

1979 SUPPLEMENT

**PATTERN
INSTRUCTIONS FOR
KANSAS**

**THIS SUPPLEMENT CONTAINS NEW AND REVISED
INSTRUCTIONS, NOTES ON USE AND
COMMENTS, TOGETHER WITH APPROPRIATE
TABLES AND INDEX WHICH COVER
LEGISLATIVE ACTION THROUGH 1979 SESSION
SUPREME COURT DECISIONS THROUGH VOL 226, No. 3
COURT OF APPEALS DECISIONS THROUGH VOL 226, No. 2**

PREPARED BY

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

THIS SUPPLEMENT REPLACES THE 1975 SUPPLEMENT

Kansas District Judges' Association

COMMITTEE ON PATTERN JURY INSTRUCTIONS

Serving as
Advisory Committee on Jury Instructions
Kansas Judicial Council

HON. HERBERT W. WALTON, Olathe, *Chairman*
HON. BOB ABBOTT, Topeka
HON. MICHAEL A. BARBARA, Topeka
HON. B. MACK BRYANT, Wichita
HON. RONALD D. INNES, Manhattan
HON. DON H. MUSSER, Pittsburg
HON. DAVID PRAGER, Topeka
HON. FREDERICK WOLESSELGEL, Lyons

Supplemental Foreword

The preparation and publication of this 1979 supplement to Pattern Instructions for Kansas-Criminal has been accomplished through the efforts of 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 original publication of PIK-Criminal in 1971 and the 1975 supplement have been of great assistance to the Bench and Bar of this state in the preparation of jury instructions in Criminal cases. This supplement covers statutes through the 1979 legislative session; Supreme Court decisions through Vol. 226, No. 3 and Court of Appeals decisions through Vol. 226, No. 2. The supplement should continue to provide the same good service to Kansas judges and lawyers.

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

DAVID PRAGER, *Chairman*
The Kansas Judicial Council

Preface

The purpose of this supplement is to update and further develop *PIK-Criminal* to reflect statutory changes and significant appellate court decisions. The original text was published in 1971 and was followed by a supplement in 1975. Since then the Kansas Legislature has amended several sections of the criminal code and the Kansas Supreme Court and the Kansas Court of Appeals have considered several of the code provisions and patterns in the text and 1975 supplement.

At the request of the Kansas Judicial Council, the Committee has prepared this supplement. The supplement contains several new and revised instructions and, where appropriate, the notes on use have been amended and the comments updated. In addition, a new chapter designated as PIK 70.00, Selected Misdemeanors, has been added.

As pointed out by Judge Musser in the preface to *PIK-Criminal* (1975 Supp.):

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 Committee is indebted to others who have made it possible to prepare this supplement. We extend our thanks to the Kansas Judicial Council for its financial support and to its excellent reporter, Randy M. Hearrell. We are grateful to the Kansas County and District Attorneys Association, judges, and lawyers who have furnished criticism and comment.

I express my personal thanks to the Committee members, their reporters, and administrative assistants for their cooperation and dedication to this work. The Committee continues to encourage comment and criticism from the lawyers and judges toward the objective of continuing improvement in the administration of justice through the use of these Pattern Jury Instructions.

HERBERT W. WALTON,
Chairman of Committee on
Pattern Criminal Jury Instructions,
Kansas District Judges Association.

Supplemental Table of Contents

CHAPTER 51.00

	PIK Number
Consideration and Binding Application of Instructions	51.02
Consideration and Guiding Application of Instructions	51.03
Consideration of Evidence [Revised]	51.04
Actions and Rulings of the Court [Revised]	51.05
Sympathy or Prejudice for or Against a Party	51.07
Penalty Not to be Considered by Jury	51.10

CHAPTER 52.00

	PIK Number
Burden of Proof, Presumption of Innocence, Reasonable Doubt	52.02
Presumption of Innocence	52.03
Reasonable Doubt	52.04
Proof of Other Crime—Limited Admissibility of Evidence	52.06
More Than One Defendant—Limited Admissibility of Evidence	52.07
Credibility of Witnesses	52.09
Defendant’s Failure to Testify	52.13
Circumstantial Evidence	52.16
Confession [Revised]	52.17
Testimony of an Accomplice [Revised]	52.18
Alibi	52.19

CHAPTER 53.00

	PIK Number
Definitions and Explanations of Terms	53.00

CHAPTER 54.00

	PIK Number
Presumption of Intent [Revised]	54.01
General Criminal Intent [New]	54.01-A
Statutory Presumption of Intent to Deprive [New]	54.01-B
Ignorance or Mistake of Law—Reasonable Belief	54.04

Responsibility for Crimes of Another [Revised]	54.05
Responsibility for Crimes of Another—Crime Not Intended [Revised]	54.06
Responsibility for Crime of Another—Actor Not Prosecuted [Revised]	54.07
Insanity—Mental Illness or Defect	54.10
Insanity—Commitment [Revised]	54.10-A
Intoxication—Involuntary [Revised]	54.11
Intoxication—Voluntary	54.12
Entrapment [Revised]	54.14
Procuring Agent [New]	54.14-A
Use of Force in Defense of Person	54.17
Use of Force in Defense of Dwelling [Revised]	54.18
Use of Force in Defense of Property Other Than Dwelling	54.19
Provocation of First Force as Excuse for Retaliation .	54.21
Initial Aggressor's Use of Force	54.22
Attempt [Revised]	55.01
Conspiracy [Revised]	55.03
Conspiracy—Withdrawal as a Defense	55.04
Conspiracy—Defined [New]	55.05
Conspiracy—Overt Act Defined [New]	55.06
Conspiracy—Declarations [New]	55.07

CHAPTER 56.00

	PIK Number
Murder in the First Degree	56.01
Murder in the First Degree—Felony Murder [Revised]	56.02
Murder in the Second Degree [Revised]	56.03
Homicide—Definitions [Revised]	56.04
Voluntary Manslaughter [Revised]	56.05
Involuntary Manslaughter [Revised]	56.06
Vehicular Homicide [Revised]	56.07
Criminal Abortion	56.10
Criminal Abortion—Justification	56.11
Assault	56.12
Assault of a Law Enforcement Officer	56.13
Aggravated Assault	56.14
Aggravated Assault on Law Enforcement Officer	56.15
Aggravated Battery	56.18
Criminal Injury to Person	56.18-A

Aggravated Battery Against a Law Enforcement Officer	56.19
Terroristic Threat	56.23
Kidnapping	56.24
Aggravated Kidnapping	56.25
Interference with Parental Custody [Revised]	56.26
Aggravated Interference With Parental Custody— By Parent Hiring Another ([New])	56.26-A
Aggravated Interference With Parental Custody— By Hiree [New]	56.26-B
Aggravated Interference With Parental Custody— By Other Circumstances [New]	56.26-C
Robbery [Revised]	56.30
Aggravated Robbery [Revised]	56.31
Aircraft Piracy [New]	56.35

CHAPTER 57.00

	PIK Number
Rape	57.01
Sexual Intercourse—Definition	57.02
Rape, Credibility of Prosecutrix’s Testimony	57.03
Indecent Liberties With a Child [Revised]	57.05
Indecent Liberties With a Ward [Revised]	57.06
Sodomy [Revised]	57.07
Aggravated Sodomy [Revised]	57.08
Adultery	57.09
Lewd and Lascivious Behavior	57.10
Indecent Solicitation of a Child	57.12
Aggravated Indecent Solicitation of a Child	57.13
Sexual Exploitation of a Child [New]	57.13-A
Prostitution	57.14
Patronizing a Prostitute	57.17
Sex Offenses—Definitions [Revised]	57.18

CHAPTER 58.00

	PIK Number
Nonsupport of a Child [Revised]	58.06
Encouraging Juvenile Misconduct [Repealed]	58.09
Endangering a Child	58.10
Aggravated Juvenile Delinquency	58.13
Contributing to a Child’s Misconduct or Deprivation [New]	58.14

CHAPTER 59.00

	PIK Number
Theft [Revised]	59.01
Theft—Knowledge Property Stolen [New]	59.01-A
Theft of Services [Revised]	59.03
Worthless Check [Revised]	59.06
Habitually Giving a Worthless Check Within Two Years [Revised]	59.08
Habitually Giving a Worthless Check—On Same Day [Revised]	59.09
Forgery—Making or Issuing a Forged Instrument [Revised]	59.11
Forgery—Possessing a Forged Instrument [Revised] .	59.12
Possession of Forgery Devices	59.16
Aggravated Burglary	59.18
Possession of Burglary Tools	59.19
Arson	59.20
Arson—Defraud an Insurer or Lienholder	59.21
Aggravated Arson	59.22
Criminal Damage to Property—Without Consent [Revised]	59.23
Criminal Damage to Property—With Intent to Defraud an Insurer or Lienholder [Revised]	59.24
Criminal Trespass [Revised]	59.25
Littering—Public	59.26
Littering—Private Property	59.27
Tampering With a Traffic Signal	59.30
Aggravated Tampering With a Traffic Signal [Revised]	59.31
Unlawful Hunting—Posted Land [New]	59.33-A
Unlawful Use of Financial Card of Another [Revised]	59.34
Unlawful Use of Financial Card—Cancelled [Revised]	59.35
Unlawful Use of Financial Card—Altered or Nonexistent [Revised]	59.36
Impairing a Security Interest—Concealment or Destruction [Revised]	59.41
Impairing a Security Interest—Sale or Exchange [Revised]	59.42
Impairing a Security Interest—Failure to Account [Revised]	59.43
Theft of Cable Television Services [New]	59.57

Piracy of Sound Recordings [New]	59.58
Piracy of Sound Recordings—Defenses [New]	59.59
Value in Issue [New]	59.70

CHAPTER 60.00

	PIK Number
Perjury [Revised]	60.05
Corruptly Influencing a Witness	60.06
Obstructing Official Duty [Revised]	60.09
Escape from Custody	60.10
Aggravated Escape From Custody	60.11
Failure to Appeal—Appearance Bond	60.15
Attempting to Influence a Judicial Officer	60.16

CHAPTER 61.00

	PIK Number
Bribery	61.01
Presenting a False Claim [Revised]	61.05
Permitting a False Claim [Revised]	61.06

CHAPTER 62.00

	PIK Number
Hypnotic Exhibition	62.10
Unlawfully Smoking in a Public Place [New]	62.11
Unlawful Smoking—Defense of Smoking in Designated Smoking Area [New]	62.12

CHAPTER 63.00

	PIK Number
Vagrancy	63.08
Public Intoxication [Repealed]	63.09
Harassment by Telephone [Revised]	63.14
Desecration of Flags	63.15

CHAPTER 64.00

	PIK Number
Unlawful Use of Weapons—Misdemeanor	64.02
Aggravated Weapons Violation	64.03
Unlawful Use of Weapons—Affirmative Defense [Revised]	64.04

CHAPTER 65.00

	PIK Number
Promoting Obscenity	65.01
Promoting Obscenity to a Minor	65.02
Promoting Obscenity—Definitions [Revised]	65.03
Promoting Obscenity—Affirmative Defenses [Revised]	65.05
Illegal Bingo Operation [New]	65.06-A
Gambling—Definitions	65.07
Dealing in Gambling Devices—Defense [New]	65.10-A
Possession of a Gambling Device—Defense [New] ..	65.12-A
Cruelty to Animals [Revised]	65.15
Cruelty to Animals—Defense [Revised]	65.16
Unlawful Disposition of Animals [New]	65.17

CHAPTER 66.00

	PIK Number
Deceptive Commercial Practices	66.03
Knowingly Employing an Alien Illegally Within the Territory of the United States [New]	66.09

CHAPTER 67.00

	PIK Number
Narcotics, Generally—Except Marijuana [Repealed] ..	67.01
Possession of Marijuana With Intent to Sell [Repealed]	67.02
Dispensing Marijuana [Repealed]	67.03
Possession of Marijuana [Repealed]	67.04
Unauthorized Possession of Narcotics Lawfully Prescribed for Person [Repealed]	67.05
Unauthorized Possession of Narcotics Lawfully Prescribed for Animal [Repealed]	67.06
Narcotics Fraud, Deceit, Forgery, Concealment [Repealed]	67.07
False Narcotics Order [Repealed]	67.08
Obtaining Narcotics by False Representation [Repealed]	67.09
False or Forged Prescription [Repealed]	67.10
False or Forged Label [Repealed]	67.11
Hypnotic, Somnifacient, or Stimulating Drugs [Repealed]	67.12

Narcotic Drugs [New]	67.13
Narcotic Drug Sale Defined [New]	67.13-A
Possession of Controlled Stimulants, Depressants, and Hallucinogenic Drugs With Intent to Sell [New] ..	67.14
Selling or Offering to Sell Controlled Stimulants, Depressants, and Hallucinogenic Drugs [New] ...	67.15
Manufacture, Possession, or Dispensation of Controlled Stimulants, Depressants, and Hallucinogenic Drugs [New]	67.16

CHAPTER 68.00

	PIK Number
Guilty Verdict—General Form	68.02
Punishment—Class A Felony	68.04
Lesser Included Offenses [Revised]	68.09
Verdict Form—Value in Issue [Revised]	68.11
Posttrial Communication With Jurors [New]	68.13

CHAPTER 69.00

	PIK Number
Murder in the First Degree With Lesser Included Offenses [Revised]	69.01
Theft With Two Participants [Revised]	69.02

CHAPTER 70.00

	PIK Number
Traffic Offenses—Driving Under the Influence of Intoxicating Liquors or Drugs [New]	70.01
Driving While Intoxicated—If Chemical Test Used [New]	70.02
Transporting Liquor in an Opened Container [New]	70.03
Reckless Driving Instruction [New]	70.04
Violation of City Ordinance [New]	70.05

Supplemental Cross Reference Table— Statutes to Instructions

Statutory Section	PIK Number
8-1005	70.02
8-1006	70.02
8-1566	70.04
8-1567	70.01
21-3109	.52.02, 52.03, 52.04, 68.09
21-3201	.54.01, 54.01-A, 56.04, 56.06
21-3203	54.04
21-3205	.54.05, 54.06, 54.07
21-3208 (1)	54.11
21-3208 (2)	54.12
21-3210	54.14
21-3211	54.17
21-3212	.54.17, 54.19
21-3301 (1)	55.01
21-3302 (1)	.55.03, 55.05, 55.06
21-3401	.56.01, 56.02
21-3422a	56.26-A
21-3431	56.18-A
21-3433	56.35
21-3516	57.12-A
21-3612	58.14
21-3701	.59.01, 59.01-A
21-3702	54.01-B
21-3748	.59.58, 59.59
21-3752	59.57
21-3904	.61.01, 61.05
21-4008	.62.11, 62.12
21-4306	.65.10, 65.10-A, 65.12-A
21-4312	65.17
21-4409	66.09
22-3204	52.07
22-3218	52.19
22-3219	54.10
22-3428	.54.10-A, 68.06
32-142a	59.33-A
41-804	70.03
60-455	52.06
65-4127a	.67.13, 67.13-A
65-4127b(a)	67.16
65-4127b(b)	67.14, 67.15

Kansas Criminal Code

SUPPLEMENTAL TABLE OF SECTIONS

ARTICLE 34. CRIMES AGAINST PERSONS

Section

- 21-3422a Aggravated Interference With Parental Custody
- 21-3431 Repealed
- 21-3432 Repealed
- 21-3433 Aircraft Piracy

ARTICLE 35. SEX OFFENSES

- 21-3516 Sexual Exploitation of a Child

ARTICLE 36. CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

- 21-3612 Contributing to a Child's Misconduct or Deprivation

ARTICLE 37. CRIMES AGAINST PROPERTY

- 21-3729 Unlawful Use of a Financial Card
- 21-3745 Theft of Telecommunication Services
- 21-3746 Repealed
- 21-3747 Repealed
- 21-3748 Piracy of Sound Recordings
- 21-3749 Dealing in Pirated Sound Recordings
- 21-3750 Nondisclosure of Source of Sound Recordings
- 21-3751 Sections 21-3748 to 21-3750 Supplemental to Code
- 21-3752 Theft of Cable Television Services

ARTICLE 38. CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

- 21-3830 Dealing in False Identification Documents

ARTICLE 40. CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

- 21-4008 Smoking in a Public Place

**ARTICLE 42. CRIMES AGAINST THE
PUBLIC SAFETY**

- 21-4214 Obtaining a Prescription-Only Drug by Fraudulent Means
- 21-4215 Obtaining a Prescription-Only Drug by Fraudulent Means for Resale

**ARTICLE 43. CRIMES AGAINST THE
PUBLIC MORALS**

- 21-4301a Promoting Obscenity to Minors
- 21-4301b Severability of 21-4301 and 21-4301a
- 21-4303a Illegal Bingo Operation
- 21-4311 Same; Custody of Animal; Disposition; Damages for Killing, When; Expenses of Care Assessed Owner, When
- 21-4312 Unlawful Disposition of Animals
- 21-4313 Definitions
- 21-4314 Sections Part of Criminal Code

ARTICLE 44. CRIMES AGAINST BUSINESS

- 21-4409 Knowingly Employing an Alien Illegally Within the Territory of the United States

**ARTICLE 45. CLASSIFICATION OF CRIMES
AND PENALTIES**

- 21-4502 Classification of Misdemeanors and Times of Confinement; Possible Disposition
- 21-4504 Conviction of Second or More Felonies; Exceptions

ARTICLE 46. SENTENCING

- 21-4609 Custody of Persons Sentenced to Confinement; Notice of Modification of Sentence
- 21-4611 Period of Probation or Suspension of Sentence; Parole of Misdemeanants
- 21-4612 Parole from Sentence of a District Magistrate Judge or Sentence of a State Court of Limited Jurisdiction
- 21-4616 Repealed
- 21-4617 Repealed
- 21-4618 Probation and Sentencing for Certain Crimes Involving use of Firearms
- 21-4619 Expungement of Certain Convictions

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) 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 its use in Kansas.

PIK 51.04 CONSIDERATION OF EVIDENCE [REVISED]

You may consider as evidence whatever is admitted in the trial as part of the record, whether it be the testimony of witnesses, an article or document marked as an exhibit, or other matter admitted such as an admission or stipulation. In those instances when objections were made to the introduction of evidence, you should consider only that evidence which I admitted.

PIK 51.05 ACTIONS AND RULINGS OF THE COURT [REVISED]

In my actions and rulings I have not meant to indicate my reaction to any evidence nor have I meant to indicate what your verdict should be.

Notes on Use

The Notes On Use in PIK might be interpreted as a belief on the part of the Committee that a judge in Kansas has the right to comment on the evidence. Actually, the Committee takes no position in this regard. *State v. Boyd*, 222 Kan. 155, 563 P.2d 446 (1977) would suggest that comment on the truth or the falsity of evidence would not be approved in Kansas. The questioned judicial action in *Boyd*, however, related to a judge's question to a witness rather than to comment on the evidence.

PIK 51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

Comment

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

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

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).

This instruction was also approved in *State v. Curtis*, 217 Kan. 717, 538 P.2d 1383 (1975), wherein the court held the trial court may have been "overly technical" but did not commit error when it refused to allow counsel to speak of "beyond a reasonable doubt" in jury argument.

The giving of this instruction was also impliedly approved in *State v. Quinn*, 219 Kan. 831, 549 P.2d 1000 (1976).

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).

An instruction attempting to define reasonable doubt although "unnecessary" will not be considered prejudicial if it is "not an erroneous statement of law which would mislead the jury." *State v. Ponds and Garrett*, 218 Kan. 416, 543 P.2d 967 (1975).

In *State v. Holloway*, 219 Kan. 245, 547 P.2d 741 (1976), an instruction on reasonable doubt was considered to not "result in prejudicial error."

PIK 52.06 PROOF OF OTHER CRIMES—LIMITED ADMISSIBILITY OF EVIDENCE**Comment**

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

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977); *State v. Cross*, 216 Kan. 511, 517, 532 P.2d 1357 (1975); *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974).

Although the same evidentiary question exists in civil actions, since the principal focus of most civil actions is not the plaintiff's or defendant's commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and therefore committed the crime with which he has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin* 129-130 (Special Report, November 1961). While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 29 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted by the court in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

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

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

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

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

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

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

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

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

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

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

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

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

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

Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176.

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

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

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

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

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

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

the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

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

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

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

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

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

Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial, 14 Washburn L. J. 367 (1975).

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

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

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

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

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

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

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

**remoteness in time*. Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admis-

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

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

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

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

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

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

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

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

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

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

(b) *character trait for care or skill.* Section 60-448 disallows the use of

evidence of a character trait relating to care or skill to prove the degree of care or skill used by that person on a specified occasion.

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

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

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

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

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

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

L. J. 231 (1973); Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 Washburn L. J. 64 (1972).

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

IV. CONCLUSIONS AND RECOMMENDATIONS

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

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 52.09 CREDIBILITY OF WITNESSES

Comment

This instruction was impliedly approved in *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976).

PIK 52.13 DEFENDANT'S FAILURE TO TESTIFY

Comment

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

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

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

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

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

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.

In *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976), the court stated that this instruction "need not be given, but the giving of such an instruction is generally beneficial to the defendant and no reversible error accrues . . ."

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.

A special instruction bearing upon the credence to be given a confession or admission is not required when the jury is given a general instruction bearing on the credibility of the testimony of each witness. *State v. Harwick*, 220 Kan. 572, 552 P.2d 987 (1976).

PIK 52.18 TESTIMONY OF AN ACCOMPLICE [REVISED]

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

Comment

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

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

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).

Death: A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and in this event, death will have occurred at the time these functions ceased; or

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

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

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

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).

Lewd fondling or touching: In a prosecution for indecent liberties with a child (K.S.A. 21-3503 [1]), *lewd fondling or touching* may be defined as "a fondling or touching in a manner which tends to undermine the morals of the child, which is

so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977).

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

Possession: Definition approved in *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977) (citing earlier approval in *State v. Neal*, 215 Kan. 737, 529 P.2d 114 [1974]).

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 [REVISED]

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

Notes on Use

The committee has revised the above instruction on the basis of *State v. Acheson*, decided by the Kansas Court of Appeals on October 15, 1979, 3 Kan. App. 2d 705, 601 P.2d 375 (1979).

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. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

Comment

The committee is of the opinion that the prior PIK 54.01 is not constitutionally defective, when considered with the other usual instructions given including the burden of proof and presumption of innocence. However, consistent with the *Acheson* case, this instruction is modified to "make it crystal clear that it is only a permissive inference, leaving the trier of fact free to consider or reject it. . . ."

It is only where the jury might interpret the instruction as creating a conclusive presumption on the issue of intent and shift the burden of persuasion to the defendant, does *Sandstrom v. Montana*, ___ U.S. ___, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), apply. In *Sandstrom* the Court held that the giving of the first sentence only of prior PIK 54.01 could infer to a jury that it was incumbent upon the defendant to prove the contrary by some quantum of proof.

Sandstrom is consistent with earlier Kansas cases holding that PIK 54.01 does not shift the burden to the defendant on the issue of intent. See *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), wherein the Court held PIK 54.01 valid where the jury is informed that the burden to prove criminal intent is on the prosecution beyond a reasonable doubt and that the presumption does not dispose with this burden nor nullify the presumption of innocence; and *State v. Woods*, 222 Kan. 179, 563 P.2d 1061 (1977), reaffirming *Lassley*.

PIK 54.01-A GENERAL CRIMINAL INTENT [NEW]

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

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

Notes on Use

For statutory authority see K.S.A. 21-3201 (1) and (2). This instruction must be given in all cases where criminal intent is required to prove the crime unless an element of specific criminal intent is contained in the crime charged (e.g. robbery, PIK 56.30). See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

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

This instruction must not be confused with PIK 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 54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE (NEW)

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

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

or

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

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

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

Notes on Use

For statutory authority see K.S.A. 1979 Supp. 21-3702 (1)(a) on false identification and (1)(b) on failure to return property. Notice is defined in paragraph (2). See PIK Chapter 59, Crimes Against Property, for the use of this instruction.

Comment

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

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

Clearly some intentional act is required for one to be criminally responsible for a crime committed by another (K.S.A. 21-3205(1)); however, failure to include “intentionally” in the above instruction would not be error if, in taking all of the instructions given, the court informs the jury that before the jury can find the defendant guilty it must be satisfied that the defendant acted wilfully and intentionally. *State v. Griffin*, 221 Kan. 83, 84, 558 P.2d 90 (1976).

In *State v. Duvaul*, 223 Kan. 718, 576 P.2d 653 (1978) the court approved this instruction.

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 respon-

sible 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

Revised Comment

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

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

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

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. 1979 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).

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

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).

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).

Comment

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

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

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

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

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

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 (consummate) (carry out his intention to complete) (complete his plan to commit)

the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of _____ was likely to occur and 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 commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the _____ by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the _____ by defendant.

Notes on Use

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

Revised Comment

In discussing when the defense of entrapment is available, the Supreme Court in *State v. Jordan*, 220 Kan. 110, 112, 551 P.2d 773 (1976) stated: "The defense of entrapment arises when a law enforcement officer, or someone acting in his behalf, generates in the mind of a person who is innocent of any criminal purpose the original intent or idea to commit a crime which he had not contemplated and would not have committed but for the inducement of the law officer." *State v. Hamrick*, 206 Kan. 543, 479, P.2d 854 (1971). A defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but he cannot rely on the defense or obtain an instruction on entrapment when the evidence establishes he had a previous intention of committing the crime and was merely afforded an opportunity by a law officer to complete it. (*State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970).)

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

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

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

PIK 54.14-A PROCURING AGENT [NEW]

It is a defense to the charge against the defendant for the sale of _____ if the defendant acted only as a procuring agent for the purchaser.

It is not a defense where the defendant acted as a seller or as an agent for a seller.

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.

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**Revised Comment**

Cited with approval in *State v. Woods*, 222 Kan. 179, 183, 563, P.2d 1061 (1977), *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976), *State v. Duckworth*, 219 Kan. 619, 549, P.2d 554 (1976), *State v. Stokes*, 215 Kan. 5, 523 P.2d 364 (1974), *State v. Blocker*, 211 Kan. 185, 194, 505 P.2d 1099 (1973), *State v. Childers*, 222 Kan. 32, 48, 563 P.2d 999 (1977).

PIK 54.18 USE OF FORCE IN DEFENSE OF DWELLING [REVISED]

A person is justified in the use of force to prevent another person from unlawfully (entering into) (remaining in) (damaging) his dwelling to the extent it appears reasonable to him under the circumstances then existing.

Notes on Use

For authority, see K.S.A. 21-3212. The applicable parenthetical phrase should be selected.

Comment

See *State v. Countryman*, 57 Kan. 815, 827, 48 P.137 (1897). This instruction has been revised to comply with *State v. Farley*, 225 Kan. 127, 587 P.2d 337 (1978).

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

Comment

K.S.A. 21-3212 is the only section of the crimes statute which makes the "reasonable man" the standard to be used as relates to force.

See *State v. Bradbury*, 67 Kan. 808, 74 P. 231 (1903).

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

Comment

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

PIK 54.22 INITIAL AGGRESSOR'S USE OF FORCE

Comment

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

CHAPTER 55.00**ANTICIPATORY CRIMES****PIK 55.01 ATTEMPT [REVISED]**

A. (The defendant is charged with the crime of an attempt to commit the crime of _____. The defendant pleads not guilty.)

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

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

1. That the defendant performed an act toward the commission of the crime of _____;
2. That the defendant did so with the intent to commit the crime of _____;
3. That the defendant failed to consummate its commission;
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

The elements of _____ are (set forth in Instruction No. ____) (as follows: _____).

Notes on Use

For authority see K.S.A. 21-3301 (1). An attempt to commit a class A felony is a class C felony. An attempt to commit a felony other than a class A felony is a class E felony. An attempt to commit a misdemeanor is a class C misdemeanor.

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

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

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

Comment

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. On the one hand mere acts of preparation are insufficient while, on the other, if the accused has performed the final act necessary for the completion of the crime, he could be prosecuted for the crime intended and not for an attempt. The overt act lies somewhere between these two extremes and each case must depend upon its own particular facts. For cases related to this subject see *State v. Gobin*, 216 Kan. 278, 531 P.2d 16 (1975); *State v. Awad*, 214 Kan. 499, 520 P.2d 1281 (1974); *State v. Cory*, 211 Kan. 528, 506 P.2d 1115 (1973); *State v. Davis*, 199 Kan. 33, 427 P.2d 606 (1967); *State v. Borsierine*, 184 Kan. 405, 337 P.2d 697 (1959); *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958); *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954); *State v. Thompson*, 118 Kan. 256, 234 Pac. 980 (1925); and *State v. McCarthy*, 115 Kan. 583, 224 Pac.

44 (1924). The reader is further referred to 21 Am.Jur.2d, Criminal Law §§ 110 and 111.

In *Cory*, the Supreme Court held that “. . . K.S.A. 1972 Supp. 21-3301 still contains three essential elements: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate it . . .” To the same effect see *State v. Gobin*, supra.

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 *Cory*, the Court examined the provisions of K.S.A. 21-3107, 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 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).

The committee comment was quoted and cases referred to in PIK 55.01, Attempt, were examined and reviewed in *State v. Gobin*, supra.

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

The requirement of an overt act toward the consummation of the crime to prove attempt and the committee comment were examined in *State v. Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978).

PIK 55.03 CONSPIRACY [REVISED]

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

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

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

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

Notes on Use

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

E felony. A conspiracy to commit a misdemeanor is a class C misdemeanor.

This instruction should be given in all crimes of conspiracy along with 55.05 and 55.06. When the evidence warrants its submission, PIK 55.04 should be given.

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

Comment

In the trial of a conspiracy case a court may become involved with the conspiracy evidence rule. Under this rule statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception to the hearsay rule. In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied*, 224 Kan. iv. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirshl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

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

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

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

Conspiracy is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime, whereas, to aid and abet requires an actual participation in the act constituting the offense. See *State v. Campbell*, *supra*.

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

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

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

The elements of conspiracy as defined in K.S.A. 21-3302 were reviewed in *State v. McQueen & Hardyway*, 224 Kan. 420, 424, 582 P.2d 251 (1978).

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

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

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

Charges alleging a conspiracy occurring subsequent to July 1, 1970, or constituting a continuing conspiracy after that date do not violate the ex post facto clause of the United States Constitution. See *State v. Cuezze, Houston & Faltico*, 225 Kan. 468, 595 P.2d 723 (1979).

PIK 55.04 CONSPIRACY—WITHDRAWAL AS A DEFENSE

Comment

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

PIK 55.05 CONSPIRACY—DEFINED [NEW]

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

Notes on Use

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

Comment

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

The agreement may be express or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977).

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

PIK 55.06 CONSPIRACY—OVERT ACT DEFINED [NEW]

A person may be convicted of a conspiracy only if some act in furtherance of the agreement is proved to have been committed. An act in furtherance of the agreement is any

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

Notes on Use

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

Comment

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

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

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

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

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

PIK 55.07 CONSPIRACY—DECLARATIONS [NEW]

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

Notes on Use

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

Comment

In *Marshall & Brown-Sidorowicz*, the Court of Appeals recognized the general rule that declarations of one conspirator, made in furtherance of the conspiracy, may be used against all co-conspirators on the theory that the declarant is an agent of the other conspirators. However, declarations not in furtherance of the conspiracy are admissible only as to the declarant to prove his participation in the

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. 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.

Revised Comment

“The words ‘maliciously’ and ‘premeditation’ are not defined in the code, but are to be given the meaning established by the decisions of the Supreme Court of Kansas.” Judicial Council 1968: Following K.S.A. 21-3402.

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

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

Under case decisions, the court has repeatedly held that in prosecution for homicide it is the imperative duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inclusive. For a thorough analysis on lesser included offenses see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

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

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

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 _____, 19___, in _____ County, Kansas.

Notes on Use

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

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

Comment

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

For a historical discussion of the felony murder rule see *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976).

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

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

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

PIK 56.03 MURDER IN THE SECOND DEGREE [REVISED]

A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)

B. (If you cannot agree that the defendant is guilty of murder in the first degree, you shall then consider the lesser included offense of murder in the second degree.)

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

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

Notes on Use

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

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 68.01 and 69.01, lead-in instructions on lesser included offenses.

Comment

The element instruction above was approved in *State v. Freeman*, 223 Kan. 362, 371, 574 P.2d 950 (1978). See Comment PIK 56.01 Murder in the First Degree.

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), and *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977).

(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), and *State v. Martinez*, 223 Kan. 536, 575 P.2d 30 (1978), for approval of this instruction.

(c) Wilfully

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

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

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

(d) Intentionally

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

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

(e) Heat of passion

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

For authority, see *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969) and *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959), and *State v. Richey*, 223 Kan. 99, 573 P.2d 973 (1977).

PIK 56.05 VOLUNTARY MANSLAUGHTER [REVISED]

A. (The defendant is charged with the crime of voluntary manslaughter. The defendant pleads not guilty.)

B. (If you cannot agree that the defendant is guilty of murder in the second degree you shall then consider the lesser included offense of voluntary manslaughter.)

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

1. That the defendant killed _____;
2. That it was done intentionally;
3. That it was done (upon a sudden quarrel) (in the heat of passion); and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3403. Voluntary manslaughter is a class C felony. If the information charges Voluntary Manslaughter, omit paragraph B; but if the information charges a higher degree omit paragraph A. See PIK 68.09 and 69.01, lead-in instructions on lesser included offenses.

Comment

See Comment PIK 56.01, Murder in the First Degree.

PIK 56.06 INVOLUNTARY MANSLAUGHTER [REVISED]

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

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

1. That the defendant unintentionally killed _____;
2. That it was done while in the commission of
 - (a) (*state misdemeanor*) in a wanton manner
 - or
 - (b) A lawful act in an unlawful manner in (state allegations constituting unlawful manner).

(c) A lawful act in a wanton manner in (state allegations constituting wantonness).

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

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

For authority see K.S.A. 1979 Supp. 21-3404 and K.S.A. 21-3201 (3).

Involuntary manslaughter is a Class E felony.

Comment

The statutory basis for items 2(b) and (c) apparently has its origin in what was formerly G.S. 1949, 21-405, where homicides were deemed excusable in cases where death resulted "in lawfully correcting a child, apprentice, servant, or in doing any other act by lawful means, with the usual and ordinary caution and without unlawful intent".

Comment on the doing of a lawful act in a wanton or unlawful manner (with unlawful intent) is found in *State v. Brecourt*, 82 Kan. 195, 107 P. 763 (1910), where a fireman participated in driving a fire wagon through congested traffic knowing that the run was on a false alarm. The Court said whether the act was lawful depended on whether it, was done with a lawful intent, and under the particular facts, it was the intent which made the act unlawful.

In *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978), the court held vehicular homicide (21-3405, 1974 Supp.) (PIK 56.07), is a lesser included offense only if the issue is whether or not the conduct of the accused was wanton; otherwise it is concurrent with the general statute on involuntary manslaughter and hence would not be lesser included offense. See also *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978).

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 _____, 19___, in _____ County, Kansas.

Notes on Use

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

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

Vehicular homicide is a Class A. Misdemeanor. This section applies only when death ensues within one year after the act of injury to the person.

Comment

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

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

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death that it operates as an intervening cause between the defendant's conduct and the death so as to be itself the cause. *State v. Gordon*, *supra*.

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

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) 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 56.12 ASSAULT**Comment**

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

This instruction was approved in *Warbritton*.

PIK 56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER**Comment**

See PIK 56.12 Comment

PIK 56.14 AGGRAVATED ASSAULT**Comment**

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

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, ___ Kan. ___, ___ P.2d ___ (1979).

PIK 56.15 AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER**Revised Notes on Use**

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

Assault of a Law Enforcement Officer, as defined by K.S.A. 21-3409 is a lesser included offense and where the evidence warrants it, PIK 56.13 should be given.

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

Aggravated Assault on a Law Enforcement Officer is a class C felony.

Comment

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

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

See PIK 56.14 Comment.

PIK 56.18 AGGRAVATED BATTERY**Comment**

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).

PIK 56.18-A CRIMINAL INJURY TO PERSON**Notes on Use**

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

PIK 56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER**Revised Notes on Use**

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

Battery Against a Law Enforcement Officer, as defined by K.S.A. 21-3413 is a lesser included offense and where the evidence warrants it, PIK 56.17 should be given.

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

Aggravated Battery Against a Law Enforcement Officer is a class B felony.

Comment

See PIK 56.18 Comment.

PIK 56.23 TERRORISTIC THREAT**Revised Comment**

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

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

PIK 56.24 KIDNAPPING**Comment**

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

The "taking or confinement" requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping. The word "facilitate" means

something more than just to make more convenient. "To facilitate" must have some significant bearing on making the commission or the crime easier. *State v. Buggs*, 219 Kan. 203, 547, P.2d 720 (1976).

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

PIK 56.25 AGGRAVATED KIDNAPPING

Comment

"Bodily harm" includes an act of physical violence even though no permanent injury results. Trivial or insignificant bruises or impressions resulting from the act itself should not be considered as "bodily harm" to subject the accused to a more severe penalty. Unnecessary acts of violence upon the victim, and those occurring after the initial abduction would constitute "bodily harm". *State v. Sanders*, 225 Kan. 156, 587 P.2d 906 (1978); *State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975).

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

PIK 56.26 INTERFERENCE WITH PARENTAL CUSTODY (REVISED)

The defendant is charged with the crime of Interference With Parental Custody. The defendant pleads not guilty.

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

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

Notes on Use

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

Interference with parental custody is a class A misdemeanor.

Comment

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

PIK 56.26-A AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY PARENTS HIRING ANOTHER [NEW]

The defendant is charged with the crime of Aggravated Interference with Parental Custody. The defendant pleads not guilty.

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

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

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3422a. Considering the various alternatives, the Committee is of the opinion that separate instructions would be more feasible and clearer to juries than one instruction with all alternative elements. PIK 56.26-A is applicable where the defendant is the non-custodial parent who hires another to interfere with parental custody. PIK 56.26-B is applicable when the person hired to interfere with parental custody is the defendant, and PIK 56.26-C would apply to any person, parent or otherwise, provided one of the elements of paragraph 5 is present.

Aggravated interference with parental custody is a Class E felony.

Comment

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

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

PIK 56.26-B AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIREE [NEW]

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

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

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

Comment

See PIK 56.26-A, for notes on Use and Comment.

PIK 56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY—OTHER CIRCUMSTANCES [NEW]

The defendant is charged with the crime of Aggravated Interference with Parental Custody. The defendant pleads not guilty.

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

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

5. That the defendant has previously been convicted of interference with parental custody.

[or]

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

[or]

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

[or]

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

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

Comment

See PIK 56.26-A, for notes on Use and Comment.

PIK 56.30 ROBBERY [REVISED]

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

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

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

Notes on Use

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

Robbery is a class C felony.

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 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.

The ownership of property taken is not an element of robbery thus failure to allege ownership is not defective. The state is not required to allege that the property taken was not that of the defendant. Therefore, the committee has revised the above instruction to exclude "of another". See *State v. Lucas*, 221 Kan. 88, 557 P.2d 1296 (1976).

In *State v. Lucas*, the trial court failed to instruct on the intent requirement. In refusing to hold error, the court found that the defendant's use of a deadly weapon established clear proof of intent, and further neither was intent made an issue in the case nor did the defendant object to the instruction. The Court went on to say that . . . "It would be better practice, however, to include the element of the intent as suggested in this supplement to PIK 56.30 and 56.31 . . .".

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

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

Notes on Use

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

Aggravated Robbery is a class B felony.

Comment

See comment in PIK 56.30.

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 _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3433.

Aircraft piracy is a class A felony.

CHAPTER 57.00

SEX OFFENSES

PIK 57.01 RAPE

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3502. Rape is a class B felony for offenses occurring after July 1, 1978, but is a class C felony for offenses committed prior to July 1, 1978.

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

Comment

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

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

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

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

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

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

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

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

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

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

PIK 57.02 SEXUAL INTERCOURSE—DEFINITION**Comment**

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

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

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

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

**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:

I. 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). The revision added the word "lewd". If a definition of the words "lewd fondling or touching" is desired, the following is suggested: As used in this instruction the words "lewd fondling or touching" mean that the state is required to prove a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

Indecent liberties with a child is a class C felony. If claim number one is based on sexual intercourse, PIK 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.2d 408, 294 N.E. 2d 113 and *State v. Minns*, 80 N.M. 269, 454 P.2d 355.

The elements of the offense of indecent liberties with a child under K.S.A. 21-3503(1)(a) are stated in *State v. Owens & Carlisle*, 210 Kan. 628, 504 P.2d 249 (1972).

Evidence of similar crimes, with proper limiting instructions under K.S.A. 60-455 may be relevant and admissible in prosecutions for indecent liberties with

a child. See the comment under PIK 52.06, Admissibility of Evidence of Other Crimes.

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the state to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonser*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App.2d 349, 578 P.2d 1147 (1978).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

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). The revision added the word "lewd". If a definition of the words "lewd fondling or touching" is desired the following is suggested: As used in this instruction the words "lewd fondling or touching" mean that the state is required to prove a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

Indecent liberties with a ward is a class B felony. If claim number one is based on sexual intercourse, PIK 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. 1979 Supp. 21-3504. See *State v. Dunham* 213 Kan. 469, 517 P.2d 150 (1973).

PIK 57.07 SODOMY [REVISED]

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

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

1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) or (a consenting adult of the opposite sex);

or

That the defendant had (oral) (anal) sexual relations with an animal;

or

That the defendant had sexual relations with an animal;

2. That there was actual penetration; and

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

Any penetration, however slight is sufficient. [The lips constitute the entrance to, and are a part of, the mouth.]

Notes on Use

For authority see K.S.A. 21-3505. The crime of sodomy is a class B misdemeanor. Sodomy between a husband and wife or between consenting adult members of the opposite sex is not a crime.

The instruction has been revised to address the issue of penetration as provided in K.S.A. 21-3505. The applicable parenthetical words or bracketed clause should be selected.

Comment

The words "copulation" and "coitus" were not included in the elements of sodomy for the reason that each mean sexual intercourse. Instead the term "sexual relations" was substituted to the end that the jury would not be confused. Sexual intercourse was not substituted as it has statutory reference to other sexual offenses.

In *State v. Thompson*, 221 Kan. 165, 558 P.2d 1079 (1976), the Supreme Court stated that a defendant convicted of forcible sodomy lacks standing to challenge the constitutional validity of the consensual sodomy statute on the basis that it discriminates against consenting homosexuals.

In *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978), penetration of the defendant's male organ beyond the lips of the complaining witness was held sufficient to constitute sodomy, although the clenched teeth of the victim prevented further penetration.

PIK 57.08 AGGRAVATED SODOMY [REVISED]

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

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

- 1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) (a consenting adult of the opposite sex);**
or
That the defendant had (oral) (anal) sexual relations with an animal;
or
That the defendant had sexual relations with an animal;
- 2. That there was actual penetration;**
- 3. That the defendant (used force or threat of force) (inflicted bodily harm upon the victim during the commission of the act); and**
or
That the victim was a child under the age of 16 years;
and
- 4. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas. Any penetration, however slight, is sufficient. [The lips constitute the entrance to, and are a part of, the mouth.]**

Notes on Use

For authority see K.S.A. 21-3506. Aggravated sodomy is a class B felony.

The instruction has been revised to address the issue of penetration as contained in K.S.A. 21-3505. The applicable parenthetical words or bracketed clause should be selected.

Comment

See comment under PIK 57.07, Sodomy.

In a prosecution for aggravated sodomy the element of penetration was satisfied from the uncontroverted facts that the defendant was on top of the victim's back and she felt pain in her rectum. *State v. Kelly*, 210 Kan. 192, 499 P.2d 1040 (1972).

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. See *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

When the victim testified there was penetration in a prosecution for aggravated sodomy, and the fact was uncontroverted, the fact alone is sufficient to establish the crime was completed, and the trial court need not instruct on a lesser included offense. See *State v. Yates*, 200 Kan. 635, 638, 556 P.2d 176 (1976).

In *State v. Thompson*, 221 Kan. 165, 558 P.2d 1079 (1976), the Supreme Court held that a defendant convicted of forcible sodomy lacks standing to challenge the constitutional validity of the consensual sodomy statute on the basis that it discriminates against consenting homosexuals. The court further held that the aggravated sodomy statute, K.S.A. 21-3506, was not unconstitutional as an invalid exercise of police power, as a bill of attainder, or as providing for cruel and unusual punishment.

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

In *State v. Cameron & Bently*, 216 Kan. 644, 533 P.2d 1255 (1975), it was not error to refuse an instruction on the lesser included offense of sodomy where the evidence showed defendants were either guilty of aggravated sodomy or nothing.

In *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978), penetration of the defendant's male organ beyond the lips of the complaining witness was held sufficient to constitute the crime of sodomy, although the clenched teeth of the victim prevented further penetration.

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

In *Blue*, the court further held that if the crime charged is aggravated sodomy, and the defense is consent, it is not error to refuse to instruct on sodomy as a lesser included offense.

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

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 57.10 LEWD AND LASCIVIOUS BEHAVIOR

Comment

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977). *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

PIK 57.12 INDECENT SOLICITATION OF A CHILD**Comment**

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

**PIK 57.12-A SEXUAL EXPLOITATION OF A CHILD
[NEW]**

The defendant is charged with the crime of sexual exploitation of a child. The defendant pleads not guilty.

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) or (coerced) a child to engage in sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) or (other printed or visual medium);

or

That the defendant was a (parent) (guardian) or (other person having custody or control of a child) and knowingly permitted the child (to engage in) or (assist another to engage in) sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) or (other printed or visual medium);

2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

As used in this instruction, the following words mean:

- a. "Sexually explicit conduct" means actual or simulated sexual intercourse. It includes [(genital-genital) (oral-genital) (anal-genital) (oral-anal) contact, whether between persons of the same or opposite sex] [sexual intercourse with an animal] [masturbation] [physical abuse for the purpose of sexual stimulation] [lewd exhibition of the genitals or pubic area of any person].
- b. "Promoting" means producing, directing, manufacturing, issuing, publishing, or advertising for pecuniary profit.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3516. Sexual exploitation of a child is a class E felony. The applicable parenthetical words under element 1 of the instruction should be selected as well as the applicable bracketed phrases under the definition of sexually explicit conduct. For a definition of the word "lewd" see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

PIK 57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

PIK 57.14 PROSTITUTION

Comment

In *City of Junction City v. White*, 2 Kan. App. 2d 403, 580 P.2d 891 (1978), the Court of Appeals held that it was within the police power of the state to prohibit prostitution and that the right of privacy does not protect solicitation of customers by a prostitute.

PIK 57.17 PATRONIZING A PROSTITUTE

Comment

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

**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. 1979 Supp. 21-3503 (1) (b).

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

PIK 58.06 NONSUPPORT OF A CHILD [REVISED]

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

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

1. That the defendant was a (natural parent) (adoptive parent) of _____ who was under the age of eighteen years.
2. That the defendant without just cause refused to provide for the support and maintenance of _____ who was then in necessitous circumstances; and
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

(The quality of proof necessary to establish parentage is only that you be satisfied the fact of parentage is more probably true than not true. The higher quality of measuring proof against a "reasonable doubt" as set forth in Instruction _____ herein does not apply to the issue of parentage.)

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3605(1). Nonsupport of a child is a class E felony. Where parentage is in issue, the bracketed instruction should be given; otherwise it is unnecessary.

Comment

Whether the legislature believed that there was a difference between "without lawful excuse" in the nonsupport of a child provision and "without just cause" in the nonsupport of a spouse provision PIK 58.07, Nonsupport of a Spouse, is not known. It is arguable that a juror might have no difficulty understanding what is meant by the term "without just cause," but would have some difficulty in understanding the term "without lawful excuse." Since the Committee does believe that "without just cause" is more understandable to jurors than "without lawful excuse," and since there are no statutory "lawful excuses," it has concluded "without just cause" should be used.

One who is outside the state may be chargeable with nonsupport of a child within this state even though he did not know the child was within this state. Moreover, it is no defense that the necessities of a child are relieved by acts of others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances if they would have been in such condition had they not been provided for by someone else." *State v. Wellman*, 102 Kan. 503, 170 P. 1052 (1918).

Evidence that the defendant failed to provide support during a period of time later than the period of time charged in the information is not admissible. *State v. Long*, 210 Kan. 436, 502 P.2d 810 (1972).

**PIK 58.09 ENCOURAGING JUVENILE MISCONDUCT
[REPEALED]**

The Statute on which this instruction was based (K.S.A. 21-3607) was repealed effective July 1, 1978. [L. 1978, Ch. 123 § § 3.]

PIK 58.10 ENDANGERING A CHILD

Comment

The provisions of K.S.A. 21-3608 (1)(a) were found to be unconstitutional since they were so vague and indefinite that they failed to establish reasonably definite standards of guilt in accord with the constitutional requirements of due process of law. *State v. Meinert*, 225 Kan. 816, 594 P.2d 232 (1979).

**PIK 58.13 AGGRAVATED JUVENILE DELINQUENCY
[REVISED]**

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

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

1. That the defendant was confined in the (State Industrial School for Boys) (State Industrial School for Girls).

2. That the defendant (wilfully burned or attempted to burn) (set fire to any combustible material for the purpose of burning) and building of the (State Industrial School for Boys) (State Industrial School for Girls); and

or

That the defendant wilfully burned or otherwise destroyed property belonging to the State of Kansas of the value of more than \$100.00; and

or

That the defendant committed an aggravated (assault) (battery) upon any (officer) (attendant) (employee) (inmate) of (The State Industrial School for Boys) (The State Industrial School for Girls); and

or

That the defendant escaped from (The State In-

ustrial School for Boys) (The State Industrial School for Girls) after having previously escaped therefrom; and

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

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3611. Aggravated juvenile delinquency is a class E felony. In case the prosecution is under K.S.A. 1979 Supp. 21-3611 (1) (c), the judge will need to instruct on the elements of aggravated assault or aggravated battery. See PIK 56.14, Aggravated Assault or PIK 56.18, Aggravated Battery.

Comment

A conviction of escape from the State Industrial School for Boys is a prior felony conviction within the purview of the Habitual Criminal Act, *LeVier v. State*, 214 Kan. 287, 520 P.2d 1325 (1974).

K.S.A. 1979 Supp. 21-3611 held constitutional in *State v. Sherk*, 217 Kan. 726, 538 P.2d 1399 (1975).

PIK 58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION [NEW]

The defendant is charged with the crime of contributing to a child's (misconduct) (deprivation). The defendant pleads not guilty.

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

1. That _____ was a child under 18 years of age;
2. That the defendant caused or encouraged _____
 - (a) To become a [(delinquent) (miscreant) (wayward) (deprived) child] [traffic offender] [truant];

or

- (b) To commit an act which if committed by an adult would be a (felony) (misdemeanor).
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3612, Contributing to a child's misconduct or deprivation is a class A misdemeanor, except that if the child is caused or encouraged to be a delinquent child or to commit an act which, if committed by an adult, would be a felony, the offense is a class E felony.

For definitions of delinquent, miscreant, or wayward child, see K.S.A. 38-802.

CHAPTER 59.00

CRIMES AGAINST PROPERTY

PIK 59.01 THEFT [REVISED]

The defendant is charged with the crime of theft of property of the value of [one hundred dollars or more] [less than one hundred dollars]. The defendant pleads not guilty.

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

1. That _____ was the owner of the property;
2. That the defendant [obtained] [exerted] unauthorized control over the property,
 or
 That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant,
 or
 That the defendant obtained by threat control over property,
 or
 That the defendant obtained control over property knowing the property to have been stolen by another;
3. That the defendant intended to deprive _____ permanently of the use or benefit of the property.
4. That the value of the property was [one hundred dollars or more] [less than one hundred dollars]; and
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3701. Theft of property of the value of one hundred dollars or more is a class D felony. Theft of property of the value of less than one hundred dollars is a class A misdemeanor.

In a felony theft prosecution it is necessary to provide the jury with the alternative of finding misdemeanor theft if value is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 to establish intent to permanently deprive, an instruction on the meaning of prima facie is required. See PIK 54.01-B, Presumption of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

Comment

PIK 59.01 is approved in 223 Kan. 398, 573 P.2d 1048 (1978).

In a prosecution for felony theft where value is in issue an instruction with respect to the element of value and a finding as to value is required. *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975), *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976), *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977).

The Committee believes that no instruction should be given relating to the circumstances of possession of goods proven to have been recently stolen. The statute defining the crime of theft as compared with what was formerly larceny does not require the elements of taking and carrying away. These were elements which the traditional instruction permitted to be inferred against the possessor by the fact of possession.

There is doubt that the principle was ever proper as an instruction. The circumstance of possession of goods recently stolen is a rule of evidence, not a rule of law. Its only application should have been in determining whether as a matter of law there was sufficient evidence to justify submitting the case to the jury. Comment noted and approved in *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

To convict a defendant of theft under K.S.A. 21-3701 (d) the State has the burden of proving that the defendant at the time he received property had a belief or reasonable suspicion from all the circumstances known to him that the property was stolen and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 59.01-A should be used with 59.01 in possession of stolen property cases.

Prima facie evidence is defined as evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978) requires the State to prove in a theft by deception prosecution pursuant to K.S.A. 1979 Supp. 21-3701 (b) that the victim was deceived by reliance in whole or in part upon the false statement. PIK 59.01 has been modified accordingly.

PIK 59.01-A THEFT-KNOWLEDGE PROPERTY STOLEN [NEW]

Knowledge that property has been stolen by another must exist at the time control first occurs and may be proven by a showing that the defendant either knew or had a reasonable suspicion from all the circumstances known to him that the property was stolen.

Notes on Use

The instruction should be used with PIK 59.01 in a prosecution for violation of K.S.A. 1979 Supp. 21-3701 (d), receiving stolen property.

State v. Bandt, 219 Kan. 816, 549 P.2d 936 (1976) requires that knowledge of the stolen character of the property exists at the time control first occurs where defendant is charged under K.S.A. 1979 Supp. 21-3701 (d).

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 by means of a false statement or representation which deceived _____ who relied in whole or in part upon the false representation or statement of the defendant] [threat] [coercion] [stealth] [mechanical tampering] [use of a false token or device];
3. That the value of the services obtained was [one hundred dollars or more] [less than one hundred dollars]; and
4. That this act occurred on or about the __ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-3704. Theft of services of the value of one hundred dollars or more is a class D felony. Theft of services of the value of less than one hundred dollars is a class A misdemeanor.

In the prosecution of felony theft of services it is necessary to provide the jury with the alternative of finding misdemeanor theft of services if value might be in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

Comment

Consistent with the ruling of the Court in *State v. Finch*, 223 Kan. 398, 573 P.2d 1048 (1978), PIK 59.03 has been modified to require proof of reliance by the victim upon the false representation or statement of the defendant.

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 a [check] [order] [draft] was [made] [drawn] [issued] [delivered] by the defendant to _____,
or
That a [check] [order] [draft] was caused or directed to be [made] [drawn] [issued] [delivered] by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] with the [bank] [de-

pository] at the time of the [making] [drawing] [issuing] [delivering] of the [check] [order] [draft] for the payment in full of the [check] [order] [draft] on its presentation;

3. That the defendant intended to defraud _____;
4. That the amount of the [check] [order] [draft] was [fifty dollars or more] [less than fifty dollars]; and
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3707. Giving a worthless check in the amount of fifty dollars or more is a class E felony. Giving a worthless check of less than fifty dollars is a class A misdemeanor.

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

In a prosecution for a felony worthless check it is necessary to provide the jury with the alternative of finding a misdemeanor worthless check violation if value might be in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

A definition of prima facie evidence is necessary if K.S.A. 21-3707(2) is relied upon to prove intent to defraud. See PIK 53.00, Definitions and Explanations of Terms.

Comment

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Instructions approved as to the statutory presumption to prove intent to defraud as permitted by K.S.A. 21-3707(2) when accompanied by a definition of prima facie evidence as "evidence that on its face is true, but may be overcome by evidence to the contrary." *State v. Powell*, supra.

PIK 59.08 HABITUALLY GIVING A WORTHLESS CHECK WITHIN TWO YEARS [REVISED]

The defendant is charged with the crime of habitually giving a worthless check. The defendant pleads not guilty.

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

1. That a [check] [order] [draft] was [made] [drawn] [issued] [delivered] by the defendant to _____,
or
That a [check] [order] [draft] was caused or directed to be [made] [drawn] [issued] [delivered] by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] with the [bank] [depository] at the time of the [making] [drawing] [issu-

- ing] [delivering] of the [check] [order] [draft] for the payment in full of the [check] [order] [draft] on its presentation;
3. That the defendant had the intent to defraud _____;
 4. That the check was drawn for less than fifty dollars (\$50.00);
 5. That the defendant had been convicted two times for giving a worthless check between the ___ day of _____, 19___, and the ___ day of _____, 19___; and
 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. 21-3708(a).

Habitually giving a worthless check is a class D felony.

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

The date to be placed in the first blank in element 5 should be the date of the first conviction which must be within two years immediately preceding the date of the check in question. The second date blank should be the date of the check in question. See K.S.A. 21-3708(a).

PIK 59.09 HABITUALLY GIVING WORTHLESS CHECKS—ON SAME DAY [REVISED]

The defendant is charged with the crime of habitually giving worthless checks on the same day. The defendant pleads not guilty.

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

1. That two or more [checks] [orders] [drafts] were [made] [drawn] [issued] [delivered] on the ___ day of _____, by the defendant to _____,
or
That two or more [checks] [orders] [drafts] were caused or directed to be [made] [drawn] [issued] [delivered] on the ___ day of _____, by the defendant to _____;
2. That the defendant knew that there were [no moneys or credits] [not sufficient funds] at the time of the [making] [drawing] [issuing] [delivering] of the [checks] [orders] [drafts] for the payment in full of the [checks] [orders] [drafts] on their presentation;
3. That the defendant had the intent to defraud _____;
4. That each of the checks was drawn for less than fifty

dollars (\$50.00), but together they totaled fifty dollars (\$50.00) or more; and

5. That these acts occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3708(b).

Habitually giving worthless checks is a class D felony.

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

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 _____, 19___, in _____ County, Kansas.

Notes on Use

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

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

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 to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);
2. That the defendant intended to issue or deliver the _____;
3. That the defendant did so with the intent to defraud; and
4. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

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

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

PIK 59.16 POSSESSION OF FORGERY DEVICES

Notes on Use

For authority see K.S.A. 21-3714. Possession of forgery devices is a class E felony.

Comment

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

PIK 59.18 AGGRAVATED BURGLARY

Comment

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

PIK 59.19 POSSESSION OF BURGLARY TOOLS

Notes on Use

For statutory authority, see K.S.A. 21-3717. Possession of burglary tools is a class E felony.

Comment

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

PIK 59.20 ARSON

Notes on Use

For statutory authority, see K.S.A. 21-3718 (a). Arson is a class C felony. This section should not be used for K.S.A. 21-3718 (b).

Comment

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

PIK 59.21 ARSON—DEFRAUD AN INSURER OR LIENHOLDER**Notes on Use**

For statutory authority, see K.S.A. 21-3718 (b). Arson is a class C felony. This section should not be used for K.S.A. 21-3718 (a).

Comment

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

PIK 59.22 AGGRAVATED ARSON**Notes on Use**

For authority see K.S.A. 21-3719. Aggravated arson is a class B felony.

Comment

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

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 property described as _____) (had an interest as a _____ in property described as _____);
2. That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property;
3. That the defendant did so without the consent of the _____;
4. That the property was damaged to the extent of (one hundred dollars or more) (less than one hundred dollars).
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3720 (1) (a). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred dollars or is of the value of one hundred dollars or more and is damaged to the extent of less than one hundred dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred dollars. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

See PIK Civil—Chapter 9 for instructions as to Property Damage and Value.

Comment

Under the statute property cannot be damaged more than the total value of the property at the time the damage occurred. If the total value of the property at the time it is damaged is less than one hundred dollars, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than fifty dollars, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

**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 was damaged to the extent of (one hundred dollars or more) (less than one hundred dollars);
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3720 (1) (b). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred dollars or is of the value of one hundred dollars or more and is damaged to the extent of less than one hundred dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred dollars. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

This section should not be used for K.S.A. 1979 Supp. 21-3720 (1) (a).

See PIK Civil—Chapter 9 for instructions as to Property Damage and Value.

PIK 59.25 CRIMINAL TRESPASS [REVISED]

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

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

1. That _____ (was the owner) (had authorized control) of the property;

2. That the property was (fenced) (enclosed),

or

That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;

or

That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;

or

That the defendant had been restrained and personally served by a court order from (entering into) (remaining on) the property;

3. That the defendant intentionally, without authority (entered into) (remained on) the property; and

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

Notes on Use

For authority, see K.S.A. 1979 Supp. 21-3721. Criminal Trespass is a class C misdemeanor.

Comment

K.S.A. 21-3721 was broadened in 1979 to permit a criminal prosecution for criminal trespass where a person had been restrained pursuant to K.S.A. 60-1607 or pursuant to the protection from abuse act (K.S.A. 1979 Supp. 60-3101 *et seq.*).

PIK 59.26 LITTERING—PUBLIC**Revised Notes on Use**

For statutory authority, see K.S.A. 1979 Supp. 21-3722 (a). Littering is a misdemeanor which is punishable by a fine of not less than ten dollars or more than five hundred dollars.

PIK 59.27 LITTERING—PRIVATE PROPERTY**Revised Notes on Use**

For statutory authority, see K.S.A. 1979 Supp. 21-3722 (b). Littering is a misdemeanor which is punishable by a fine of not less than ten dollars or more than five hundred dollars.

PIK 59.30 TAMPERING WITH A TRAFFIC SIGNAL**Comment**

K.S.A. 1979 Supp. 21-3725 amended to include railroad switching devices in 1975.

PIK 59.31 AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL [REVISED]

The defendant is charged with the crime of aggravated tampering with a traffic signal. The defendant pleads not guilty.

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

1. That the defendant intentionally [manipulated] [altered] [destroyed] [removed] a _____;
2. That the _____ was for the purpose of controlling or directing the movement of [motor vehicles] [railroad trains] [aircraft] [watercraft];
3. That the act of the defendant resulted in an accident [causing the death of _____] [causing great bodily injury to _____],

or

- That the act of the defendant could have resulted in an accident which would have caused death or great bodily injury to a human being; and
4. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3726. Aggravated tampering with a traffic signal is a class E felony.

Comment

The resulting accident need not now be a "traffic" accident, as formerly required. K.S.A. 1979 Supp. 21-3726.

PIK 59.33-A UNLAWFUL HUNTING—POSTED LAND [NEW]

The defendant is charged with the crime of hunting on posted land. The defendant pleads not guilty.

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

1. That the defendant [(shot) (hunted) (pursued)] [(a bird) (an animal)] upon the land of another;
2. That _____, was [the owner] [the person lawfully in possession] of the land, and had posted the land with signs stating that hunting on the land shall be by written permission only;
3. That the defendant did not have in [his] [her] possession written permission to [(shoot) (hunt) (pursue)] [(a bird) (an animal)] from _____, [the owner] [the person in possession] of the land in question; and
4. That this act occurred on or about the __ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 32-142a. Unlawful hunting upon posted land is a class C misdemeanor.

It is a defense to a charge of unlawful hunting on posted land if a person licensed to hunt follows a wounded bird or animal on the posted land.

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

The defendant is charged with the crime of unlawful use of financial card of another. The defendant pleads not guilty.

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

1. That the defendant used a _____ financial card;
2. That the cardholder _____, had not consented to the use of the financial card by the defendant;
3. That the defendant used the financial card for the purpose of obtaining _____;
4. That the defendant did so with the intent to defraud;

5. That the financial card was unlawfully used in an amount of [fifty dollars or more] [less than fifty dollars] between _____, 19____, and _____, 19____;
6. That this act occurred on or about the ___ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3729(a). Unlawful use of a financial card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 1979 Supp. 21-3729(b)(c).

In a prosecution for the unlawful use of a financial card of another it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card of another if value is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 1979 Supp. 21-3729(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

**PIK 59.35 UNLAWFUL USE OF FINANCIAL CARD—
CANCELLED [REVISED]**

The defendant is charged with the crime of unlawful use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

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

1. That the defendant knowingly used _____, a financial card or number which had been revoked or cancelled;
2. That the defendant had received written notice that that financial card was revoked or cancelled;
3. That the defendant used the financial card for the purpose of obtaining _____;
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in an amount of (fifty dollars or more) (less than fifty dollars) between _____, 19____, and _____, 19____; and
6. That this act occurred on or about the ___ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3729(b). Unlawful use of a financial card is a class E felony if the money, goods, property, services or

communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 1979 Supp. 21-3729(a)(c).

In a prosecution for the unlawful use of a financial card which had been revoked or cancelled, it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which had been revoked or cancelled if value is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 1979 Supp. 21-3729(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

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

The defendant is charged with the crime of unlawful use of a financial card which had been (use applicable term). The defendant pleads not guilty.

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

1. That the defendant used a _____ financial card that had been (falsified) (mutilated) (altered);
or
That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. That the defendant used the financial card for the purpose of obtaining _____;
3. That the defendant did so with the intent to defraud;
4. That the financial card was unlawfully used in an amount of (fifty dollars or more) (less than fifty dollars) between _____, 19____, and _____, 19____; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3729(c). Unlawful use of a credit card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 1979 Supp. 21-3729(a) or (b).

In a prosecution for the unlawful use of a financial card which is altered or is nonexistent it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which is altered or is nonexistent if

value is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

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. 21-3734(a). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more. Impairment of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars, or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(b) or (c).

In the prosecution of impairing a security interest by concealment or destruction it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

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); and
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). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more. Impairment of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars, or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(a) or (c).

In the prosecution of impairing a security interest by sale or exchange it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

Comment

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

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); and
 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). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more. Impairing of a security interest is a Class A misdemeanor when the property subject to the security interest is of the value of less than fifty dollars, or of the value of fifty dollars or more but subject to a security interest of less than fifty dollars.

This section is concerned only with personal property.

This section does not apply to K.S.A. 21-3734(a) or (b).

See K.S.A. 84-1-204 (1965) which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution of impairing a security interest by failure to account it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 68.11, Verdict Form—Value in Issue and PIK 59.70, Value in Issue should be used and modified accordingly.

PIK 59.57 THEFT OF CABLE TELEVISION SERVICES [NEW]

The defendant is charged with the crime of theft of cable television services. The defendant pleads not guilty.

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

1. That _____ was the owner of cable television services;
2. That the defendant obtained cable television services from _____ by means of (threat) (deception) (electrical or mechanical tampering) (electronic tampering); and
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3752. Theft of cable television services is a class C misdemeanor.

PIK 59.58 PIRACY OF SOUND RECORDINGS [NEW]

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

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

1. That _____ was the owner of sound recordings;
2. That the defendant knowingly (duplicated) (caused to be duplicated) sounds recorded on (a phonograph record) (a disc) (a wire) (tapes) (films) (an article on which sounds are recorded);
3. That _____ did not consent to the defendant (duplicating) (causing to be duplicated) the sound recordings;
4. That the defendant (duplicated) (caused to be duplicated) the sound recordings with the intent to (sell) (cause to be sold) (give away as part of a promotion for any product or service) such duplicated sounds; and
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3748. Piracy of sound recordings is a class E felony.

Defenses to the charge of piracy of sound recordings are set forth in PIK 59.59, Piracy of Sound Recordings—Defenses.

In the event that there is a dispute or issue as to ownership, then refer to the statutory definition of owner, K.S.A. 1979 Supp. 21-3748.

PIK 59.59 PIRACY OF SOUND RECORDING—DEFENSES [NEW]

It is a defense to the charge of piracy of sound recordings if the duplication of the sound occurs by (any person in connection with or as part of a radio or television broadcast or cable television, or for the purpose of archival preservation) (any person who duplicated such sounds for personal use and without compensation for such duplication.)

Notes on Use

For statutory authority, see K.S.A. 1979 Supp. 21-3748(3).

PIK 59.70 VALUE IN ISSUE [NEW]

The State has the burden of proof as to the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check(s)) (order(s)) (draft(s)) which the defendant allegedly (obtained) (damaged) (impaired) (gave).

The State claims that the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check(s)) (order(s)) (draft(s)) involved herein was in the amount of _____ or more.

It is for you to determine the amount on the verdict form furnished.

Notes on Use

It is necessary to use this instruction with PIK 68.11, Verdict Form—Value in Issue when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

For authority see *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975) and *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977), *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

PIK 60.05 PERJURY [REVISED]

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

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

1. That the defendant wilfully, knowingly, and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon his oath or affirmation legally administered by a person authorized to administer oaths; and
2. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3805. Perjury is a class C felony if the false statement is made upon the trial of a felony. Perjury is a class E felony if the false statement is made in a proceeding other than the trial of a felony charge.

Comment

In *State v. Bingham*, 124 Kan. 61, 257 P. 951 (1927) it was held that the question of whether false testimony is material in a perjury case is to be determined as a question of law by the trial court and not as a question of fact by the jury. In order to constitute perjury under the statute it is essential that the false testimony be on a material matter. The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; it is sufficient if they relate to collateral matters upon which evidence would have been admissible. For cases related to this subject see *State v. Elder*, 199 Kan. 607, 433 P.2d 462 (1967), *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973), and *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

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. 21-3806.

PIK 60.09 OBSTRUCTING OFFICIAL DUTY [REVISED]

The defendant is charged with the crime of obstructing official duty. The defendant pleads not guilty.

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

1. That _____ was authorized by law to _____;
2. That the defendant knowingly and wilfully (obstructed) (resisted) (opposed) _____ in the _____ which was the official duty of _____;
3. That at the time the defendant knew or should have known that _____ was a law enforcement officer; and
4. That this act occurred on or about the __ day of _____, 19__, in _____ County, Kansas.

Notes on Use

In the second blank of 1, the court should insert the act or acts the person named in the first blank was authorized to perform.

In the second blank in 2, the court should insert the act or acts the defendant obstructed, resisted or opposed.

For authority see K.S.A. 21-3808.

Obstructing official duty in a felony case is a class E felony.

Obstructing official duty in a misdemeanor case is a class A misdemeanor.

Comment

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977) it is stated: A defendant who runs from a federal officer assisting state law enforcement officials in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, prescribing obstructing official duty of a law enforcement official, it is necessary that the state prove the defendant had reasonable knowledge that the person he opposed was a law enforcement official.

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. 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.

In *State v. Pritchett*, 222 Kan. 719, 567 P.2d 886 (1977) the Supreme Court states when and under what circumstances a person may be considered to be in "Custody".

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. 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.

In *State v. Pritchett*, 222 Kan. 719, 567 P.2d 886 (1977) the Supreme Court states when and under what circumstances a person may be considered to be in "custody".

PIK 60.15 FAILURE TO APPEAR—APPEARANCE BOND

Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814 the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 1979 Supp. 22-2807 in order to establish the element of willfulness in 21-3814. See *State v. Rodgers*, 225 Kan. 242, 589 P.2d 981 (1979).

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 61.01 BRIBERY

Comment

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall and Brown-Sidorowicz*, 2 Kan.App.2d 182; 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780; 539 P.2d 329 (1975).

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. 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. 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 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

PIK 62.10 HYPNOTIC EXHIBITION

Revised Notes on Use

For authority, see K.S.A. 1979 Supp. 21-4007. By a 1978 amendment, the legislature changed hypnotic exhibition from a class C misdemeanor to an unclassified misdemeanor punishable by a fine of not more than twenty-five dollars.

PIK 62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE [NEW]

The defendant is charged with the crime of unlawfully smoking in a public place. The defendant pleads not guilty.

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

1. That the defendant smoked tobacco where a no smoking sign was posted by the (presiding officer) (chairperson) (owner) (lessee) or (other person in control of the premises);
2. That the defendant smoked tobacco in any business meeting of (_____);
or
2. That the defendant smoked tobacco in any (_____) which is used by or is open to the public;
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1979 Supp. 21-4008. Complete paragraph 2 of the instruction by supplying the name of the governmental body or public place specified in paragraph (1) or (2) of the statute. Unlawful smoking is an unclassified misdemeanor punishable by a fine of not more than \$25.00.

PIK 62.12 UNLAWFUL SMOKING—DEFENSE OF SMOKING IN DESIGNATED SMOKING AREA [NEW]

It is a defense to the charge of unlawful smoking that defendant smoked tobacco in a public place in an area designated and posted as a smoking area by the person in control of the premises.

Notes on Use

For authority, see K.S.A. 1979 Supp. 21-4008.

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 62.11.

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 63.09 PUBLIC INTOXICATION [REPEALED]**Notes on Use**

K.S.A. 21-4109, Public Intoxication, was repealed in 1977.

PIK 63.14 HARASSMENT BY TELEPHONE [REVISED]

The defendant is charged with the crime of harassment by telephone. The defendant pleads not guilty.

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

1. That the defendant (used a telephone to) (knowingly permitted a telephone under his control to be used to)
 - (a) make any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent.
 - or
 - (b) to intentionally abuse, threaten or harass any person at the called number, whether or not conversation ensues.
 - or
 - (c) cause the telephone of another to ring repeatedly with intent to harass any person at the called number.
 - or
 - (d) make repeated telephone calls, during which conversation ensued, solely to harass any person at the called number.
 - or
 - (e) play any recording on a telephone, except recordings such as weather information or sports information, when the number thereof is dialed, unless the person or group playing

**the recording shall identify itself or himself
and state that it is a recording.**

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

Notes on Use

For authority, see K.S.A. 1979 Supp. 21-4113. Harassment by telephone is a class A misdemeanor. For a charge of refusal to yield a party line, see PIK 64.13, Refusal to Yield a Telephone Party Line. For Terroristic Threat, see PIK 56.23. Part (b) of the instruction has been revised to reflect the 1978 amendment to K.S.A. 21-4113.

Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562; 331 P.2d 318 (1958).

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 64.02 UNLAWFUL USE OF WEAPONS—MISDEMEANOR

Comment

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 1979 Supp. 21-4201 (1) (b), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. (*State v. Lassley*, 218 Kan. 758, 545 P.2d 383 [1976].) In *Lassley*, the court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201 (1) (b), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the state to prove that the proscribed act was done willfully or knowingly.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201 (1) (d) is not a lesser included offense of unlawful possession of a firearm under 21-4204 (1) (b). PIK 64.02 is cited.

PIK 64.03 AGGRAVATED WEAPONS VIOLATION

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. (*State v. Buggs*, 219 Kan. 203, 547 P.2d 720 [1976].)

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense of unlawful possession of a firearm under K.S.A. 21-4204 (1) (b).

PIK 64.04 UNLAWFUL USE OF WEAPONS—AFFIRMATIVE DEFENSE [REVISED]

It is a defense to the charge of (unlawful use of weapons) (aggravated weapons violation) that at the time of the commission of the act the defendant was a _____ and (used) (possessed) the weapon while acting within the scope of (his) (her) authority.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4201 (2), which lists persons exempt from the application of the act. There should be inserted in the blank space of the instruction a description of an exempt person under the statute.

Comment

In *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972), which involved a charge of possession of marijuana in violation of K.S.A. 65-2502, it was held that the accused had the burden of introducing evidence as a matter of defense that he was within an exception or exemption in the statute.

State v. Lassley, 218 Kan. 758, 545 P.2d 383 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 1979 Supp. 21-4201 (2). The fact that the knife may have been used in his trade was not a defense to the proscribed act of knowingly carrying a dangerous knife concealed on his person.

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 is not the innocent handling of the weapon but a willful or knowing possession of a firearm with the intent to control the use and management thereof. (*State v. Farris*, 207 Kan. 785, 486 P.2d 1404 [1971]; *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 [1972]; *State v. Atkinson*, 215 Kan. 139, 523 P.2d 737 [1974]; and *State v. Neal*, 215 Kan. 737, 529 P.2d 114 [1974].)

In *Neal* it was held that the district court erred in not including an instruction defining possession when requested by the defendant. In the opinion the court cited PIK-Criminal, Chapter 53, Definitions and Explanations of Terms, page 69, where possession is defined as having control over a place or thing with knowledge of and the intent to have such control.

In *State v. Rasler*, 216 Kan. 582, 533 P.2d 1262 (1975), the court approved the giving of PIK 64.06 and held that the *specific* time of the possession is not an essential element of K.S.A. 21-4204 and need not be instructed upon.

State v. Farris, 218 Kan. 136, 542 P.2d 725 (1975), holds that the admission of an entire criminal file of a district court is *not* a proper method of establishing a prior conviction of a felony as an element of a firearms charge under K.S.A. 21-4204 (1) (b). A certified or authenticated copy of the journal entry of conviction is sufficient.

A charge of unlawful possession of a firearm (K.S.A. 21-4204) may be joined in the same information with aggravated robbery and aggravated battery counts where the offenses are based on the same transaction. (*State v. Gander*, 220 Kan. 88, 551 P.2d 797 [1976].)

There is no requirement that the firearm itself be produced for the jury's inspection to support a conviction under K.S.A. 21-4204 (1) (b). (*State v. Harwick*, 220 Kan. 572, 578, 552 P.2d 987 [1976].)

In *State v. Guebara*, 220 Kan. 520, 553 P.2d 296 (1976), and *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976), the court held that unlawful, willful, or knowing possession of a revolver by a recently convicted or released felon, with the intent to control the use and management of the weapon, is a felony which is inherently or foreseeably dangerous to human life and sufficient to establish the *felony* element of the felony-murder rule.

State v. Birch, 221 Kan. 122, 558 P.2d 119 (1976), held that the failure to define possession was not reversible error since an instruction was given requiring the

state to prove that the defendant “did willfully possess a firearm having a barrel less than 12 inches in length” and further instructing that “willfully means conduct that is purposeful and intentional and not accidental.” In holding that this instruction was not clearly erroneous, the court observed that no objection had been lodged and no “innocent handling” of the weapon theory was presented by the defense.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of carrying a concealed weapon (K.S.A. 21-4201 [1] [d]) is not a lesser included offense of unlawful possession of a firearm (K.S.A. 21-4204 [1] [b].) PIK 64.06 is cited.

It is unlawful for a defendant in a criminal case to possess a firearm under K.S.A. 21-4204 where the defendant has been adjudged guilty by verdict or plea in a district court, even though sentence has not yet been imposed, *State v. Holmes*, 222 Kan. 212, 563 P.2d 480 (1977), or even though an appeal from the conviction is then pending. (*State v. Watie*, 223 Kan. 349, 573 P.2d 1034 [1978].)

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

PIK 65.01 PROMOTING OBSCENITY

Comment

For definition of "recklessness" see K.S.A. 21-3201 (3).

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 (2) (a) (1974) was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1967). In June of 1973 the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller* the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* holds that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejects the standard that the work must be utterly without redeeming social value. The opinion also rejects any interpretation of the First Amendment which requires the application of national standards when determining if material is obscene.

In March 1976 in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, the Kansas Supreme Court interpreted the prior obscenity statute and construed the word "obscenity" in accordance with the standards mandated by *Miller* as a word of constitutional meaning in upholding the constitutionality of the statute. In response to these decisions, the legislature in 1976 amended 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself. Under the circumstances PIK 65.01, as it is contained in the original volume, is entirely appropriate to be used under the new statute. Changes necessitated by the new statutory definition of "obscenity" will be taken care of in the definition section, PIK 65.03.

In *State v. Allen*, 1 Kan. App.2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 (the prior obscenity statute). It held that the decision in *State v. Motion Picture Entitled "The Bet"*, supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974. The definition of "obscene" as it existed in 21-4301 prior to 1976 was found to be unconstitutionally overbroad.

In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976) the court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to enhance punishment.

K.S.A. 1979 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other

similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 228, 597 P.2d 1098 (1979).

PIK 65.02 PROMOTING OBSCENITY TO A MINOR

Revised Notes on Use

For authority see K.S.A. 1979 Supp. 21-4301a. The first offense is a class A misdemeanor; a second offense within two years is a class E felony; a third or subsequent offense within two years is a class D felony.

Comment

See the comment under PIK 65.01 in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 13, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) and the decision of the Supreme Court of Kansas in *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

PIK 65.02 contains the basic elements of the offense of promoting obscenity to a minor which are essentially the same under both the old statute and the statute enacted in 1976. With the exception of a minor change in a word in section 4 of 21-4301a, the statute was not changed except to modify the definition of the word "obscene." PIK 65.02 as originally drawn may be used in cases involving the 1976 statute.

K.S.A. 1977 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 296 P.2d 1058 (1979).

PIK 65.03 PROMOTING OBSCENITY—DEFINITIONS [REVISED]

Certain terms used in the preceding instructions are defined as follows:

Any material or performance is "obscene" if the average person, applying contemporary community standards, would find that the dominant theme of the material or performance, taken as a whole, appeals to the prurient interest; that the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and that the material or performance, taken as a whole, lacks serious literary, educational, artistic, political, or scientific value.

"Material" means any tangible thing which is capable of being used or adapted to arouse interest, whether through

the medium of reading, observation, sound, or other manner.

“Performance” means any play, motion picture, dance, or other exhibition performed before any audience.

“Prurient interest” means lustful thought or desire.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4301 and K.S.A. 1979 Supp. 21-4301a. It should be noted that under the new statutes the definition of “obscenity” is the same whether applied to adults under K.S.A. 1979 Supp. 21-4301 or to minors under K.S.A. 1979 Supp. 21-4301a.

COMMENT

See the comments under PIK 65.01 and 65.02. This instruction, which defines the term “obscene”, has been changed to comply with the new definition of the word “obscenity” as required by *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), and *State v. Motion Picture Entitled “The Bet”*, 219 Kan. 64, 71, 547 P.2d 760 (1976). The statutory definition has been expanded somewhat to include the language used in the cases.

A jury may not understand the meaning of the term “prurient interest.” We have defined “prurient interest” in the instruction to mean “lustful thought or desire” in accordance with Webster.

PIK 65.05 PROMOTING OBSCENITY—AFFIRMATIVE DEFENSES [REVISED]

(a) (It is a defense to the charge of promoting obscenity that the persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental justification for possessing or viewing the same.)

or

(b) (It is a defense to the charge of promoting obscenity that the defendant was a projectionist, or assistant projectionist, having no financial interest in the show or in its place of presentation other than regular employment as a projectionist or assistant projectionist and the motion picture was shown commercially to the general public.)

or

(c) (It is a defense to the charge of promoting obscenity to minors that the defendant had reasonable cause to believe that the minor involved was 18 years old or over and such minor exhibited to the defendant a draft card, driver’s license, birth certificate, or other official or apparently official document purporting to establish that such minor was eighteen [18] years old or more.)

or

(d) (It is a defense to the charge of promoting obscenity to minors that the allegedly obscene material was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction as such school.)

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4301 and K.S.A. 1979 Supp. 21-4301a.

The 1969 criminal code was amended to create an aggravated offense of promoting obscenity to minors. As applied to minors, the amendment provides two additional affirmative defenses which are incorporated in the instruction above.

In a particular case an appropriate instruction should be given pertaining to the applicable affirmative defenses.

Paragraphs (c) and (d) may apply only where minors are involved. Paragraphs (a) and (b) may apply in any obscenity case.

Only paragraph (a) has been revised in the supplement to eliminate the words "or other similar" in accordance with *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978).

Comment

K.S.A. 1979 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 297 P.2d 1058 (1979).

PIK 65.06-A ILLEGAL BINGO OPERATION [NEW]

The defendant is charged with the crime of illegal bingo operation. The defendant pleads not guilty.

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

(1) That the defendant (managed) (operated) (conducted) a game of bingo;

(2) That the defendant did so in violation of a (statute) (regulation) which provides as follows:

(Include here the specific statute or regulation which the state contends the defendant failed to comply with)

(3) That the act occurred on the ___ day of _____, 19___, in _____ County, Kansas.

"Bingo" means a game in which each participant must pay a charge and a prize or prizes are awarded to the winner

or winners in which each participant receives one or more cards each of which is marked off into twenty-five (25) squares arranged in five (5) horizontal rows of five (5) squares each and five (5) vertical rows of five (5) squares each, with each square being designated by number, letter or combination of numbers and letters, and only the center square designated with the word "free" with no two (2) cards being identical, with the players covering squares as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters, or combinations of numbers and letters corresponding to the system used for designating the squares, with the winner of each game being the player or players first properly covering a predetermined and announced pattern of squares upon the card being used by such player or players.

Notes on Use

Illegal bingo operation is a new crime created by the 1977 legislature to be a part of the criminal code at K.S.A. 1979 Supp. 21-4303a. An illegal bingo operation is a class A misdemeanor. The definition of bingo set forth in the instruction is that contained at K.S.A. 79-4701 (a).

Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, element (2) of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), the Supreme Court construed K.S.A. 79-4701 *et seq.*, to permit a class A private club to fall within the definition of a bona fide fraternal organization, thereby making the club eligible for a bingo license.

PIK 65.07 GAMBLING—DEFINITIONS

Revised Notes on Use

For authority see K.S.A. 1979 Supp. 21-4302. This instruction contains the statutory definitions applicable to gambling offenses. The 1977 amendment affected only section (1) (d) and the third paragraph of section (3) to provide a new exception for legitimate bingo operations.

The notes on use as contained in the original volume are still applicable to types of gambling other than a bingo operation.

Revised Comment

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program, does not involve

valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 79-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization thus making the club eligible for a bingo license.

In *State v. Thirty-six Pinball Machines*, 222 Kan. 416, 565 P.2d 236 (1977), the court construed the term "gambling devices" in 21-4302(4) and held that a pinball machine which is played by means of a spring-loaded plunger and metallic balls and which "pays off" only in free replays is capable of innocent use and is not a gambling device *per se*. The court stated that it is the actual use to which a pinball machine is put which determines whether it is possessed and used as a gambling device.

PIK 65.10-A DEALING IN GAMBLING DEVICES- DEFENSE [NEW]

It is a defense to this charge that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured prior to the year 1950.

Notes on Use

The defense was added by K.S.A. 1979 Supp. 21-4306.

PIK 65.12-A POSSESSION OF A GAMBLING DEVICE- DEFENSE [NEW]

It is a defense to this charge that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured prior to the year 1950.

Notes on Use

The defense was added by K.S.A. 1979 Supp. 21-4306.

PIK 65.15 CRUELTY TO ANIMALS [REVISED]

The defendant is charged with the crime of cruelty to animals. The defendant pleads not guilty.

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

(1) That the defendant

(a) intentionally (killed) (injured) (maimed) (tortured) (mutilated) (the animal) ;

or

(b) had physical custody of _____ and (acted) (failed to act) causing pain and suffering to the animal;

or

(c) (abandoned) (left) _____ without making provisions for its proper care

or

(d) had physical custody of _____ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) as needed for the health or well-being of that kind of animal.

(2) That the act occurred on or about the __ day of _____, 19__ in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4310. Cruelty to animals is a class B misdemeanor. The act or acts of cruelty specified in (1) (a), (b), (c), or (d) appropriate to the case should be used in the instruction.

Comment

K.S.A. 21-4310 was completely revised in 1977. The new statute eliminates the term "cruel mistreatment" and replaces it with specified acts of cruelty. K.S.A. 1979 Supp. 21-4313 defines "animal." K.S.A. 1979 Supp. 21-4311 provides for the taking into custody and disposition of a mistreated animal. K.S.A. 1979 Supp. 21-4312 creates a new crime of unlawful disposition of animals. It has been included as a new offense in PIK 65-17, Unlawful Disposition of Animals.

It was held in *State, ex rel. v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute 21-4310.

PIK 65.16 CRUELTY TO ANIMALS—DEFENSE [REVISED]

The statute making cruelty to animals a criminal offense is not applicable to *(list here any relevant exceptions contained in K.S.A. 1979 Supp. 21-4310)*.

Revised Notes on Use

K.S.A. 21-4310(2) provides eight (8) specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant.

PIK 65.17 UNLAWFUL DISPOSITION OF ANIMALS [NEW]

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

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

- (1) That the defendant (raffled) (gave as a prize or premium) (used as an advertising device or promotional display) living (rabbits) (chickens) (ducklings) (goslings); and
- (2) That this act occurred on or about the day of ____, _____, 19____, in _____ County, Kansas.

Unlawful disposition of animals does not include the giving of the described animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4312. Unlawful disposition of animals is a class C misdemeanor. In each case the appropriate act and animal should be selected depending on the facts. The exception is contained in the statute and, if applicable, should be included in the instruction.

CHAPTER 66.00

CRIMES AGAINST BUSINESS

PIK 66.03 DECEPTIVE COMMERCIAL PRACTICES

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. 8-611 (b), he cannot also be charged with a deceptive commercial practice under K.S.A. 21-4403 for the same wrongdoing.

PIK 66.09 KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY WITHIN THE TERRITORY OF THE 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 _____, 19__ in _____ County, Kansas.

(The statute making the employment of an alien illegally within the territory of the United States an offense is not applicable to aliens who have entered the United States illegally and thereafter have been permitted to remain within the United States, temporarily or permanently, pursuant to federal law.)

Notes on Use

For authority see K.S.A. 1979 Supp. 21-4409.

Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor.

21-4409 was amended by the 1978 legislature to include in substance the above language. See K.S.A. 1979 Supp. 21-4409.

If it becomes applicable under the evidence, the last paragraph may be given.

The statute does not state what constitutes permission to remain within the United States. The committee is of the opinion that the statute should be liberally construed to include cases where an alien has been permitted to remain within the

United States by inaction of federal immigration authorities in addition to cases where the immigration authorities have affirmatively acted to permit the alien to remain in the United States.

CHAPTER 67.00**NARCOTIC DRUGS****PIK 67.01 NARCOTICS GENERALLY—EXCEPT MARIJUANA [REPEALED]**

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

PIK 67.02 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 Substances Act of the State of Kansas as it pertains to a narcotic drug known as _____. The defendant pleads not guilty.

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

1. That the defendant (manufactured) (possessed) (had under his or her control) (possessed with the intent to sell) (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a narcotic drug known as _____;
2. That the defendant did so willfully; and
3. That the defendant did so on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1979 Supp. 65-4127a. The statute specifically relates to "any opiates, opium, or narcotic drugs."

If a defendant is charged with either sale or delivery, this instruction should be given.

An instruction defining "willful" should be given. K.S.A. 21-3102(2).

K.S.A. 21-3201 provides that as used in the Kansas Criminal Code, "the terms 'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'willful.'"

K.S.A. 1979 Supp. 65-4101 defines the terms "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), "manufacture" in paragraph (n), and "person" in paragraph (s).

If a definition of "possession" is necessary, see chapter 53.

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. Sale under the act means selling for money, and also includes barter, exchange, or gift, or any offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession. K.S.A. 1979 Supp. 65-4127a; *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act, specifically defines the term "narcotic drug" in K.S.A. 1979 Supp. 65-4101 (p). The section includes "opium and opiate" under the definition and K.S.A. 65-4101 (q) presents a detailed definition of "opiate." The committee believes that for convenience a court should refer to the substance in question under the generic term "narcotic drug" and insert the name of the specific drug in the appropriate blank. There will undoubtedly be occasions when a court should include the definitions, either in the same or in additional instructions.

K.S.A. 1979 Supp. 65-4127a provides in part:

"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 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. A Kansas conviction after a conviction in another jurisdiction would not seem to be a conviction for a second offense because K.S.A. 65-4127 relates to convictions under the Kansas Uniform Controlled Substances Act.

Comment

K.S.A. 1979 Supp. 65-4127a qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any complaint, information, indictment, or other pleading, or in any trial, hearing, or other proceeding under the act it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the person must shoulder the burden of proof to rebut the presumption.

The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 1979 Supp. 65-4101[e]), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 1979 Supp. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 65-4123, and K.S.A. 1979 Supp. 65-4138.

The committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses

that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense pattern, together with appropriate comment relative to a similar procedural setting, see PIK 64.04, Unlawful Use of Weapons—Affirmative Defense.

PIK 67.13-A NARCOTIC DRUG SALE DEFINED [NEW]

A sale under the Uniform Controlled Substances Act has a broader meaning than “sale” usually has. Sale under the act means selling for money, and also includes barter, exchange, or gift, or an offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession.

Notes on Use

For authority, see K.S.A. 1979 Supp. 65-4127a; *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

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 did so on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1979 Supp. 65-4127b (b). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are included. For example, it refers to K.S.A. 65-4105 (d) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

A violation of K.S.A. 1979 Supp. 65-4127b (b) is a class D felony.

Comment

The committee notes that the only substance incorporated under K.S.A. 1979 Supp. 65-4127b (b) that is defined in the “definitions” section of the uniform act is “marihuana.” See K.S.A. 1979 Supp. 65-4101 (o), where marihuana is defined in terms of the plant *cannabis*.

K.S.A. 1979 Supp. 65-4127b (b) qualifies the acts specified as unlawful with the premise, "(e)xcept as authorized by the uniform controlled substances act." And K.S.A. 65-4136 provides that in any complaint, information, indictment, or other pleading, or in any trial, hearing, or other proceeding under the act, it is unnecessary to negate any exemption or exception contained in the act. The section further provides that the burden of proof of any exemption or exception rests with the person claiming it. It also states that in the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the act, the person is presumed not to be the holder. Accordingly, the accused must shoulder the burden of proof to rebut the presumption.

The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 1979 Supp. 65-4101 [e]) may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 1979 Supp. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 65-4123, and K.S.A. 1979 Supp. 65-4138.

An instruction that is "substantially" in the form of PIK 67.14 correctly sets out the elements of the offense. Syl. ¶ 1, *State v. Guillen*, 218 Kan. 272, 543 P.2d 934 (1975).

A definition of "intent to sell" is not necessary, as the phrase "was not used in any technical sense nor in any way different from its ordinary use in common parlance." *State v. Guillen*, *Supra*.

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

The committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense pattern, together with appropriate comment relative to a similar procedural setting, see PIK 64.04.

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 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 (sold) (offered to sell) (a stimulant) (a depressant) (a hallucinogenic drug) known as _____;
2. That the defendant did so willfully; and
3. That the defendant did so on or about the __ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1979 Supp. 65-4127b (b). The section refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are involved. For example, it refers to K.S.A. 65-4105 (d) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

A violation of K.S.A. 1979 Supp. 65-4127b (b) is a class D felony.

See Notes on Use to PIK 67.13.

Comment

See the comment to PIK 67.14.

Delivery is not a lesser included offense of sale. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976).

Possession is not a lesser included offense of sale. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

PIK 67.16 MANUFACTURE, POSSESSION, OR DISPENSATION OF 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 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 (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 willfully; and**
- 3. That the defendant did so on or about the ___ day of _____, 19___, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 1979 Supp. 65-4127b (a). The subsection refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are included. For example, it refers to K.S.A. 65-4105 (d) relative to the hallucinogenic drugs involved, which includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among others.

A violation of K.S.A. 1979 Supp. 65-4127b (a) is a class A misdemeanor, "except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony." "Prior conviction of possession of narcotics is not an element of the class B felony defined by K.S.A. 1979 Supp. 65-4127a, but serves

only to establish the class of the felony and thus to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing. Syl. ¶1, *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1975).

K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation of either federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas. Both this statute and K.S.A. 1979 Supp. 65-4127b (a) are silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction. A Kansas conviction would appear not to be a conviction for a second offense because K.S.A. 1979 Supp. 65-4127a relates to convictions under the Kansas Uniform Controlled Substances Act.

K.S.A. 21-3201 provides that as used in the Kansas Criminal Code, "the terms 'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'willful.'"

K.S.A. 1979 Supp. 65-4101 defines the term "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), "manufacture" in paragraph (n), and "person" in paragraph (s). When appropriate, definitions should be given.

Comment

As discussed in the comment to PIK 67.01, Narcotic Drugs, K.S.A. 21-3204 provides that no criminal intent is necessary if the crime is a misdemeanor "and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described." Although the unauthorized manufacturing, possessing, controlling, prescribing, administering, delivering, distributing, dispensing, or compounding of a substance covered by K.S.A. 1979 Supp. 65-4127b (a) constitutes a class A misdemeanor for a first offense, the committee does not find that the statute defining the offense "clearly indicates a legislative purpose to impose absolute liability for the conduct described." The statute does provide that, upon conviction of a second or subsequent offense, a person shall be guilty of a class D felony. The committee does not believe 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 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. 1979 Supp. 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).

The duty of the trial court to instruct on lesser degrees of crime in homicide cases is stated and applied in *State vs. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). See "The Doctrine of Lesser Included Offenses in Kansas", 15 Washburn L. J. 40 (1976).

PIK 68.11 VERDICT FORM—VALUE IN ISSUE [REVISED]

We, the jury, find the defendant guilty of (_____ offense charged—without reference to amount _____) and find the [value of] [damage to] [amount of] the [property] [services] [money or its equivalent] [communication services] [check(s)] [order(s)] [draft(s)] which the defendant [obtained] [damaged] [impaired] [gave] to be:

_____ dollars (\$_____) or more

Less than _____ dollars (\$_____)

(Place an X in the appropriate square to indicate value.)

Foreman

Notes on Use

Complete the form by selecting the applicable parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. See Comments and Notes on Use PIK 59.70, Value in Issue.

PIK 68.13 POSTTRIAL COMMUNICATION WITH JURORS [NEW]

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but

you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Notes on Use

See Rules of Supreme Court No. 169, effective January 10, 1977. Under this rule, the Court shall give the substance of the above instruction upon completion of the jury trial and before discharge of the jury.

Supreme Court Rule 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized if possible.

CHAPTER 69.00**ILLUSTRATIVE SETS OF INSTRUCTIONS****PIK 69.01 MURDER IN THE FIRST DEGREE WITH
LESSER INCLUDED OFFENSES [REVISED]****Summary of the Facts and Issues**

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of June 1, 1971, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun. There was no evidence in the case that John Green had a weapon in his possession or that he had made any threats against Wilbur Smith.

An Outline of Suggested Instructions in Sequence Follows:

-
- Instruction 1. PIK 51.02, Consideration and Binding Application of Instructions.
- Instruction 2. PIK 56.01, Murder in the First Degree.
- Instruction 3. PIK 56.03, Murder in the Second Degree.
- Instruction 4. PIK 56.05, Voluntary Manslaughter.
- Instruction 5. PIK 56.06, Involuntary Manslaughter.
- Instruction 6. PIK 68.09, Lesser Included Offenses.
- Instruction 7. PIK 56.04, Homicide Definitions.
- Instruction 8. PIK 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
- Instruction 9. PIK 54.01, Presumption of Intent.
- Instruction 10. PIK 51.05, Rulings of the Court.
- Instruction 11. PIK 51.06, Statements and Arguments of Counsel.

Instruction 12. PIK 52.09, Credibility of Witnesses.

Instruction 13. PIK 68.09, Lesser Included Offenses.

Instruction 14. PIK 69.01, Concluding Instruction.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1

Members of the jury: It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of the instructions. You must not single out one or more instructions and disregard others. You should construe each instruction in the light of and in harmony with the other instructions, and you shall apply the instructions as a whole to the evidence. You should decide the case by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

(PIK—Criminal 51.02)

Instruction No. 2

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

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

- 1. That the defendant killed John Green;**
- 2. That such killing was done maliciously;**
- 3. That it was done willfully;**
- 4. That it was done deliberately and with premeditation;**
- 5. That such killing occurred on or about the 1st day of June 1971, in Douglas County, Kansas.**

(PIK—Criminal 56.01)

Revised Instruction No. 3

The offense of murder in the first degree with which the defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter. If you find the defendant guilty of murder in the first degree then you need not consider the lesser offenses; however, if you cannot agree that the defendant is guilty of murder in the first degree, you shall consider if he is guilty of murder in the second degree.

To establish the charge of murder in the second degree each of the following claims must be proved:

- 1. That the defendant killed John Green;**
- 2. That such killing was done maliciously;**

3. That this act was done on or about the 1st day of June, 1971, in Douglas County, Kansas.
(PIK—Criminal 56.03)

Revised Instruction No. 4

If you cannot agree that the defendant is guilty of murder in the second degree, then you shall consider if he is guilty of voluntary manslaughter.

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

1. That the defendant killed John Green;
2. That such killing was done intentionally;
3. That it was done in the heat of passion;
4. That this act occurred on or about the 1st day of June, 1971, in Douglas County, Kansas.

(PIK—Criminal 56.05)

Revised Instruction No. 5

If you cannot agree that the defendant is guilty of voluntary manslaughter, then you shall consider if he is guilty of involuntary manslaughter.

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

1. That the defendant unintentionally killed John Green;
2. That it was done while in the commission of the unlawful act of shooting a firearm within the city of Lawrence, Kansas, under circumstances that evidenced a realization of the imminence of danger to the person of another coupled with a reckless disregard for the probable consequences of such conduct;
3. That such killing occurred on or about the 1st day of June, 1971, in Douglas County, Kansas.

The act of shooting a firearm in the city of Lawrence, Kansas, is against the ordinances of such city and is unlawful.

(PIK—Criminal 56.06)

Instruction No. 6

If you find the defendant is not guilty of murder in the first degree, or of murder in the second degree, or of voluntary manslaughter, or of involuntary manslaughter, then you must find the defendant not guilty.

(PIK—Criminal 68.09)

Instruction No. 7

As used in these instructions the following words and phrases are defined as indicated:

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

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

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

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

“Heat of passion” means any intense or vehement emotional excitement which was spontaneously provoked from the circumstance.

(PIK—Criminal 56.04)

Instruction No. 8

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

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

(PIK—Criminal 52.05)

Instruction No. 9

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

(PIK—Criminal 54.01)

Instruction No. 10

At times during the trial the Court has ruled upon the admissibility of evidence. You must not concern yourself with these rulings. I have not meant to indicate any opinion

as to the facts or as to what your verdict should be by any ruling that I have made or anything that I have said or done.
(PIK—Criminal 51.05)

Instruction No. 11

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law but they are not evidence. If any statements are made that you believe are not supported by evidence, they should be disregarded.
(PIK—Criminal 51.06)

Instruction No. 12

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.
(PIK—Criminal 52.09)

Instruction No. 13

You will be submitted forms for all possible verdicts in this case.

1. Guilty of murder in the first degree.
2. Guilty of murder in the second degree.
3. Guilty of voluntary manslaughter.
4. Guilty of involuntary manslaughter.
5. Not guilty.

(PIK—Criminal 68.09)

Revised Instruction No. 14

When you retire to the jury room you will first select one of your members as presiding juror who will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19__

(PIK—Criminal 68.01)

PIK 69.02 THEFT WITH TWO PARTICIPANTS [REVISED]

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 1, 1979, two men entered the store together. The

defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store Smith and Green proceeded to the Men's Department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

- Instruction 1. PIK 51.02, Consideration and Binding Application of Instructions.
 PIK 51.05, Rulings of the Court.
 PIK 51.06, Statements and Arguments of Counsel.
 PIK 52.09, Credibility of Witnesses.
- Instruction 2. PIK 59.01, Theft.
- Instruction 3. PIK 59.70, Value in Issue.
- Instruction 4. PIK 54.15, Responsibility for Crimes of Another.
- Instruction 5. PIK 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
- Instruction 6. PIK 54.01, Presumption of Intent.
- Instruction 7. PIK 68.01, Concluding Instruction.
 PIK 68.11, Verdict of Guilty and Finding of Value of Property.
 PIK 68.03, Not Guilty Verdict.

TEXT OF SUGGESTED INSTRUCTIONS**Instruction No. 1**

Members of the Jury: It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of the instructions. You must not single out one or more instructions and disregard others. You should construe each instruction in the light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. You should decide the case by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

(PIK—Criminal 51.02)

In my actions and rulings I have not meant to indicate my reaction to any evidence nor have I meant to indicate what your verdict should be.

(PIK—Criminal 51.05)

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

(PIK—Criminal 51.06)

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

(PIK—Criminal 52.09)

Instruction No. 2

The defendant is charged with the crime of theft of property of the value of One Hundred Dollars (\$100) or more. The defendant pleads not guilty.

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

1. That Acme Department Store was the owner of the property;
2. That the defendant exerted unauthorized control over the property;
3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;

4. That the value of the property was One Hundred Dollars (\$100) or more; and
5. That this act occurred on or about the 1st day of July, 1979, in Sedgwick County, Kansas.

(PIK—Criminal 59.02)

Instruction No. 3

The State has the burden of proof as to the value of the property which the defendant allegedly exerted unauthorized control over.

The State claims that the value of the property involved herein was in the amount of One Hundred Dollars (\$100) or more.

It is for you to determine the value on the verdict form provided.

(PIK—Criminal 59.70)

Instruction No. 4

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.

(PIK—Criminal 54.04)

Instruction No. 5

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

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

(PIK—Criminal 52.02)

Instruction No. 6

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may

accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK—Criminal 54.01)

Instruction No. 7

When you retire to the jury room you will first select one of your members as foreman. He will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____ 19__,
(PIK—Criminal 68.01)

VERDICT FORMS

1. We, the jury, find the defendant guilty of theft and find the value of the property which the defendant exerted unauthorized control over to be:

One Hundred Dollars (\$100) or more

Less than One Hundred Dollars (\$100)

(Place an X in the appropriate square to indicate value)

Foreman

(PIK—Criminal 68.11)

2. We, the jury, find the defendant not guilty.

Foreman

(PIK—Criminal 68.03)

CHAPTER 70.00**SELECTED MISDEMEANORS****PIK 70.01 TRAFFIC OFFENSE—DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUORS OR DRUGS [NEW]**

The defendant is charged with the crime of operating a vehicle while under the influence of intoxicating liquors or drugs. The defendant pleads not guilty.

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

1. That the defendant was operating a vehicle;
2. (a) That the defendant was under the influence of intoxicating liquor and the control of his mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely driving a vehicle;
(b) That the defendant was under the influence of a drug and the control of his mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely driving a vehicle;
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1979 Supp. 8-1567. A first conviction of this offense shall be punishable by imprisonment of not more than one (1) year, or by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), or by both such fine and imprisonment. On a second or subsequent conviction he or she shall be punished by imprisonment for not less than ninety (90) days nor more than one (1) year and, in the discretion of the court, a fine of not more than five hundred dollars (\$500). In addition, pursuant to K.S.A. 1979 Supp. 8-1567 (d), the court may revoke the individual's license to operate a vehicle on the public highways of this state.

Comment

As to what is a "vehicle" within statutes making it an offense to drive while intoxicated, see 66 A.L.R.2d 1146.

As to what constitutes "operating" a vehicle within statutes making it an offense to operate a vehicle while intoxicated, see 47 A.L.R.2d 570.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved under the laws of this state and the jury should be so instructed when applicable. K.S.A. 1979 Supp. 8-1567 (b).

PIK 70.02 DRIVING WHILE INTOXICATED—IF CHEMICAL TEST USED [NEW]

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) may be taken in order to determine the amount of alcohol in the defendant's blood at the time the alleged offense occurred. If the test shows that at the time there was less than 0.10 percent by weight of alcohol in the defendant's blood, you shall presume that the defendant was not under the influence of intoxicating liquor. If the test shows that there was 0.10 percent or more by weight of alcohol in the defendant's blood, you shall presume that the defendant was under the influence of intoxicating liquor.

You are further instructed that the use of a (blood) (breath) test does not reduce the weight of any other evidence on the question of whether or not the defendant was under the influence of intoxicating liquor. The presumption that the test establishes is not conclusive, but should be considered by you along with all the other evidence in this case.

Notes on Use

For authority, see K.S.A. 1979 Supp. 8-1005 and K.S.A. 8-1006.

Comment

A similar instruction was approved in *State v. Bailey*, 184 Kan. 704, 339 P.2d 45 (1959).

PIK 70.03 TRANSPORTING LIQUOR IN AN OPENED CONTAINER [NEW]

The defendant is charged with the crime of transporting alcoholic liquor in an opened container. The defendant pleads not guilty.

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

1. That the defendant transported a container of alcoholic liquor in a vehicle upon a public (highway) (street) (alley);
2. That the container had been opened;
3. That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;
4. That the defendant knew or had reasonable cause to

know that he was transporting an opened container of alcoholic liquor; and

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

Notes on Use

For authority see K.S.A. 41-804. A person convicted of this offense shall be punished by a fine of not more than two hundred dollars (\$200), or by imprisonment for not more than six (6) months or by both such fine and imprisonment.

Comment

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), adds a scienter requirement to the statute, *i.e.*, a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

PIK 70.04 RECKLESS DRIVING INSTRUCTION [NEW]

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

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

1. That the defendant was driving a vehicle;
2. That the defendant was driving in a reckless manner;
3. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

As used in this instruction, the term "reckless" means driving a vehicle under circumstances that show a realization of the imminence of danger to the person or property of another where there is a reckless disregard or complete indifference and unconcern for the probable consequences of such conduct.

Notes on Use

For authority see K.S.A. 8-1566. A first conviction of reckless driving shall be punished by imprisonment for a period of not less than five (5) days nor more than ninety (90) days, or by fine of not less than twenty-five dollars (\$25) nor more than five hundred dollars (\$500), or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punished by imprisonment for not less than ten (10) days nor more than six (6) months, or by a fine of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500), or by both such fine and imprisonment.

Comment

"Reckless" is defined as an indifference whether wrong is done or not, and to be reckless the conduct must be such as to show disregard of or indifference to the consequences under circumstances involving danger to life or safety of others, although no harm was intended. *Montgomery v. Barton*, 212 Kan. 368, 370, 510 P.2d 1187 (1973).

See also *Hanson v. Swain*, 172 Kan. 105, 238 P.2d 517 (1951) and *Bailey v. Resner*, 168 Kan. 439, 214 P.2d 323 (1949).

PIK 70.05 VIOLATION OF CITY ORDINANCE [NEW]

The ordinance of the City of _____, Kansas, makes it unlawful for any person to (state offense charged) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

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

1. (List the
2. _____ various elements
3. _____ of the offense)
4. That this act occurred on or about the ___ day of _____, 19___, within the City of _____, Kansas.

Notes on Use

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

PIK CRIMINAL INDEX

- ABORTION,**
 - Criminal, 56.10
 - Justification, 56.11
- ACCOMPLICE,**
 - Testimony, 52.18
- ADULTERY, 57.09**
- AFFIRMATIVE DEFENSES,**
 - Obscenity, promoting, 65.05
 - Promoting obscenity, 65.05
 - Unlawful use of weapons, 64.04
- AGGRAVATED ARSON, 59.22**
- AGGRAVATED ASSAULT,**
 - Elements instruction, 56.14
 - Law enforcement officer, 56.15
- AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER,**
 - Elements instruction, 56.15
- AGGRAVATED BATTERY,**
 - Elements instruction, 56.18
- AGGRAVATED BATTERY AGAINST LAW ENFORCEMENT OFFICER,**
 - Elements, instruction, 56.19
- AGGRAVATED BURGLARY,**
 - Elements instruction, 59.18
- AGGRAVATED ESCAPE FROM CUSTODY, 60.11**
- AGGRAVATED INDECENT SOLICITATION OF A CHILD,**
 - Elements instruction, 57.13
- AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY,**
 - By hiree, 56.25-B
 - By parents hiring another, 56.26-A
 - Other circumstances, 56.26-C
- AGGRAVATED JUVENILE DELINQUENCY,**
 - Elements instruction, 58.13
- AGGRAVATED KIDNAPPING, 56.25**
- AGGRAVATED ROBBERY,**
 - Elements instruction, 56.31
- AGGRAVATED SODOMY,**
 - Elements instruction, 57.08
- AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL,**
 - Elements instruction, 59.31
- AGGRAVATED WEAPONS VIOLATION,**
 - Elements instruction, 64.03
- AIRCRAFT PIRACY,**
 - Elements instruction, 56.35

- ALIBI**, 52.19
- ALIEN, ILLEGAL**,
 - Knowingly employing, 66.09
- ANIMALS**,
 - Cruelty, 65.15
 - Defense, 65.16
 - Unlawful disposition, 65.17
- ANTICIPATORY CRIMES**,
 - Chapter containing, 55.00
- APPEARANCE BOND**,
 - Failure to appear, 60.15
- ARSON**, 59.20
 - Aggravated, 59.22
 - Defraud an insurer or lienholder, 59.21
- ASSAULT**,
 - Aggravated, 56.14
 - Aggravated on law enforcement officer, 56.15
 - Elements instruction, 56.12
 - Law enforcement officer, 56.13
- ASSAULT ON LAW ENFORCEMENT OFFICER**,
 - Aggravated, 56.15
 - Elements instruction, 56.13
- ATTEMPT**, 55.01
- ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER**, 60.16
- BATTERY**,
 - Aggravated, 56.18
 - Aggravated against law enforcement officer, 56.19
- BATTERY AGAINST LAW ENFORCEMENT OFFICER**,
 - Aggravated, 56.19
- BEHAVIOR, LEWD AND LASCIVIOUS**,
 - Elements instruction, 57.10
- BINGO**,
 - Illegal operation, 65.06-A
- BRIBERY**,
 - Elements instruction, 61.01
- BURDEN OF PROOF**, 52.02
- BURGLARY**,
 - Aggravated, 59.18
 - Possession of tools, 59.19
 - Tools, possession, 59.19
- BUSINESS**,
 - Crimes against, Chapter 66.00
- CABLE TELEVISION SERVICES**,
 - Theft, 59.57

CAUTIONARY INSTRUCTIONS,

- Application, 51.02
- Chapter containing, 51.00
- Consideration, 51.02
- Court rulings, 51.05
- Jury, consideration of penalty, 51.10
- Penalty, consideration by jury, 51.10
- Prejudice, 51.07
- Sympathy, 51.07

CHECK,

- Worthless, 59.06, 59.08, 59.09

CHILD,

- Aggravated indecent solicitation, 57.13
- Contributing to misconduct or deprivation, 58.14
- Endangering, 58.10
- Indecent liberties,
 - Elements instruction, 57.05
- Indecent solicitation, 57.12
- Nonsupport, 58.06
- Sexual exploitation, 57.13-A
- Solicitation,
 - Aggravated indecent, 57.13
 - Indecent, 57.12

CHILDREN,

- Crimes affecting, Chapter 58.00

CIRCUMSTANTIAL EVIDENCE,

- Guiding instruction, 52.16

CITY ORDINANCE,

- Violation, 70.05

CLASS A FELONY,

- Punishment, 68.04

COMMERCIAL PRACTICES,

- Deceptive, 66.03

COMMITMENT,

- Insanity, 54.10-A

COMMUNICATION WITH JURORS,

- Post-trial, 68.13

CONCLUDING INSTRUCTIONS AND VERDICT FORMS,

- Chapter containing, 68.00

CONFESSION,

- Guiding instruction, 52.17

CONSPIRACY, 55.03

- Declarations of conspirator, 55.07
- Defense, 55.04
- Defined, 55.05
- Overt act defined, 55.06

CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION, 58.14**CONTROLLED STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS,**

- Manufacture, possession or dispensation, 67.16
- Possession, 67.14
- Selling or offering to sell, 67.15

CONTROLLED SUBSTANCES ACT, 67.13, 67.14, 67.15, 67.16**CORRUPTLY INFLUENCING A WITNESS, 60.06****COURT,**

- Rulings, cautionary instruction, 51.05

CREDIBILITY,

- Prosecutrix's testimony, rape case, 57.03
- Rape case, prosecutrix's testimony, 57.03

CREDIBILITY OF WITNESS, 52.09**CRIME, PROOF OF OTHER,**

- Evidence, admissibility, 52.06

CRIMES,

- Affecting family relationships and children, Chapter 58.00
- Anticipatory, Chapter 55.00
- Children, affecting, Chapter 58.00
- Defenses, see Defenses, this index
- Family relationships, affecting, Chapter 58.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS,

- Chapter containing, Chapter 60.00

CRIMES AFFECTING PUBLIC TRUST,

- Chapter containing, 61.00

CRIMES AGAINST BUSINESS,

- Chapter containing, 66.00

CRIMES AGAINST PERSON,

- Chapter containing, 56.00

CRIMES AGAINST PROPERTY,

- Chapter containing, 59.00

CRIMES AGAINST THE PUBLIC MORALS,

- Chapter containing, 65.00

CRIMES AGAINST THE PUBLIC PEACE,

- Chapter containing, 63.00

CRIMES AGAINST THE PUBLIC SAFETY,

- Chapter containing, 64.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS,

- Chapter containing, 62.00

CRIMES OF ANOTHER,

- Responsibility, 54.05
 - Actor not prosecuted, 54.07
 - Crime not intended, 54.06

- CRIMINAL ABORTION, 56.10**
 - Justification, 56.11
- CRIMINAL DAMAGE TO PROPERTY WITHOUT CONSENT,**
 - Elements instruction, 59.23
- CRIMINAL INJURY TO PERSON,**
 - Elements instruction, 56.18-A
- CRIMINAL INTENT, GENERAL,**
 - Instruction, 54.01-A
- CRIMINAL LIABILITY,**
 - Defenses, see Defenses, this index
 - Principles, Chapter 54.00
- CRIMINAL TRESPASS,**
 - Elements instruction, 59.25
- CRUELTY TO ANIMALS,**
 - Defense, 65.16
 - Elements instruction, 65.15
- CUSTODY,**
 - Aggravated, escape from, 60.11
 - Escape from, 60.10
- CUSTODY, PARENTAL,**
 - Aggravated interference, 56.26-A, 56.26-B, 56.26-C
 - Interference, 56.26
- DAMAGE TO PROPERTY,**
 - Criminal, without consent, 59.23
 - Intent to injure or defraud insurer or leinholder, 59.24
- DEALING IN GAMBLING DEVICES,**
 - Defense, 65.10-A
- DECEPTIVE COMMERCIAL PRACTICES, 66.03**
- DEFENDANTS,**
 - Failure to testify, 52.13
 - Multiple, 52.07
- DEFENSES,**
 - Abortion, 56.11
 - Conspiracy, 55.04
 - Crime of another, 54.05, 54.06, 54.07
 - Criminal abortion, 56.11
 - Cruelty to animals, 65.16
 - Dealing in gambling devices, 65.10-A
 - Defense of dwelling, 54.18
 - Defense of person, 54.17
 - Defense of property other than dwelling, 54.19
 - Entrapment, 54.14
 - Ignorance of law, 54.04
 - Insanity, mental illness or defect, 54.10
 - Intoxication,
 - Involuntary, 54.11
 - Voluntary, 54.12

- Involuntary intoxication instruction, 54.13
 - Mistake of law, 54.04
 - Obscenity, promoting, 65.05
 - Possession of gambling device, 65.12-A
 - Principles, 54.00
 - Procuring agent, 54.14-A
 - Promoting obscenity, 65.05
 - Self-defense, 54.17
 - Unlawful use of weapons, 64.04
 - Voluntary intoxication, 54.12
 - Withdrawal, conspiracy, 55.04
- DEFINITIONS,**
- Chapter containing, 53.00
 - Conspiracy, 55.05
 - Conspiracy, overt act, 55.06
 - Gambling, 65.07
 - Homicide definitions, 56.04
 - Narcotic drug sale, 67.13-A
 - Overt act, conspiracy, 55.06
 - Promoting obscenity, 65.03
 - Sex offenses, 57.18
 - Sexual intercourse, 57.02
- DELINQUENCY, JUVENILE,**
- Aggravated, 58.13
- DEPRESSANTS,**
- Manufacture, possession or dispensation, 67.16
 - Possession with intent to sell, 67.14
 - Selling or offering to sell, 67.15
- DEPRIVATION,**
- Childs, contributing, 58.14
- DESECRATION OF FLAGS, 63.15**
- DISPENSATION,**
- Controlled stimulants, depressants and hallucinogenic drugs, 67.16
- DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUORS OR DRUGS (MISDEMEANOR)**
- Elements instruction, 70.01
- DRIVING WHILE INTOXICATED,**
- Chemical test used, 70.02
- DRUG SALE,**
- Narcotic, defined, 67.13-A
- DRUGS, NARCOTIC, 67.13**
- Chapter relating to, 67.00
- ENCOURAGING JUVENILE MISCONDUCT, 58.09**
- ENDANGERING A CHILD,**
- Elements instruction, 58.10
- ENTRAPMENT,**
- Instruction on principle, 54.14

- ESCAPE FROM CUSTODY**, 60.10
Aggravated, 60.11
- EVIDENCE**,
Admissibility,
 Multiple defendants, 52.07
 Proof of other crime, 52.06
Alibi, 52.19
Burden of proof, 52.02
Circumstantial, 52.16
Confession, 52.17
Consideration, 51.04
Guides for consideration, Chapter 52.00
Multiple defendant, admissibility, 52.07
Presumption of innocence, 52.02, 52.03
Proof of other crime, 52.06
Reasonable Doubt, 52.02, 52.04
Testimony,
 Defendants failure, 52.13
 Testimony of accomplice, 52.18
- EXHIBITION**,
Hypnotic, 62.10
- EXPLANATIONS OF TERMS**,
Chapter containing, 53.00
- FAILURE TO APPEAR—APPEARANCE BOND**,
Elements instruction, 60.15
- FALSE CLAIM**,
Permitting, 61.06
Presenting, 61.05
- FAMILY RELATIONSHIPS**,
Crimes affecting, Chapter 58.00
- FELONY**,
Class A, punishment, 68.04
Possession of firearms, 64.06
- FELONY—MURDER**,
Instruction, 56.02
- FINANCIAL CARD**,
Altered or nonexistent, 59.36
Cancelled, use of, 59.35
Use of another's, 59.34
- FIREARMS**,
Possession,
 Felony, 64.06
Unlawful possession, felony, 64.06
- FIRST DEGREE MURDER**, 56.01
Felony Murder instruction, 56.02
Illustrative Instructions, 69.01

FLAGS,

Desecration, 63.15

FORCE, USE,

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Initial aggressor, 54.22

FORGERY,

Making or issuing a forged instrument, 59.11

Possessing a forged instrument, 59.12

Possession of devices, 59.16

FORMS, VERDICT,

Value in issue, 68.11

GAMBLING,

Definitions, 65.07

GAMBLING DEVICES,

Dealing in,

Defense, 65.10-A

Possession,

Defense, 65.12-A

GENERAL CRIMINAL INTENT,

Instruction, 54.01-A

GOVERNMENTAL FUNCTIONS,

Crimes affecting, Chapter 60.00

GUILTY VERDICT,

General form, 68.02

HABITUALLY GIVING A WORTHLESS CHECK,

On same day, 59.09

Within two years, 59.08

HALLUCINOGENIC DRUGS,

Manufacture, possession or dispensation, 67.16

Possession with intent to sell, 67.14

Selling or offering to sell, 67.15

HARASSMENT BY TELEPHONE,

Elements instruction, 63.14

HOMICIDE,

Definitions, 56.04

Vehicular, 56.07

HUNTING,

Unlawful, posted land, 59.33-A

HYPNOTIC EXHIBITION,

Elements instruction, 62.10

IGNORANCE OF LAW,

Defense, 54.04

- ILLEGAL ALIEN,**
 - Knowingly employing, 66.09
- ILLEGAL BINGO OPERATION,** 65.06-A
- ILLUSTRATIVE SETS OF INSTRUCTIONS,**
 - Chapter containing, 69.00
- IMPAIRING A SECURITY INTEREST,**
 - Concealment, 59.41
 - Destruction, 59.41
 - Exchange, 59.42
 - Failure to account, 59.43
 - Sale, 59.42
- INCLUDED OFFENSES, LESSER,** 68.09
- INDECENT LIBERTIES WITH A CHILD,**
 - Elements instruction, 57.05
- INDECENT LIBERTIES WITH A WARD,**
 - Elements instruction, 57.06
- INDECENT SOLICITATION OF A CHILD,**
 - Aggravated, 57.13
 - Elements instruction, 57.12
- INFLUENCING A WITNESS,**
 - Corruptly, 60.06
- INITIAL AGGRESSOR'S USE OF FORCE,** 54.22
- INJURY TO PERSON, CRIMINAL,**
 - Elements instruction, 56.18-A
- INSANITY,**
 - Instruction regarding commitment, 54.10-A
 - Mental illness or defect, 54.10
- INSTRUCTIONS,**
 - Application, 51.02, 51.03
- INSTRUCTIONS, CONCLUDING,**
 - Chapter containing, 68.00
- INSTRUCTIONS, ILLUSTRATIVE SET,**
 - Chapter containing, 69.00
- INSURER,**
 - Arson to defraud, 59.21
 - Damage to property to defraud, 59.24
- INTENT, CRIMINAL,**
 - Instruction, 54.01-A
- INTENT TO DEPRIVE,**
 - Statutory presumption, 54.01-B
- INTENT TO SELL,**
 - Possession,
 - Controlled stimulants, depressants and hallucinogenic drugs, 67.14

INTERFERENCE WITH PARENTAL CUSTODY,

- Aggravated, 56.26-A, 56-26-B, 56.26-C
- Elements instruction, 56.26

INTOXICATION,

- Involuntary, 54.11
- Public, 63.09
- Voluntary, 54.12

INTRODUCTORY INSTRUCTIONS,

- Application, 51.02, 51.03
- Chapter containing, 51.00
- Consideration, 51.02, 51.03
- Consideration of evidence, 51.04
- Penalty, consideration by jury, 51.10

INVOLUNTARY INTOXICATION,

- Defense, 54.11

INVOLUNTARY MANSLAUGHTER,

- Elements instruction, 56.06

ISSUING A FORGED INSTRUMENT,

- Elements instruction, 59.11

JUDICIAL OFFICER,

- Attempting to influence, 60.16

JURORS,

- Post-trial communication, 68.13

JURY,

- Consideration of penalty, 51.10
- Penalty, consideration, 51.10

JUVENILE DELINQUENCY,

- Aggravated, 58.13

JUVENILE MISCONDUCT,

- Encouraging, 58.09

KIDNAPPING,

- Aggravated, 56.25
- Elements instruction, 56.24

KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY WITHIN THE TERRITORY OF THE UNITED STATES,

- Elements instruction, 66.09

LAW ENFORCEMENT OFFICER,

- Aggravated assault, 56.14
- Aggravated battery, 56.19
- Assault, 56.13

LESSER INCLUDED OFFENSES,

- Instruction, 68.09

LEWD AND LASCIVIOUS BEHAVIOR,

- Elements instruction, 57.10

LIABILITY,

- Principles, Chapter 54.00

LIBERTIES WITH A CHILD,

Indecent, 57.05

LIBERTIES WITH A WARD,

Indecent, 57.06

LIENHOLDER,

Arson to defraud, 59.21

Damage to property to defraud, 59.24

LIQUOR,

Transporting in open container, 70.03

LITTERING,

Private property, 59.27

Public, 59.26

MAKING A FORGED INSTRUMENT,

Elements instruction, 59.11

MANSLAUGHTER,

Involuntary, 56.06

Voluntary, 56.05

MANUFACTURE,

Controlled stimulants, depressants and hallucinogenic drugs, 67.16

MANUFACTURE, POSSESSION OR DISPENSATION OF CONTROLLED STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS, 67.16**MENTAL ILLNESS OR DEFECT, 54.10**

Commitment, 54.10-A

MINOR,

Promoting obscenity, 65.02

MISCONDUCT,

Childs, contributing, 58.14

MISDEMEANORS,

Chapter containing, 70.00

Driving under the influence of intoxicating liquor or drugs, 70.01

Driving while intoxicated, chemical test used, 70.02

Reckless driving, 70.04

Traffic offenses, 70.01

Transporting liquor in opened container, 70.03

Unlawful use of weapons, 64.02

Violation of city ordinance, 70.05

MISTAKE OF LAW,

Defense, 54.04

MULTIPLE DEFENDANT,

Admissibility of evidence, 52.07

MURDER,

First degree, 56.01

Felony murder, 56.02

Illustrative instructions, 69.01

Second degree, 56.03

- NARCOTIC DRUG SALE,**
 - Defined, 67.13-A
- NARCOTIC DRUGS, 67.13**
 - Chapter relating to, 67.00
- NONSUPPORT OF A CHILD, 58.06**
- OBSCENITY,**
 - Promoting, 65.01
 - Defenses, 65.05
 - Definition, 65.03
 - Minor, 65.02
- OBSTRUCTING OFFICIAL DUTY,**
 - Elements instruction, 60.09
- OFFENSES, LESSER INCLUDED,**
 - Instruction, 68.09
- OFFICIAL DUTY,**
 - Obstructing, 60.09
- PARENTAL CUSTODY,**
 - Interference, 56.26
- PATRONIZING A PROSTITUTE,**
 - Elements instruction, 57.17
- PERJURY,**
 - Elements instruction, 60.05
- PERMITTING A FALSE CLAIM,**
 - Elements instruction, 61.06
- PERSONAL RIGHTS,**
 - Crimes involving violations, Chapter 62.00
- PIRACY, AIRCRAFT,**
 - Elements instruction, 56.35
- PIRACY OF SOUND RECORDINGS,**
 - Defenses, 59.59
 - Elements instruction, 59.58
- POSSESSING A FORGED INSTRUMENT,**
 - Elements instruction, 59.12
- POSSESSION,**
 - Burglary tools, 59.19
 - Controlled stimulants, depressants and hallucinogenic drugs, 67.16
 - With intent to sell, 67.14
 - Firearm, 64.06
 - Forgery device, 59.16
 - Gambling device, 65.12-A
- POSTED LAND,**
 - Unlawful hunting, 59.33-A
- POST-TRIAL COMMUNICATION WITH JURORS, 68.13**
- PREJUDICE,**
 - Cautionary instruction, 51.07

- PRESENTING A FALSE CLAIM,**
 - Elements instruction, 61.05
- PRESUMPTION,**
 - Intent to deprive, 54.01-B
- PRESUMPTION OF INNOCENCE,** 52.02, 52.03
- PRESUMPTION OF INTENT,** 54.01
- PRINCIPLES OF CRIMINAL LIABILITY,**
 - Chapter containing, 54.00
- PROCURING AGENT,**
 - Instruction, 54.14-A
- PROMOTING OBSCENITY,** 65.01
 - Affirmative defenses, 65.05
 - Defenses, 65.05
 - Definition, 65.03
- PROMOTING OBSCENITY TO A MINOR,**
 - Elements instruction, 65.02
- PROOF OF OTHER CRIME,**
 - Admissibility of evidence, 52.06
- PROPERTY,**
 - Criminal damage, without consent, 59.23
- PROPERTY, CRIMES AGAINST,**
 - Chapter containing, 59.00
- PROSTITUTE,**
 - Patronizing, 57.17
- PROSTITUTION,**
 - Elements instruction, 57.14
- PROVOCATION,**
 - Excuse for retaliation, 54.21
 - Retaliation, 54.21
- PUBLIC INTOXICATION,**
 - Elements instruction, 63.09
- PUBLIC MORALS,**
 - Crimes, Chapter 65.00
- PUBLIC PEACE,**
 - Crimes against, Chapter 63.00
- PUBLIC SAFETY,**
 - Crimes against, Chapter 64.00
- PUBLIC TRUSTS,**
 - Crimes affecting, Chapter 61.00
- PUNISHMENT,**
 - Felony, Class A, 68.04
- RAPE,** 57.01
 - Credibility of prosecutrix's testimony, 57.03

- REASONABLE DOUBT**, 52.02, 52.04
- RECKLESS DRIVING**,
 - Elements instruction, 70.04
- RESPONSIBILITY FOR CRIMES OF ANOTHER**,
 - Actor not prosecuted, 54.07
 - Crime not intended, 54.06
 - Instruction on principle, 54.05
- ROBBERY**,
 - Aggravated, 56.31
 - Elements instruction, 56.30
- RULINGS OF COURT**,
 - Cautionary instructions, 51.05
- SECOND DEGREE MURDER**, 56.03
- SECURITY INTEREST**,
 - Concealment, 59.41
 - Destruction, 59.41
 - Exchange, 59.42
 - Failure to account, 59.43
 - Impairing, 59.41
 - Sale, 59.42
- SELECTED MISDEMEANORS**,
 - Chapter Containing, 70.00
- SELF DEFENSE**,
 - Defense of dwelling, 54.18
 - Defense of person, 54.17
 - Defense of property other than dwelling, 54.19
 - Force, 54.17
- SELLING OR OFFERING TO SELL**,
 - Controlled stimulants, depressants or hallucinogenic drugs, 67.15
- SERVICES**,
 - Theft, 59.03
- SEX OFFENSES**,
 - Chapter containing, 57.00
 - Definitions, 57.18
- SEXUAL EXPLOITATION OF A CHILD**, 57.13-a
- SEXUAL INTERCOURSE**,
 - Definition, 57.02
- SMOKING IN PUBLIC PLACE**,
 - Unlawful, 6211
 - Defense, 62.12
- SODOMY**,
 - Aggravated, 57.08
 - Elements instruction, 57.07
- SOLICITATION OF A CHILD**,
 - Aggravated indecent, 57.13
 - Indecent, 57.12

SOUND RECORDINGS,

- Defenses, 59.59
- Piracy, 59.58

STATUTORY PRESUMPTION OF INTENT TO DEPRIVE, 54.01-B**STIMULANTS,**

- Manufacture, possession or dispensation, 67.16
- Possession with intent to sell, 67.14
- Selling or offering to sell, 67.15

SYMPATHY,

- Cautionary instruction, 51.07

TAMPERING WITH A TRAFFIC SIGNAL,

- Aggravated, 59.31
- Elements instruction, 59.30

TELEPHONE,

- Harassment, 63.14

TERMS, EXPLANATIONS,

- Chapter containing, 53.00

TERRORISTIC THREAT,**TESTIMONY,**

- Accomplice, 52.18
- Credibility of prosecutrix's, rape case, 57.03
- Defendant's failure, 52.13
- Prosecutrix's credibility in rape case, 57.03
- Rape case, credibility of prosecutrix's testimony, 57.03

THEFT,

- Cable television services, 59.57
- Elements instruction, 59.01
- Illustrative instructions, 69.02
- Knowledge of property stolen, 59.01-A
- Service, 59.03

THREAT,

- Terroristic, 56.23

TRAFFIC OFFENSES—DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUORS OR DRUGS (MISDEMEANOR),

- Elements instruction, 70.01

TRAFFIC SIGNAL,

- Aggravated tampering, 59.31
- Tampering, 59.30

TRANSPORTING LIQUOR IN OPENED CONTAINER,

- Elements instruction, 70.03

TRESPASS,

- Criminal, 59.25

UNIFORM CONTROLLED SUBSTANCES ACT, 67.13, 67.14, 67.15, 67.16**UNLAWFUL DISPOSITION OF ANIMALS,**

- Elements instruction, 65.17

- UNLAWFUL HUNTING, POSTED LAND, 59.33-A
- UNLAWFUL POSSESSION OF A FIREARM—FELONY, 64.06
- UNLAWFUL SMOKING IN PUBLIC PLACE,
 - Defense, 62.12
 - Elements instruction, 62.11
- UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER,
 - Altered, 59.35
 - Cancelled, 59.35
 - Elements instruction, 59.34
 - Nonexistent, 59.36
- UNLAWFUL USE OF WEAPONS,
 - Affirmative defense, 64.04
- UNLAWFUL USE OF WEAPONS—MISDEMEANOR,
 - Elements instruction, 64.02
- USE OF FORCE,
 - Defense of dwelling, 54.18
 - Defense of property other than dwelling, 54.19
 - Initial aggressor, 54.22
- VAGRANCE, 63.08
- VALUE IN ISSUE,
 - Instruction, 59.70
 - Verdict form, 68.11
- VEHICULAR HOMICIDE,
 - Elements instruction, 56.07
- VERDICT FORM,
 - Value in issue, 68.11
- VERDICT FORMS,
 - Chapter containing, 68.00
- VERDICTS,
 - Guilty, form, 68.02
- VIOLATION OF CITY ORDINANCE,
 - Elements instruction, 70.05
- VIOLATION OF PERSONAL RIGHTS,
 - Chapter containing, 62.00
- VOLUNTARY MANSLAUGHTER,
 - Elements instruction, 56.05
- WARD,
 - Indecent liberties,
 - Elements instruction, 57.06
- WEAPONS,
 - Aggravated violation, 64.03
 - Unlawful use,
 - Defense, 64.04
 - Misdemeanor, 64.02

WITNESS,

- Corruptly influencing, 60.06
- Credibility influencing, 60.06

WORTHLESS CHECK,

- Elements instruction, 59.06
- Habitually giving on same day, 59.09
- Habitually giving within two years, 59.08

