the evidence in each case and make appropriate selections and modifications in the instructions. As a general principal of jury instructions, the Committee recommends that the judge give the minimum number of instructions a case requires, rather than give all that may be legally permissible.

The Hon. Albert B. Fletcher, Jr., Junction City, served as Chairman of the Committee during most of the preparation of this supplement, but has now resigned due to his appointment in April of 1975 as Chief Judge of the United States Court of Military Appeals. The Committee wishes to express its appreciation to Judge Fletcher, the Kansas Judicial Council for its financial support and to its excellent reporter, Randy M. Hearrell, the Kansas County & District Attorneys Association and those judges and lawyers who furnished criticism and comment which aided the Committee in the preparation of this supplement. The committee solicits further suggestions and comments from the bench and bar.

DON MUSSER,
Chairman of Committee on
Pattern Criminal Jury Instructions,
Kansas District Judges Association.

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

PIK 51.02 CONSIDERATION AND BINDING APPLICATION OF INSTRUCTIONS

Comment

In *State v. McClanahan,* 212 Kan. 208, 510 P. 2d 153 (1973), the Kansas Supreme Court by implication gave approval to this instruction. The court spoke of this instruction as being "the conventional instruction." In essence, though not in words, that is what it is. The court did not agree with this committee that PIK Criminal 51.03 was "perhaps a more honest statement as to the binding effect of instructions than the conventional instruction, PIK Criminal 51.02."

PIK 51.03 CONSIDERATION AND GUIDING APPLICATION OF INSTRUCTIONS

Comment

The Kansas Supreme Court disapproved of this instruction "for use in Kansas" in *State v. McClanahan,* 212 Kan. 208, 213, 510 P. 2d 153 (1973). The court concluded that this instruction was in conflict with other instructions in the case advising that the verdict of the jurors must be founded " 'entirely upon the evidence admitted and the law as given in these instructions'."

The court held that the instruction is contrary to K. S. A. 22-3403 (3) (1972 Supp.) which provides that "questions of law shall be decided by the court and issues of fact shall be determined by the jury."

Chief Judge Brazelon gave scholarly support for this type of instruction in his dissenting opinion in the "D. C. Nine" case, *United States v. Dougherty,* 473 F. 2d 1113 (D. C. Cir. 1972).

In "The American Jury System: A Time for Reexamination," Helwig, *Judicature,* Vol. 55, No. 3 (October 1971), the author relates that this type of instruction appears to have appeal to the generation of lawyers coming on. Even if this be true, it would seem from *McClanahan* that it is too early for it use in Kansas.

PIK 51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Comment

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

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS CONSIDERATION

PIK 52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

Comment

This instruction was approved in *State v. Taylor,* 212 Kan. 780, 784, 512 P. 2d 449 (1973); and *State v. Wilkins,* 215 Kan. 145, 523 P. 2d 728 (1974).

PIK 52.03 PRESUMPTION OF INNOCENCE

Comment

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

PIK 52.04 REASONABLE DOUBT

Comment

State v. Bridges and *State v. Davis* set out above are cited as authority for not defining "reasonable doubt" in *State v. Larkin,* 209 Kan. 660, 498 P. 2d 37 (1972); and *State v. Taylor,* 212 Kan. 780, 785, 512 P. 2d 449 (1973).

PIK 52.06 PROOF OF OTHER CRIMES—LIMITED ADMISSIBILITY OF EVIDENCE

Comment

See *State v. Bly,* 215 Kan. 169, 523 P. 2d 397 (1974) for discussion of K. S. A. 60-455 (1964).

PIK 52.07 MORE THAN ONE DEFENDANT—LIMITED ADMISSIBILITY OF EVIDENCE

Comment

In *State v. Cameron and Bently,* 216 Kan. 644, 533 P. 2d 1255 (1975), this instruction is cited with approval as appropriate to give in a case in which multiple defendants are charged in the same information.

PIK 52.16 CIRCUMSTANTIAL EVIDENCE [REVISED]

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

Comment

In *State v. Wilkins,* 215 Kan. 157, 523 P. 2d 728 (1974), the Supreme Court stated that an instruction on circumstantial evidence is unnecessary when a proper instruction on "reasonable doubt" is given. See PIK 52.04.

PIK 52.17 CONFESSION [REVISED]

The Committee recommends that there be no separate instruction on confession.

Notes on Use

In *State v. Stephenson,* 217 Kan. 169, 535 P. 2d 940 (1975), the court held that it is not necessary for the trial court to instruct on the voluntariness of a confession. Consistent with this holding, but not required by this holding, the Committee recommends that this instruction never be given. If the trial court has determined that a confession is admissible, it becomes evidence in the case to be considered as any other evidence. To instruct on admissibility would be to dwell upon, and hence emphasis, a particular type of evidence, a practice that the Committee has generally disapproved.

PIK 52.18 TESTIMONY OF AN ACCOMPLICE

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 P. 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).

PIK 52.19 ALIBI

Comment

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

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

PIK 53.00 DEFINITIONS AND EXPLANATIONS OF TERMS

Additional Definitions

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).

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 at 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. 1971 Supp. 21-3210.

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).

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).

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.

Possession: Having control over a place or thing with knowledge of and the intent to have such control. Cited in *State v. Neal,* 215 Kan. 737, 529 P. 2d 114 (1974).

Prima Facie Evidence: 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).

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).

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

PIK 54.01 PRESUMPTION OF INTENT

Comment

This instruction must not be confused with PIK 54.01-A General Criminal Intent. The above instruction is a rule of evidence and does not fulfill the required element of criminal intent necessary for conviction in those cases where criminal intent is a necessary element of the offense.

It is error to omit the second sentence of this instruction. *State v. Warbritton*, 211 Kan. 506, 506 P. 2d 1152 (1973).

PIK 54.01-A GENERAL CRIMINAL INTENT [NEW]

In order for the defendant to be found guilty of the crime charged in this case, it must be proved that his conduct was wilful. Wilful conduct is conduct that is purposeful and intentional and not accidental.

Notes on Use

See K. S. A. 21-3201 (1) (2) (1974). This instruction must be given in all cases where wilful conduct is required to prove the crime, unless specific criminal intent is contained in the crime charged, in which case, intent must be included as an element in the specific charge instruction. 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 provided for in K. S. A. 21-3204 (1974), (Misdemeanor) or in cases where wanton conduct is sufficient to prove the crime (21-3201 (1) (3) (1974)).

This instruction must not be confused with PIK 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.

PIK 54.04 IGNORANCE OR MISTAKE OF LAW—REASONABLE BELIEF

Comment

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).

PIK 54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER [REVISED]

A person is criminally responsible for the conduct of another when, either before or during the commission of a crime, and with the intent to promote or assist in the commission of the crime, he intentionally aids or advises the other to commit the crime.

Comment

See *State v. Schriner,* 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."

PIK 54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER—CRIME NOT INTENDED [REVISED]

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

PIK 54.07 RESPONSIBILITY FOR CRIME OF ANOTHER—ACTOR NOT PROSECUTED [REVISED]

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 of any lesser degree) (has been acquitted).

PIK 54.10 INSANITY—MENTAL ILLNESS OR DEFECT

Comment

The M'Naughten Rule is adhered to in *State v. Lamb,* 209 Kan. 453, 497 P. 2d 275 (1972).

PIK 54.10-A INSANITY—COMMITMENT [REVISED]

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

Notes on Use

For authority, see K. S. A. 1974 Supp. 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).

PIK 54.11 INTOXICATION—INVOLUNTARY [REVISED]

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) (1974).

Comment

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

PIK 54.12 INTOXICATION—VOLUNTARY

Notes on Use

For authority, see K. S. A. 21-3208 (2) (1974).

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).

PIK 54.14 ENTRAPMENT [REVISED]

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 (consumate) (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 that the law enforcement officer or his agent did not mislead the defendant into believing his conduct to be lawful.

In considering the defense of entrapment the question for you to determine is this: Did the defendant conceive the idea of committing the crime or was the idea conceived by the law enforcement officer or his agent and suggested to the defendant for the purpose of inducing him to commit the crime in order to entrap him and cause his arrest.

A person's previous disposition or intention to committ 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 this sale, prior sales by defendant, or ease of access to the ________ by defendant.

Notes on Use

For authority see K. S. A. 21-3210 (1974). Insert the name of the article or substance sold in the blank spaces.

Comment

For other Kansas cases involving the defense of entrapment, see *State v. Reichenberger*, 209 Kan. 210, 495 P. 2d 919 (1972), *State v. Houpt*, 210 Kan. 778, 504 P. 2d 570 (1972), *State v. Fitzgibbon*, 211 Kan. 553, 507 P. 2d 313 (1973), *State v. Carter*, 214 Kan. 533, 521 P. 2d 294 (1974).

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

PIK 54.14-A PROCURING AGENT [NEW]

It is a defense to the charge against the defendant for the sale of __________ that 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 at the request of and for the purchaser. The agreement may be written, oral or implied by the behavior of the parties.

It is not a defense where 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.

PIK 54.17 USE OF FORCE IN DEFENSE OF A PERSON

Comment

See *State v. Weyer,* 210 Kan. 721, 728, 504 P. 2d 178 (1972) in which the Supreme Court of Kansas approves PIK 54.17, Use of Force in Defense of a Person.

See also *State v. Blocker,* 211 Kan. 185, 194, 505 P. 2d 1099 (1973), *State v. Stokes,* 215 Kan. 5, 523 P. 2d 367 (1974).

CHAPTER 55.00

ANTICIPATORY CRIMES

PIK 55.01 ATTEMPT

Comment

In *State v. Knowles,* 209 Kan. 676, 498 P. 2d 40 (1972), the court held that charges of attempted theft of a hand gun and unlawful possession of a firearm were not duplicitous even though arising out of the same conduct as different elements were required to prove each offense.

In *State v. Cory,* 211 Kan. 528, 506 P. 2d 1115 (1973), the court examined the provisions of K. S. A. 21-3107 (1974), concerning multiple prosecutions for the same act, and held that offenses of attempted burglary and possession of burglary tools were not duplicitous. The court stated that where the same conduct of a defendant constitutes a violation of two statutory proscriptions the test of duplicitous offenses is whether each requires proof of an element that is different from the other.

The elements of an attempt to commit a crime under the provisions of K. S. A. 21-3301 (1974) were reviewed and stated in *State v. Cory,* supra.

The crime of aggravated burglary with the intent to commit rape followed by an attempt to rape are separate offenses regardless of the fact that both require the common element of an intent to commit rape. *State v. Lora,* 213 Kan. 184, 515 P. 2d 1086 (1973).

It is a jury question whether there was a completed crime or a thwarted attempt unless the evidence is so conclusive as to preclude submission of one in favor of the other. *State v. Awad,* 214 Kan. 499, 520 P. 2d 1281 (1974).

The committee comment was quoted and cases referred to in PIK 55.01, Attempt, were examined and reviewed in *State v. Gobin,* 216 Kan. 278, 531 P. 2d 16 (1975).

PIK 55.03 CONSPIRACY

Comment

The conspiracy evidence rule is discussed and applied in *State v. Nirschl,* 208 Kan. 111, 490 P. 2d 917 (1971) and in *State v. Campbell,* 210 Kan. 265, 500 P. 2d 21 (1972).

The procuring agent theory is a defense to the charge of conspiracy to sell cocaine when the evidence is susceptible of proving either a sale or agency. The court must instruct on the theory when warranted by the evidence and requested by the defendant. *State v. Osborn,* 211 Kan. 248, 505 P. 2d 742 (1973). The committee believes the instruction should be given when warranted by the evidence whether requested or not.

CHAPTER 56.00

CRIMES AGAINST PERSONS

PIK 56.01 MURDER IN THE FIRST DEGREE

Notes on Use

For authority, see K. S. A. 21-3401 (1974). Murder in the first degree is a class A felony.

This instruction should be given where perpetration of felony is not involved. For felony murder instruction, see PIK 56.02, Murder in The First Degree—Felony Murder.

Instructions on definition of terms should be given with this. See PIK 56.04, Homicide Definitions.

PIK 56.02 MURDER IN THE FIRST DEGREE—FELONY MURDER [REVISED]

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 ________ in __________ County, Kansas.**

Notes on Use

For authority, see K. S. A. 21-3401 (1974). Murder in the first degree is a class A felony.

In addition to this instruction, an instruction should be given setting out the elements of the felony alleged in paragraph two (2) above.

Comment

N. B. There has been a significant change in the wording and definition of murder under K. S. A. 21-3401, enacted in July, 1972.

K. S. A. 21-401, prior to 1970, provided "every murder which shall be committed . . . by any kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or an attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree."

K. S. A. 21-3401, 1970 Supp., provided "Murder in the first degree is the malicious killing of a human beilng committed wilfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony."

K. S. A. 21-3401 (1974), as amended in 1972, provides "Murder in the first degree is the killing of a human being committed maliciously, wilfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony."

Prior to 1972 amendment of K. S. A. 21-3401, "malice" was considered an essential element of felony murder because of the context of the statute.

In July, 1972, the statute was amended to indicate that "malice" was an essential element of murder in the first degree but was not an essential element in felony murder, following *State v. Clark,* 204 Kan. 38, 460 P. 2d 586 (1969), wherein the court stated:

"The purpose of the felony murder rule is to relieve the state of the burden of proving premeditation and malice when the death is caused by the killer while he is committing another felony, the rationale being that the killer's malignant purpose is established by proof of the collateral felony."

But see *State v. Osbey,* 213 Kan. 564, 517 P. 2d 141 (1973), a felony murder charge based upon a homicide committed during a robbery which occurred in September, 1972, after the effective date of the 1972 amendment. There the court spoke of "malice" needs to be proved by the prosecution was not directly before the court nor raised by any party.

The Committee is of the opinion that malice should not be included as an essential element in felony murder as the effect of this statute is to impute malice and deliberation.

"To support a conviction for felony murder all that is required is to prove a felony was being committed which was inherently dangerous to human life, and that the homicide was a direct result of the commission of that felony." (or the attempt to commit the felony) (*State v. Reed,* 214 Kan. 562, 565, 520 P. 2d 1314 (1974); *State v. Mauldin,* 215 Kan. 956, 529 P. 2d 124 (1974).

PIK 56.04 HOMICIDE DEFINITIONS [REVISED]

(*a*) *Maliciously*

Maliciously means wilfully 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. 517 P. 2d 141 (1974).

(*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 P. 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 P. 389 (1914).)

(*c*) *Wilfully*

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

For authority, see K. S. A. 21-3201 (2) (1974 Supp.).

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

(*d*) *Intentionally*

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

For authority, see K. S. A. 21-3201 (2) (1974 Supp.).

(*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. 399, 449 P. 2d 545 (1969) and *State v. Jones*, 185 Kan. 235, 341 P. 2d 1042 (1959).

(*f*) *Feloniously*

Feloniously means done with intent to commit a crime of the quality of a felony. *State v. Clingerman*, 213 Kan. 525, 516 P. 2d 1022 (1973).

PIK 56.07 VEHICULAR HOMICIDE [REVISED]

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 constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances;
3. That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and

4. That this act occurred on or about the ___ day of______, in ________ County, Kansas.

Notes on Use

For authority, see K. S. A. 21-3405 (1974), where the word "material" was substituted for "substantial."

Vehicular homicide is a class A misdemeanor.

This section shall be applicable only when death of the injured person ensues within one year after the act causing death.

The gravamen of the offense is negligence. Criminal intent, that is, wilfulness or wantonness is excluded as an essential element under K. S. A. 21-3401 (1) (1974 Supp.).

PIK 56.10 CRIMINAL ABORTION

Notes on Use

The Committee is of the opinion that *Roe v. Wade*, 410 U. S. 113, 35 L. 2d 147, 93 S. Ct. 705 (1973) has nullified the present abortion statute K. S. A. 21-3407 (1) (1974) and thus no instruction is recommended until the legislature modifies existing statute.

PIK 56.11 CRIMINAL ABORTION—JUSTIFICATION

Comment

See Notes on Use in PIK 56.10.

PIK 56.18-A CRIMINAL INJURY TO PERSON [NEW]

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

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

1. **That the defendant (did inflict great bodily harm to ________ by maiming, wounding or disfiguring) (endangered the life of ________ under circumstances which would constitute murder or manslaughter if death had ensued);**
2. **That this act was done without the specific intent to injure or endanger the life of ________; and**
3. **That this act occurred on or about the ___ day of ______, in ________ County, Kansas.**

Notes on Use

See K. S. A. 21-3431 (1974). Criminal Injury is a class E felony.

Comment

This statute should be considered as a lesser included offense of Aggravated Battery K. S. A. 21-3414 (1974).

Aggravated Battery (PIK 56.18) requires a specific intent to kill, maim or wound. Specific intent to kill, maim or wound is not an essential element of Criminal Injury. Criminal intent, however, is still a necessary element, and an instruction on general criminal intent should be given (see PIK 54.01-A).

This offense should be likened to K. S. A. 21-435, which was repealed in 1970.

See *State v. Kirtdoll,* 206 Kan. 208, 478 P. 2d 188 (1970), and *State v. Wright,* 112 Kan. 1, pp. 3-4 (1922), for discussion on element of these offenses.

PIK 56.23 TERRORISTIC THREAT

Comment

See *State v. Gunzelman,* 210 Kan. 481, 502 P. 2d 705 (1972) whereby the word "threat" as used in K. S. A. 21-3419 (1974) means a communicated intent to inflict physical or other harm on any person or on property. (21-3110 [24] [1974]).

The word "terrorize" means to reduce to terror by violence or threats, and "terror" means an extreme fear or fear that agitates body and mind.

The court should define the above words in the instruction.

PIK 56.30 ROBBERY [REVISED]

The defendant is charged with the 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 of another 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 _______, in ________ County, Kansas.**

Notes on Use

For authority, see K. S. A. 21-3426 (1974).

Robbery is a class C felony.

Additional Comment

"Where intent is a required element of the crime it must be included in the charge and in the instructions of the court covering the separate elements of that particular case." *State v. Carr,* 151 Kan. 36.

K. S. A. 21-3201 (1974) provides, with limited exceptions, "a criminal intent is an essential element of every crime defined by this code." See *State v. Clingerman,* 213 Kan. 525, 516 P. 2d 1022 (1973), wherein the court noted the absence of an instruction of intent to commit robbery.

PIK 56.31 AGGRAVATED ROBBERY [REVISED]

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 of another 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 ______, in ________ County, Kansas.

Notes on Use

For authority, see K. S. A. 21-3427 (1974).
Aggravated Robbery is a class B felony.

PIK 56.35 AIRCRAFT PIRACY [NEW]

The defendant is charged with aircraft piracy. The defendant pleads not guilty.

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

1. That the defendant seized an aircraft by the use of force (or 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 ______, in ________ County, Kansas.

Notes on Use

For authority, see K. S. A. 21-3433 (1974).
Aircraft piracy is a class A felony.

CHAPTER 57.00

SEX OFFENSES

PIK 57.01 RAPE

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 kidnapping in the first degree. *State v. Schriner,* 215 Kan. 86, 523 P. 2d 703 (1974).

PIK 57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

Comment

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 *State v. Nichols,* supra, 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.

PIK 57.05 INDECENT LIBERTIES WITH A CHILD [REVISED]

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

The instruction has been revised to reflect the 1975 amendment of K. S. A. 21-3503 (1) (*b*) (1975 Supp.). The revision added the word "lewd." If a definition of the word "lewd" is desired, the following is suggested: As used in this instruction the word "lewd" means an inclination for lust and indecent sexual relations. Indecent liberties with a child is a class C felony. If claim number one is based on sexual intercourse, PIK 57.02, Sexual Intercourse—Definition, should be given.

Comment

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."

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. 3d 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).

PIK 57.06 INDECENT LIBERTIES WITH A WARD [REVISED]

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

The instruction has been revised to reflect the 1975 amendment of K. S. A. 21-3504 (1) (*b*) (1975 Supp.). The revision added the word "lewd." If a definition of the word "lewd" is desired, the following is suggested: As used in this instruction the word "lewd" means an inclination for lust and indecent sexual relations. Indecent liberties with a ward is a class B felony. If claim number one is based on sexual intercourse, PIK 57.02, Sexual Intercourse—Definition, should be given.

Comment

See comment under PIK 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 (1975 Supp.). See *State v. Dunham*, 213 Kan. 469, 517 P. 2d 150 (1972).

PIK 57.08 AGGRAVATED SODOMY

Comment

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).

PIK 57.09 ADULTERY

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).

PIK 57.18 SEX OFFENSES — DEFINITIONS [REVISION OF SECTION (*a*)]

Unlawful sexual acts are defined as follows:

(*a*) Indecent liberties with a child. "Indecent liberties with a child" means engaging in either 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.

Notes on Use

Section (*a*) has been revised to reflect the 1975 amendment of K. S. A. 21-3503 (1) (*b*) (1975 Supp.).

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

PIK 58.06 NONSUPPORT OF A CHILD

Comment

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. 437, 502 P. 2d 810 (1972).

PIK 58.13 AGGRAVATED JUVENILE DELINQUENCY

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, *Le Vier v. State*, 214 Kan. 287, 520 P. 2d 1325 (1974).

CHAPTER 59.00

CRIMES AGAINST PROPERTY

PIK 59.01 THEFT [REVISED]

The defendant is charged with the crime of theft. 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 by threat control over the property,

   or

   That the defendant obtained control over the property, knowing the property to have been stolen by another;
3. **That the defendant intended to deprive ________ permanently of the use and benefit of the property;**
4. **That the value of the property was (fifty dollars or more) (less than fifty dollars); and**
5. **That this act occurred on or about the __ day of ______ in ________ County, Kansas.**

Notes on Use

For authority see K. S. A. 21-3701 (1974 Supp.). Theft of property of the value of fifty dollars or more is a class D felony. Theft of property of the value of less than fifty dollars is a class A misdemeanor.

See PIK 68.11, Verdict Form—Value in Issue.

The Committee believes that no instruction should be given relating to the circumstance 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.

See *State v. Piland,* 217 Kan. _____, _____ P. 2d _____ (1975).

PIK 59.03 THEFT OF SERVICES [REVISED]

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 obtained services from ________;
2. That the defendant obtained these services by (deception) (threat) (coercion) (stealth) (mechanical tampering) (use of a false token or device);
3. That the value of the services obtained was (fifty dollars or more) (less than fifty dollars); and
4. That this act occurred on or about the __ day of ______, in ________ County, Kansas.

Notes on Use

For authority see K. S. A. 21-3704 (1974 Supp.). Theft of services of the value of fifty dollars or more is a class D felony. Theft of services of the value of less than fifty dollars is a class A misdemeanor.

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.06 WORTHLESS CHECK [REVISED]

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 the defendant (made) (drew) (issued) (delivered) a (check) (order) (draft) to ________,

   or

   That the defendant caused or directed a (check) (order) (draft) to be (made) (drawn) (issued) (delivered) to ________;
2. That the defendant knew that there was (no moneys or credits) (not sufficient funds) with the (bank) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft);
3. That the defendant intended to defraud ________;
4. That the amount of the (check) (order) (draft) (made) (drawn) (issued) was (fifty dollars or more) (less than fifty dollars); and

5. That this act occurred on or about the ___ day of ________, in ________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3707 (1974 Supp.).

Giving a worthless check is a class E felony if drawn for $50.00 or more and a class A misdemeanor if drawn for less than $50.00.

Defenses to the charge of giving a worthless check are set forth in PIK 59.07, Worthless Check—Defense.

The jury, in addition to its regular finding, must make a finding as to the value of the property in question. See PIK 68.11, Verdict Form, Value in Issue.

PIK 59.11 FORGERY-MAKING OR ISSUING A FORGED INSTRUMENT [REVISED]

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 ________ in ________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3710 (*a*), (*b*) (1974). Forgery is a class D felony. This section should not be used for K. S. A. 21-3710 (*c*) (1974).

For definition of intent to defraud, see K. S. A. 21-3110 (9) (1974).

PIK 59.12 FORGERY—POSSESSING A FORGED INSTRUMENT [REVISED]

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 ot 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 ______ in ________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3710 (*c*) (1974). Forgery is a class D felony. This section should not be used for K. S. A. 21-3710 (*a*), (*b*) (1974).

For definition of intent to defraud, see K. S. A. 21-3110 (9) (1974).

PIK 59.16 POSSESSION OF FORGERY DEVICES

Comment

An Instruction that is "essentially" in the form and substance of PIK (Criminal) 59.16 correctly sets out the elements of the offense. *State v. Atkinson,* 215 Kan. 139, 523 P. 2d 737 (1974).

PIK 59.19 POSSESSION OF BURGLARY TOOLS

Comment

Possession of burglary tools and attempt to commit a burglary are separate offenses. *State v. Cary,* 211 Kan. 528, 506 P. 2d 1115 (1973).

PIK 59.20 ARSON

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable to "lay and professional people alike." *State v. McVeigh,* 213 Kan. 432, 516 P. 2d 918 (1973).

PIK 59.21 ARSON—DEFRAUD AN INSURER OR LIENHOLDER

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable to "lay and professional people alike." *State v. McVeigh,* 213 Kan. 432, 516 P. 2d 918 (1973).

PIK 59.22 AGGRAVATED ARSON

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable to "lay and professional people alike." *State v. McVeigh,* 213 Kan. 432, 516 P. 2d 918 (1973).

PIK 59.23 CRIMINAL DAMAGE TO PROPERTY—WITHOUT CONSENT [REVISED]

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________) (had an interest as a ________ in ________);**
2. **That the defendant intentionally damaged the property;**
3. **That the defendant did so without the consent of the ________;**
4. **That the property was damaged to the extent of (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

A felony conviction following the giving of the original PIK 59.23 and without giving an instruction like PIK 68.11, which requires value of damages to be set forth, will be set aside and defendant sentenced for a class A misdemeanor. *State v. Smith,* 215 Kan. 865, 528 P. 2d 1195 (1974).

PIK 59.24 CRIMINAL DAMAGE TO PROPERTY—WITH INTENT TO DEFRAUD AN INSURER OR LIEN HOLDER [REVISED]

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) ________;
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 damaged was damaged to the extent of (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 statutory authority, see K. S. A. 21-3720 (*b*) (1974 Supp.). Criminal damage to property is a class E felony if the property is damaged to the extent of fifty 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 fifty dolllars or is of the value of fifty dollars or more and is damaged to the extent of less than fifty dollars.

This section should not be used for K. S. A. 21-3720 (*a*) (1974 Supp.).

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.34 UNLAWFUL USE OF CREDIT CARD OF ANOTHER [REVISED]

The defendant is charged with the crime of unlawful use of credit card(s). The defendant pleads not guilty.

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

1. That the defendant used a ________ credit card issued in the name of ________;
2. That ________ had not consented to use the credit card by the defendant;
3. That the defendant used the credit card for the purpose of obtaining ________;
4. That the defendant did so with the intent to defraud;
5. That the value of the (money) (goods) (property) (services) (communication services) obtained between ______, 19__, and ______, 19__, was (fifty dollars or more) (less than fifty dollars); and

6. That this act occurred on or about the ___ day of_______ in _________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3729 (*a*) (1974 Supp.). Unlawful use of a credit card is a class E felony if the money, goods, property, services or communication services 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 (*b*), (*c*) (1974 Supp.)

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.35 UNLAWFUL USE OF CREDIT CARD—CANCELLED [REVISED]

The defendant is charged with the crime of unlawful use of a credit card. The defendant pleads not guilty.

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

1. That the defendant knowingly used _________, a credit card or number which had been revoked or cancelled;
2. That the defendant had received written notice that the credit card was revoked or cancelled;
3. That the defendant used the credit card for the purpose of obtaining _________;
4. That the defendant did so with the intent to defraud;
5. That the value of the (goods) (services) obtained between _________, 19___, and _________, 19___, was (fifty dollars or more) (less than fifty dollars); and
6. That this act occurrd on o about the ___ day of _______ in _________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3729 (*b*) (1974 Supp.). Unlawful use of a credit card is a class E felony if the goods or services 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 (*a*), (*c*) (1974 Supp.).

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.36 UNLAWFUL USE OF CREDIT CARD—ALTERED OR NONEXISTENT [REVISED]

The defendant is charged with the crime of unlawful use of credit card(s). The defendant pleads not guilty.

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

1. That the defendant used a ________ credit card that had been (falsified) (mutilated) (altered),

   or

   That the defendant used a nonexistent credit card number as if the same were a valid credit card number;
2. That the defendant used the credit card for the purpose of obtaining ________;
3. That the defendant did so with the intent to defraud;
4. That the value of the (goods) (services) obtained between ________, 19__, and ________, 19__, was (fifty dollars or more) (less than fifty dollars); and
5. That this act occurred on or about the __ day of ________ in ________ County, Kansas.

Notes on Use

For statutory authority, see K. S. A. 21-3729 (*c*) (1974 Supp.). Unlawful use of a credit card is a class E felony if the goods or services obtained within a 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 (*a*) or (*b*) (1975 Supp.).

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.41 IMPAIRING A SECURITY INTEREST—CONCEALMENT OR DESTRUCTION [REVISED]

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 statutory authority, see K. S. A. 21-3732 (*a*) (1974 Supp.). 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*) (1974 Supp.).

See PIK 68.11, Verdict Form—Value in Issue.

PIK 59.42 IMPAIRING A SECURITY INTEREST—SALE OR EXCHANGE [REVISED]

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 _______ 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).**
6. **That this act occurred on or about the ___ day of_______, 19___, in __________ County, Kansas.**

Notes on Use

For statutory authority, see K. S. A. 21-3734 (*b*) (1974 Supp.). 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 of 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*), (*c*) (1974 Supp.).
See PIK 68.11, Verdict Form—Value in Issue.

Comment

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

PIK 59.43 IMPAIRING A SECURITY INTEREST—FAILURE TO ACCOUNT [REVISED]

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);**
6. **That this act occurred on or about the __ day of ______, 19__, in ________ County, Kansas.**

Notes on Use

For statutory authority, see K. S. A. 21-3734 (*c*) (1974 Supp.). 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 (*a*) or (*b*) (1974 Supp.).
See PIK 68.11, Verdict Form—Value in Issue.
See K. S. A. 84-1-204 (1965) which allows a reasonable time to account if no specific time is fixed in the security agreement.

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

PIK 60.06 CORRUPTLY INFLUENCING A WITNESS

Comment

It was held in *State v. Reed,* 213 Kan. 557, 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. 1972 Supp. 21-3806.

PIK 60.10 ESCAPE FROM CUSTODY

Comment

In *State v. Pruett,* 213 Kan. 41, 515 P. 2d 1051 (1973), the court discussed the specific statutory definition of the word "charge" in K. S. A. 22-2202 (5), and held that in view of the specific statutory definition of the word "charge" in K. S. A. 22-2202 (5), the 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 held that K. S. A. 1971 Supp. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where a defendant escapes from custody prior to the filing of a formal written complaint, information or indictment.

PIK 60.11 AGGRAVATED ESCAPE FROM CUSTODY

Comment

In *State v. Pruett,* 213 Kan. 41, 515 P. 2d 1051 (1973), the court discussed the specific statutory definition of the word "charge" in K. S. A. 22-2202 (5), and held that in view of the specific statutory definition of the word "charge" in K. S. A. 22-2202 (5), the 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 held that K. S. A. 1971 Supp. 21-3808, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where a defendant escapes from custody prior to the filing of a formal written complaint, information or indictment.

PIK 60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER

Comment

In *State v. Torline*, 215 Kan. 539, 527 P. 2d 994 (1974), 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.

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

PIK 61.05 PRESENTING A FALSE CLAIM [REVISED]

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).
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 (1974 Supp.). 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 forms depending on values see PIK 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.

PIK 61.06 PERMITTING A FALSE CLAIM [REVISED]

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).**
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 (1974 Supp.). 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 presenting 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 forms depending on value see PIK 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 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.

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

PIK 63.08 VAGRANCY

Comment

Palmer v. City of Euclid, Ohio, 402 U. S. 544, 29 L. Ed. 2d 98, 91 S. Ct. 1563, 39 U. S. L. W. 4612 (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.

PIK 63.15 DESECRATION OF FLAGS

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, 42 U. S. L. W. 4393 (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 (1968). The case is annotated at 22 L. Ed 2d 972 under the subject "Constitutionality of Statutes, Ordinances, or Administrative Provisions Prohibiting Defiance, Disrespect, Mutilation, or Misuse of American Flag—Federal Cases."

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

PIK 64.04 UNLAWFUL USE OF WEAPONS—AFFIRMATIVE DEFENSE

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 (1964), 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.

PIK 64.06 UNLAWFUL POSSESSION OF A FIREARM—FELONY

Comment

K. S. A. 21-2611, which was superseded by 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).

The Supreme Court has consistently emphasized that the possession of a firearm proscribed by K. S. A. 21-4204 (1974) is not the innocent handling of the weapon but a wilful or knowing possession of a firearm with the intent to control the use and management thereof. *State v. Farris*, 207 Kan. 785, 485 P. 2d 1040 (1971); *State v. Knowles*, 209 Kan. 676, 489 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.

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

PIK 65.01 PROMOTING OBSCENITY

Comment

The statutory definition of obscenity as contained in K. S. A. 21-4301 (2) (*a*) (1974) is 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 S. Ct. 1304 (1957). 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 (1973) 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. It is not clear what effect, if any, *Miller* and other recent decisions following it will have on the Kansas obscenity statute. In *People v. Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rep. 433 (1973), a California obscenity statute similar to the Kansas statute was held to meet the constitutional requirements of *Miller.* Although *Enskat* is not dispositive of the Kansas statute's constitutionality, it supports the proposition that the Kansas obscenity statute would meet *Miller's* guidelines. For two recent law review articles discussing the law of obscenity in Kansas, see Wilkins, *The Obscenity Law's Application in Kansas: Issues and Procedures,* 12 Washburn L. J. 185 (Winter 1973); and Terry, *The Effect of Recent Obscenity Cases,* 13 Washburn L. J. 26 (Winter 1974).

In *Grove Press, Inc. v. Kansas,* 304 F. Supp. 383 (1969) supplemented in 307 F. Supp. 711, the 1963 obscenity statute was held constitutional. The present obscenity statute, K. S. A. 21-4301, was enacted in 1969 as a part of the new Criminal Code and was modified in 1970 to make the penalty for obscenity more severe for repeated convictions.

PIK 65.03 PROMOTING OBSCENITY—DEFINITION

Comment

See the additional comment under PIK 65.01, Promoting Obscenity.

PIK 65.07 GAMBLING DEFINITIONS

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 thus 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).

The 1971 amendments to K. S. A. 21-4302 consisted of paragraph (1) (*d*) and the third paragraph of section (3), wherein the legislature attempted to create an exception for bingo conducted by tax exempt organizations. In *State v. Nelson*, 210 Kan. 439, 502 P. 2d 841 (1972), those amendments were held unconstitutional since they were inconsistent with the constitutional provision against lotteries, Article 15, Section 3, of the Kansas Constitution.

On November 5, 1974, Article 15 (3) (*a*) was adopted by the people at the general election. The section provides as follows: "# 3a. Regulation, licensing and taxation of 'bingo' games authorized. Notwithstanding the provisions of Section 3, Article 15 of the Constitution of the State of Kansas, the legislature may regulate, license and tax the operation or conduct of games of 'bingo' as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations."

Pursuant to the constitutional amendment the 1975 state legislature enacted Senate bill No. 116 to provide for the regulations, licensing and taxation of the operation or conduct of games of bingo by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations. This complex statute contains many definitions and restrictions on the conduct of bingo games. A violation of any of the provisions of the act or rules and regulations adopted pursuant thereto is a class B misdemeanor.

PIK 65.15 CRUELTY TO ANIMALS

Comment

It was held in *State, ex rel., v. Clairborne*, 211 Kan. 264, 505 P. 2d 732 (1973), that cockfighting does not constitute cruelty to animals under K. S. A. 21-4310 (1974).

PIK 65.16 CRUELTY TO ANIMALS—DEFENSE [REVISED]

The statute making cruelty to animals a criminal offense is not applicable to accepted veterinary practices or activities carried on for scientific research.

Notes on Use

K. S. A. 21-4310 (2) was amended in 1974 to require diseased or disabled animals to be taken to a humane society or licensed veterinarian for disposition.

CHAPTER 66.00

CRIMES AGAINST BUSINESS

PIK 66.03 DECEPTIVE COMMERCIAL PRACTICES

Comment

It was held in *State v. Kliewer,* 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. 1974 Supp. 8-611 (*b*), he cannot also be charged with a deceptive commercial practice under K. S. A. 21-4403 (1974) for the same wrongdoing.

PIK 66.09 KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY WITHIN THE TERRITORY OF UNITED STATES [NEW]

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.

(4) That this act occurred on the _____ day of ________ in ________ County, Kansas.

Notes on Use

For authority see K. S. A. 21-4409 (1974) which became effective on July 1, 1973. Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor.

CHAPTER 67.00

NARCOTIC DRUGS

PIK 67.02 POSSESSION OF MARIJUANA WITH INTENT TO SELL [REPEALED]

Statute on which instruction based (K. S. A. 65-2502) was repealed effective July 1, 1972 [L. 1972, Ch. 234, § 41].

PIK 67.03 DISPENSING MARIJUANA [REPEALED]

Statute on which instruction based (K. S. A. 65-2502) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.04 POSSESSION OF MARIJUANA [REPEALED]

Statute on which instruction based (K. S. A. 65-2502) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.05 UNAUTHORIZED POSSESSION OF NARCOTICS LAWFULLY PRESCRIBED FOR PERSON [REPEALED]

Statute on which instruction based (K. S. A. 65-2510) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.06 UNAUTHORIZED POSSESSION OF NARCOTICS LAWFULLY PRESCRIBED FOR ANIMAL [REPEALED]

Statute on which instruction based (K. S. A. 65-2510) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.07 NARCOTICS FRAUD, DECEIT, FORGERY, CONCEALMENT [REPEALED]

Statute on which instruction based (K. S. A. 65-2516) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.08 FALSE NARCOTICS ORDER [REPEALED]

Statute on which instruction based (K. S. A. 65-2516) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.09 OBTAINING NARCOTICS BY FALSE REPRESENTATION [REPEALED]

Statute on which instruction based (K. S. A. 65-2516) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.10 FALSE OR FORGED PRESCRIPTION [REPEALED]

Statute on which instruction based (K. S. A. 65-2516) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.11 FALSE OR FORGED LABEL [REPEALED]

Statute on which instruction based (K. S. A. 65-2516) was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.12 HYPNOTIC, SOMNIFACIENT, OR STIMULATING DRUGS [REPEALED]

Article 26 of Chapter 65 of the Kansas Statutes Annotated was repealed effective July 1, 1972. [L. 1972, Ch. 234, § 41.]

PIK 67.13 NARCOTIC DRUGS [NEW]

The defendant is charged with the crime of violation of the Uniform Controlled Substance Act of the State of Kansas as it pertains to a narcotic drug known as __________. The defendant pleads guilty. To establish this charge, each of the following claims must be proved:

1. **That the defendant (manufactured) (possessed) (had under his control) (possessed with the intent to sell) (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a narcotic drug known as __________;**
2. **That he did so (wilfully) (knowingly) (intentionally); and**
3. **That he did so on or about the _____ day of __________, in __________ County, Kansas.**

Notes on Use

This instruction applies to offenses which occurred on or after July 1, 1972. For authority, see K. S. A. 65-4127a (1974 Supp.). The statute specifically relates to "any opiates, opium, narcotic drugs."

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*) (1974 Supp.). The section includes "Opium and opiate"

under the definition and K. S. A. 65-4101 (*q*) (1974 Supp.) 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 undoubtedly be occasions when a court should include the definitions, either in the same or in additional instruction.

K. S. A. 65-4127a (1974 Supp.), in part, provides:

> Any person who violates this subsection shall be guilty of a class C felony, except that, upon conviction for the 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, and the punishment shall be life imprisonment.

It should be noted that K. S. A. 65-4129 (1972) 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. 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 of an act violative of the Kansas act for which no Kansas prosecution is possible. It would seem that the Kansas conviction would not be a conviction for a second offense because K. S. A. 65-4127a (1974 Supp.) relates to convictions under the Kansas Uniform Controlled Substances Act.

K. S. A. 21-3201 (1974 Supp.) provides that as used in the Kansas Criminal Code, "the terms 'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'wilful.'" The most meaningful term should be used under claim number (2) as circumstances require.

K. S. A. 65-4101 (1974 Supp.) 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*).

Comment

Although K. S. A. 65-4127a, (1974 Supp.), which makes the described acts unlawful, does not use the term "wilfully," K. S. A. 21-3201 (1974 Supp.) states that, except for certain limited exceptions, a criminal intent is an essential element of every crime defined by the Kansas Criminal Code. Further, it provides that criminal intent may be established by proof of wilful or wanton conduct. In addition it states that proof of wilful conduct shall be required to establish criminal intent, unless the statute defining the crime expressly requires wanton conduct. (Also see the notes on the above as they apply to "wilful.") K. S. A. 21-3204 (1974 Supp.) states 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." The crimes embraced in K. S. A. 65-4127a (1974 Supp.) are felonies and as such do not fall within the exception to the requirement of criminal intent. Although the Uniform Controlled Substances Act is not set out as a part of the Kansas Criminal Code in Chapter 21 of K. S. A., K. S. A. 21-3102 (2) (1974) states, "Unless expressly stated otherwise, or the context otherwise requires, the provisions of this code apply to crimes created by statute other than in this code."

K. S. A. 65-4127a (1974 Supp.) qualifies the acts specified as unlawful with the premise, "Except as authorized by the Uniform Controlled Substances Act." And K. S. A. 65-4136 (1972) 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 negative 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*) (1974), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K. S. A. 65-4116 (1974 Supp.), K. S. A. 65-4117 (1974 Supp.), K. S. A. 65-4122 (1972), K. S. A. 65-4123 (1972), and K. S. A. 65-4138 (1972).

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 64.04, Unlawful Use of Weapons—Affirmative Defense.

PIK 67.14 POSSESSION OF CONTROLLED STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS WITH INTENT TO SELL [NEW]

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) (a depressant) (a 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) (a depressant) [a hallucinogenic drug] known as ________;**
2. **That the defendant did so with the intent to sell it; and**
3. **That the defendant possessed it with the intent to sell it on or about the _____ day of ________, in ________ County, Kansas.**

Notes on Use

This instruction applies to offenses which occurred on or after July 1, 1972. For authority, see K. S. A. 65-4127b (*b*) (1974 Supp.). 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*) (1972) relative to the hallucinogenic drugs involved, which subsection includes such substances as Lysergic acid diethylamide, Marihuana, Mescaline, and Peyote, among many others.

Any person who violates K. S. A. 65-4127b (*b*) (1974 Supp.) shall be deemed guilty of a class D felony.

Comment

The Committee notes that the only substance incorporated under K. S. A. 65-4127b (*b*) (1974 Supp.) that is defined in the Definitions section of the uniform act is "Marihuana." See K. S. A. 65-4101 (*o*) (1974 Supp.), where "marihuana" is defined in terms of the plant *Cannabis sativa L.* The Committee further notes that in accordance with our scientific binomial system, the term "Cannabis" refers to the genus of the organism and the term "sativa" refers to its species. The "L." refers to the famous Swedish scientist and founder of modern taxonomy, Dr. Carolus Linnaeus (Carl von Linne). In accordance with our system, he who first publishes the name of a genus or species is considered the author of that group. Accordingly, his name and its abbreviation follows the name of the group. See Strausbaugh and Weimer, *Elements of Biology,* 285 (1944).

K. S. A. 65-4127b (*b*) (1974 Supp.) qualifies the acts specified as unlawful with the premise, "Except as authorized by the Uniform Controlled Substances Act." And K. S. A. 65-4136 (1972) 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 controlled substances, which is defined in K. S. A. 65-4101 (*e*) (1974 Supp.), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K. S. A. 65-4116 (1974 Supp.), K. S. A. 65-4117 (1972), K. S. A. 65-4122 (1972), K. S. A. 65-4123 (1972), and K. S. A. 65-4238 (1972).

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 64.04, Unlawful Use of Weapons—Affirmative Defense.

PIK 67.15 SELLING OR OFFERING TO SELL CONTROLLED STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS [NEW]

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 stmulant) (a depressant) (a 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 hallucenognic drug) known as ________;
2. That the defendant did so (wilfully) (knowingly) (intentionally); and
3. That the defendant did so on or about the ____ day of ________, in ________ County, Kansas.

Notes on Use

This instruction applies to offenses which occurred on or after July 1, 1972. For authority, see K. S. A. 65-4127b (*b*) (1974 Supp.). 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. 65-4105 (*d*) (1972) relative to the hallucinogenic drugs involved, which subsection includes such substances as Lysergic acid diethlamide, Marihuana, Mescaline, and Peyote, among many others.

Any person who violates K. S. A. 65-4127b (*b*) (1974 Supp.) shall be deemed guilty of a class D felony.

Comment

See the Comment to PIK 67.02, Possession of Controlled Stimulants, Depressants, and Hallucinogenic Drugs With Intent To Sell.

PIK 67.16 MANUFACTURE, POSSESSION, OR DISPENSATION OF CONTROLLED STIMULENTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS [NEW]

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) (a depressant) (a hallucinogenic drug) known as ________.

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) (dispensed) (compounded) (a stimulant) (a depressant) (a hallucinogenic drug) known as ________;
2. That the defendant did so (wilfully) (knowingly) (intentionally); and

3. That he did so on or about the ____ day of ________, in _________ County, Kansas.

Notes on Use

This instruction applies to offenses which occurred on or after July 1, 1972. For authority, see K. S. A. 65-4127b (*a*) (1974 Supp.). 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*) (1972) relative to the hallucinogenic drugs involved, which includes such substances as Lysergic acid diethylamide, Marihauna, Mescaline, and Peyote, among others.

Any person who violates K. S. A. 65-4127b (*a*) (1974 Supp.) shall be deemed guilty of a class A misdemeanor, "except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony."

K. S. A. 65-4129 (1972) 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. 65-4127b (*a*) (1974 Supp.) are silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction of an act violative of the Kansas act for which no Kansas prosecution is possible. It would seem that the Kansas conviction would not be a conviction for a second offense because K. S. A. 65-4127a (*b*) (1974 Supp.) relates to convictions under the Kansas Uniform Controlled Substances Act.

K. S. A. 21-3201 (1974 Supp.) provides that as used in the Kansas Criminal Code, "the terms 'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'wilful.'" The most meaningful term should be used under claim number (2) as circumstances require.

K. S. A. 65-4101 (1974 Supp.) defines the terms "Administer" in paragraph (*a*), "Deliver" or "delivery" in paragraph (*g*), "Dispense" in paragraph (*h*), "Distribute" in paragraph (*j*), "Manufacture (*n*), and "Person" in paragraph (*s*). When appropriate, definitions should be given.

Comment

As discussed in the Comment to PIK 67.01, Narcotic Drugs, K. S. A. 21-3204 (1974 Supp.) 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. 65-4127b (*a*) (1974 Supp.) constitutes a class A misdemeanor in 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 that the legislature could have possibly 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 statutes clearly indicates such a position.

CHAPTER 68.00

CONCLUDING INSTRUCTIONS AND VERDICT FORMS

PIK 68.02 GUILTY VERDICT—GENERAL FORM

Comment

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.

PIK 68.04—PUNISHMENT—CLASS A FELONY

Notes on Use

The jury choice of a sentence of death or life imprisonment in a class A felony under K. S. A. 21-4501 (*a*) is no longer constitutionally permissible. *State v. Randol,* 212 Kan. 461, 513 P. 2d 248 (1973).

PIK 68.09 LESSER INCLUDED OFFENSES [REVISED]

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 foreman 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.

Comment

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).

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).

PIK 68.11 VERDICT FORM—VALUE IN ISSUE

Comment

Where defendant was tried for the crime of criminal damage to property, the jury should have been required to set forth in its verdict the value of the property damaged as required in PIK 68.11. (*State v. Smith,* 215 Kan. 865, 528 P. 2d 1195 1974.)

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