

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

(Cite as PIK 2d)

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PREFACE TO 1983 SUPPLEMENT

The 1983 Supplement to PIK-Criminal 2d has been prepared at the request of the Judicial Council to reflect statutory changes and significant appellate court decisions since publication of the second edition in 1982. The supplement contains several new and revised patterns—particularly amendments to the chapter on sex offenses—and, where appropriate, the notes on use and comments have been updated and revised.

The pages of the supplement are numbered and dated. They correspond to and are keyed to the same pages in the loose-leaf binder. While the pages in the supplement should replace the corresponding pages in the loose-leaf binder, it is suggested that the old pages be retained for a reasonable period until those instructions are no longer needed.

The composition of the Committee has changed since publication of the second edition. The Honorable John W. Brookens of Westmoreland and the Honorable B. Mack Bryant of Wichita have retired and the Honorable Ronald D. Innes of Manhattan has resigned. New members of the Committee are the Honorable Robert L. Bishop of Winfield, Honorable J. Patrick Brazil of Eureka, and the Honorable James J. Noone of Wichita. The complete membership of the committee is: Herbert W. Walton, chairman, Olathe; Bob Abbott, Topeka; Michael A. Barbara, Topeka; Robert L. Bishop, Winfield; J. Patrick Brazil, Eureka; J. Richard Foth, Topeka; James J. Noone, Wichita; David Prager, Topeka, and Frederick Woleslagel, Lyons.

The Committee is indebted to others who have made it possible to prepare the supplement. We extend our thanks to the Kansas Judicial Council for its financial support and its excellent reporter, Randy M. Hearrell. We are further 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 towards the objective of continuing to improve the administration of justice through the use of these pattern jury instructions.

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



SUPPLEMENTAL FOREWORD

The preparation and publication of this 1983 supplement to Pattern Instructions for Kansas-Criminal 2d 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, supplements to that book in 1975 and 1980, and the publication of PIK-Criminal 2d in 1982 have been of great assistance to the bench and bar of this state in the preparation of jury instructions in criminal cases.

This 1983 supplement covers statutes through the 1983 legislative session; Supreme Court decisions through Vol. 233, No. 4; and Court of Appeals decisions through Vol. 8, No. 8. The supplement should continue to provide the same good service to Kansas judges and lawyers.

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

David Prager, Chairman
James D. Waugh, Secretary
J. Richard Foth
James J. Noone
Herbert W. Walton
Robert G. Frey
Elwaine F. Pomeroy
Robert H. Cobean
Jack E. Dalton
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PART III

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CHAPTER 52.00
EVIDENCE AND GUIDES FOR ITS
CONSIDERATION

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Defendant as a Witness	52.10
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52.01 INFORMATION—INDICTMENT

The Committee recommends that no separate instruction be given.

Comment

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

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

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

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52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

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

You should evaluate the evidence admitted in this case and determine whether the defendant is guilty or not guilty (, or not guilty by reason of insanity,) entirely in accordance with these instructions. The test you must use is this: If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty. 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 the claims made by the State but have a reasonable doubt as to the defendant's mental capacity as defined in instruction No. [PIK 2d No. 54.10] at the time of the commission of the alleged offense, you should find the defendant not guilty by reason of insanity.)

Notes on Use

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

If the defendant's mental capacity at the time the alleged offense was committed is an issue, include the language in the parentheses.

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

Comment

A nearly identical predecessor to this instruction was approved by *State v. Mack*, 228 Kan. 83, 887, 612 P.2d 158 (1980), and by *State v. Laughlin*, 232 Kan. 110, 652 P.2d 690 (1982). *State v. Peoples*, 227 Kan. 127, 135, 136, 605 P.2d 135 (1980) stated that when separate offenses are involved, there is no need for a separate instruction on reasonable doubt as to each offense charged.

State v. Behler, 230 Kan. 278, 281, 634 P.2d 1071 (1981), held that defense counsel should have been permitted to use the phrase "beyond a reasonable doubt" in voir dire and argument. The opinion is directed only to counsel's scope

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of argument. It is not a criticism of PIK 52.02. The exact language of the predecessor instruction, as opposed to the term "beyond a reasonable doubt" was again approved in *State v. Williams*, 6 Kan. App.2d 833, 839, 635 P.2d 1274 (1981).

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

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52.03 PRESUMPTION OF INNOCENCE

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

Notes on Use

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

Comment

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

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52.16 CIRCUMSTANTIAL EVIDENCE

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

Comment

In *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 902 (1976), the Supreme Court stated: "This court now feels it is time to discard our former rule requiring a circumstantial evidence instruction to be given."

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

In *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981) the Supreme Court affirmed defendant's conviction although he requested this type instruction and the request was refused. The opinion notes the recommendation of the Committee. See also *State v. Williams*, 6 Kan. App.2d 1274 (1981).

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52.17 CONFESSION

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

Comment

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

52.18 TESTIMONY OF AN ACCOMPLICE

An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice.

Comment

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

For complete discussion, see *State v. Wood*, 196 Kan. 599, 604, 413 P.2d 90 (1966); *State v. McLaughlin*, 207 Kan. 594, 485 P.2d 1360 (1971); and *State v. Shepherd*, 213 Kan. 498, 515 P.2d 945 (1973).

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

If accomplice testimony is corroborated only in part and the defendant requests a cautionary instruction it is error to not give the instruction. This error, however, may not be reversible. *State v. Moody*, 223 Kan. 699, 576 P.2d 637 (1978). *Moody* is followed in *State v. Bryant*, 227 Kan. 385, 388, 607 P.2d 66 (1980) and in *State v. Ferguson, Washington, & Tucker*, 228 Kan. 522, 525, 618 P.2d 1186 (1980).

In *State v. Moore*, 229 Kan. 73, 622 P.2d 631 (1981) earlier cases are reviewed and the Supreme Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be in error. Whether that error is prejudicial and reversible, however, must be determined upon the facts of the individual case." 229 Kan. at 80. In *State v. Warren*, 230 Kan. 385, 300, 635 P.2d 1236 (1981), the Court held that it was error to fail to give an accomplice instruction when accomplice testimony was supported in part by only questionably reliable eyewitness testimony.

An instruction based upon PIK 52.18 was approved in *State v. Schlicher* 230 Kan. 482, 494, 639 P.2d 467 (1982).

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52.19 ALIBI

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

Notes on Use

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

Comment

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

In *State v. Peters*, 232 Kan. 519, 520, 521, 656 P.2d 768 (1983), the court held that it was not reversible error to give an alibi instruction. It stated, however, that one should not be given.

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52.21 CHILD'S HEARSAY EVIDENCE

It is for you to determine what weight or credit to give to the evidence of a statement claimed to have been made by _____. You should consider (her) (his) age and maturity, the nature of the statement, the circumstances existing when it was claimed to have been made, any possible threats or promises that may have been made to (her) (him) to obtain the statement, and any other relevant factors.

Notes On Use

For authority, see K.S.A. 60-460(dd). The statute provides for admissibility of this type of evidence in (a) criminal proceedings, and (b) proceedings to determine if a child is deprived or in need of care.

Before admitting this type of evidence, the judge must hold a hearing and determine that (a) the child is disqualified or unavailable as a witness, (b) the statement is apparently reliable, and (c) the child was not induced to make the statement(s) falsely by use of threats or promises.

Comment

In some cases this type of evidence may be admissible without use of this statute. An example would be a "contemporaneous statement" under K.S.A. 60-460(d), see *State v. Rodriguez*, 8 Kan. App.2d 353, 657 P.2d 79 (1983).

CHAPTER 55.00
ANTICIPATORY CRIMES

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

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55.01 ATTEMPT

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

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

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

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3301(1). Except as otherwise provided by law: (1) an attempt to commit a class A felony is a class B felony; (2) an attempt to commit a class B felony is a class C felony; (3) an attempt to commit a class C felony is a class D felony; (4) an attempt to commit a class D or E felony is a class E felony; (5) an attempt to commit a class A misdemeanor is a class B misdemeanor; and (6) an attempt to commit a class B or C misdemeanor is a class C misdemeanor.

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

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

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

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Comment

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

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

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

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

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

Where the crime charged is completed, there is no basis for an instruction on an attempted crime. *State v. Grauerholz*, 232 Kan. 221, 230, 654 P.2d 395 (1982).

The mandatory sentencing statute (K.S.A. 21-4618) is limited to crimes under article 34 and certain sex crimes. The statute does not apply to an attempted aggravated robbery conviction under K.S.A. 21-3301 and 21-3427. *State v. Smith*, 232 Kan. 284, 285, 654 P.2d 929 (1982).

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

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

The Committee recommends that no separate instruction be given.

Notes on Use

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

Comment

The Supreme Court of Kansas held in *State v. Logan & Cromwell*, 232 Kan. 646, 650, 656 P.2d 777 (1983) that under the provisions of K.S.A. 21-3301 (3) neither legal impossibility nor factual impossibility is a defense to an attempted crime.

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55.03 CONSPIRACY

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

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

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

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

Notes on Use

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attempted crimes under K.S.A. 21-3301 and the crime of conspiracy under K.S.A. 21-3302 when read together do not include a crime of attempted conspiracy. See *State v. Sexton*, 232 Kan. 539, 657 P.2d 43 (1983).

PATTERN INSTRUCTIONS FOR KANSAS

55.04 CONSPIRACY—WITHDRAWAL AS A DEFENSE

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS

56.06 INVOLUNTARY MANSLAUGHTER

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

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

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

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

Notes on Use

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

Comment

A city ordinance prohibiting the discharge of a firearm within the city may be used to define an unlawful act done in a wanton manner. Those ordinances are designed to protect human life or safety, and even an accidental discharge may be within the purview of this instruction where the discharge is alleged to be wanton. *State v. Thomas*, 6 Kan. App.2d 925, 636 P.2d 807 (1981).

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56.07 VEHICULAR HOMICIDE

The defendant is charged with the crime of vehicular homicide.

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

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

Notes on Use

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

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

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

Comment

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

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

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

CHAPTER 57.00

SEX OFFENSES

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57.01 RAPE

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

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

1. That the defendant had sexual intercourse with _____;
2. That the act of sexual intercourse was committed intentionally without the consent of _____ under circumstances when
 - (a) (she) (he) was overcome by (force) (fear); and
or
 - (b) (she) (he) was unconscious or physically powerless; and
or
 - (c) (she) (he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and
or
 - (d) (she) (he) was incapable of giving a valid consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to (her) (him) by the defendant, or by another with the defendant's knowledge, unless (she) (he) voluntarily consumed or allowed the administration of the substance with knowledge of its nature; and
3. That the act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3502. Rape is a class B felony.

The statute provides four categories when the consent of the victim was not obtained. The appropriate category should be selected. In addition, 57.02, Sexual Intercourse—Definition, should be given.

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Comment

The Kansas Legislature made three key amendments to the crime of rape in 1983. Sex discrimination, spousal immunity, and the requirement of resistance to rape were eliminated. It is now possible for a female to be charged with the rape of a male. Of greater impact, however, is the recognition that spousal abuse by marital rape should be a crime. It is no longer permissible for a defendant to assert the defense that he was the spouse of the victim. Furthermore, the need of resistance to an attack was removed. Undoubtedly, the legislature was persuaded that victims should not be required to resist an attack with an exposure to a far more serious injury. See 52 J.B.A.K. 99, 104 (1983).

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

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

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

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

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

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

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

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

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

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

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

The crime of indecent liberties with a child is a lesser included offense of rape

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where the evidence establishes that the defendant forcibly raped a female under sixteen years of age. *State v. Lilley*, 231 Kan. 694, 696, 647 P.2d 1323 (1982) and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983.)

Qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible where the defense is consent. *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982).

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57.02 SEXUAL INTERCOURSE—DEFINITION

Sexual intercourse means any penetration of the female sex organ by (a finger) (the male sex organ) (any object). Any penetration, however slight, is sufficient to constitute sexual intercourse.

(Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of the performance of:

- (a) Generally recognized health care practices; or
- (b) A body cavity search conducted in accordance with law.)

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3501. This instruction should be given in all rape prosecutions. The applicable parenthetical reference should be selected.

Comment

The Kansas Legislature amended the definition of sexual intercourse in 1983 to include rape by an object or a finger.

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

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

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57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

The Committee recommends that no separate instruction be given.

Comment

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

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

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

The rape shield statute as contained in K.S.A. 1983 Supp. 21-3525 was originally enacted into law in 1976 in K.S.A. 60-447a. The 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 expanded by the Kansas Legislature in 1983 to cover several additional sex crimes. Reference to the statute should be made to determine whether the crime charged is covered by the statute. The statute was further 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.

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

The Committee recommends that no separate instruction be given.

Comment

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

In *State v. Matlock*, 233 Kan. 1, 6, 660 P.2d 945 (1983), the Kansas Supreme Court retained the rule that the uncorroborated testimony of the prosecutrix may be sufficient to convict a defendant of rape. However, in that case the court held that no rational factfinder could have believed the uncorroborated testimony of the prosecutrix to find the defendant guilty beyond a reasonable doubt.

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57.05 INDECENT LIBERTIES WITH A CHILD

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

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

1. That the defendant had sexual intercourse with _____;
or
That the defendant submitted to lewd fondling or touching of (his) (her) person by _____, with intent to arouse or to satisfy the sexual desires of either or both;
or
That the defendant fondled or touched the person of _____ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either or both;
2. That _____ was then a child under the age of 16 years and not the married to the defendant; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

The crime of indecent liberties with a child is a lesser included offense of rape when the victim is under sixteen years of age. *State v. Lilley*, 231 Kan. 694, 696, 647 P.2d 1323 (1982) and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983).

The decision of the trial court in permitting a mother to testify to statements made by her four-year-old child who was the victim of the crime of indecent liberties with a child was upheld in *State v. Rodriguez*, 8 Kan. App.2d 353, 657 P.2d 79 (1983). The court determined that the testimony was admissible under K.S.A. 60-460(d)(2). Since that holding the legislature has enacted K.S.A. 60-460 (dd) that specifically permits such testimony when certain findings are made by

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the trial court. Also see Pierron, "K.S.A. 60-460(dd): The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements", 52 J.B.A.K. 88 (1983).

Note the similarity of the elements of this crime and elements of aggravated sexual battery, see PIK-57.21.

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57.06 AGGRAVATED INDECENT LIBERTIES WITH A WARD

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

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

1. That the defendant had sexual intercourse with _____;

or

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

or

That the defendant fondled or touched the person _____ 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 married to the defendant;

3. That the defendant was the (parent) (adoptive parent) (stepparent) (grandparent) of the child;

or

That the defendant was the [guardian] [(proprietor) (employee) of any foster home, orphanage, or other public or private institution for the care and custody of minor children,] to whose charge the child had been committed or entrusted by any court, probation officer, department of social and rehabilitation services or other agency acting under the color of law;

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

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3504. Aggravated indecent liberties with a child is a class B felony.

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

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touching” mean a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

If claim number one is based on sexual intercourse, 57.02, Sexual Intercourse—Definition, should be given.

Comment

The Kansas Legislature amended the provisions of K.S.A. 21-3504 in 1983 by changing the name of the crime of indecent liberties with a ward to the crime of aggravated indecent liberties with a child. In addition, the crime was enlarged to include a parent, adoptive parent, stepparent, or grandparent of the child. The crime of incest as contained in K.S.A. 21-3602 was amended to cover certain sex offenses with a child 16 or more years of age instead of a child under 16 years of age.

See also, 57.05, Indecent Liberties With A Child.

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57.07 CRIMINAL SODOMY

The defendant is charged with the crime of criminal 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 _____, a person of the same sex as the defendant;

or

That the defendant penetrated the anal opening of _____, a person of the same sex as the defendant, with (_____, a body part) (_____, an object);

or

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

or

That the defendant had sexual intercourse with an animal;

2. That there was actual penetration; and

3. That the 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.]

[Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of: (a) Generally recognized health care practices; or (b) a body cavity search conducted in accordance with law.]

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3505. The crime of criminal sodomy is a class B misdemeanor.

If the crime is oral sex and there is an issue concerning penetration, the first bracketed clause should be given. If the crime is penetration of the anal opening by a body part or object, the second bracketed clause should be given when applicable. If the crime is sexual intercourse with an animal, 57.02, Sexual Intercourse—Definition, should be given.

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Comment

The Kansas Legislature substituted the crime of criminal sodomy for the prior crime of sodomy in 1983. In addition to the change in name, the crime was enlarged to include penetration by any body part or object.

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

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

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

Forcing a victim to commit sodomy constitutes the infliction of "bodily harm" as that term is used in K.S.A. 21-3421 for the crime of aggravated kidnapping. See *State v. Cheers*, 231 Kan. 161, 643 P.2d 154 (1982).

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**57.08 AGGRAVATED CRIMINAL
SODOMY—NONMARITAL CHILD UNDER
SIXTEEN**

The defendant is charged with the crime of aggravated criminal 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 _____;
or
That the defendant penetrated the anal opening of _____, a person, with (_____, a body part) (_____, an object);
2. That _____ was a child who was not married to the defendant and who was under sixteen years of age;
3. That there was actual penetration; and
4. That the 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.]

[Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of: (a) generally recognized health care practices; or (b) a body cavity search conducted in accordance with law.]

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3506(a). Aggravated criminal sodomy is a class B felony.

If the crime is oral sex and there is an issue concerning penetration, the first bracketed clause should be given. If the crime is penetration of the anal opening by a body part or object, the second bracketed clause should be given, if applicable.

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Comment

See comment under PIK 2d 57.07, Sodomy.

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

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy, and is not a crime necessarily proved if aggravated sodomy is proved. See *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

When the victim testified there was penetration in a prosecution for aggravated sodomy, and the fact was uncontroverted, the fact alone is sufficient to establish the crime was completed, and the trial court need not instruct on a lesser included offense. See *State v. Yates*, 220 Kan. 635, 638, 556 P.2d 176 (1976).

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

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

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

To the same effect see *State v. Everson*, 229 Kan. 540, 542, 626 P.2d 1189 (1981).

In *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978), penetration of the defendant's male organ beyond the lips of the complaining witness was held sufficient to constitute the crime of sodomy, although the clenched teeth of the victim prevented further penetration. Also see *State v. Lovelace*, 227 Kan. 348, 607 P.2d 49 (1980).

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

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

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979), and *State v. Robinson, Lloyd, & Clark*, 229 Kan. 301, 624 P.2d 964 (1981).

An instruction defining venue for crimes committed in transit was approved in *State v. Lovelace*, 227 Kan. 348, 351, 607 P.2d 49 (1980).

Forcing a victim to commit sodomy constitutes the infliction of "bodily harm" as that term is used in K.S.A. 21-3421 for the crime of aggravated kidnapping. See *State v. Cheers*, 231 Kan. 161, 643 P.2d 154 (1982).

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57.08-A AGGRAVATED CRIMINAL SODOMY—CAUSING CHILD UNDER SIXTEEN TO ENGAGE IN SODOMY WITH A PERSON OR AN ANIMAL

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

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

1. That the defendant caused _____, a child under sixteen years of age, to have (oral) (anal) sexual relations with _____;
or
That the defendant caused _____, a child under sixteen years of age, to have (oral) (anal) sexual intercourse with an animal;
or
That the defendant caused _____, a child under sixteen years of age, to penetrate the anal opening of _____, with (_____, a body part) (_____, an object);
2. That there was actual penetration; and
3. That the 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.]

[Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of: (a) Generally recognized health care practices; or (b) A body cavity search conducted in accordance with law.]

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3506. Aggravated criminal sodomy is a class B felony.

If the crime is oral sex and there is an issue concerning penetration, the first bracketed clause should be given. If the crime is penetration of the anal opening by a body part or object, the second bracketed clause should be given, if applicable. If the crime is sexual intercourse with an animal, 57.02, Sexual Intercourse—Definition, should be given.

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**57.08-B AGGRAVATED CRIMINAL SODOMY—NO
CONSENT**

The defendant is charged with a crime of aggravated criminal 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 _____,
or
That the defendant penetrated the anal opening of _____, with (_____, a body part) (_____, an object);
or
That the defendant caused _____ to have (oral) (anal) sexual relations with _____,
or
That the defendant caused _____ to penetrate the anal opening of _____, with (_____, a body part) (_____, an object)
or
That the defendant caused _____ to have (oral) (anal) sexual relations with an animal;
or
That the defendant caused _____ to have sexual intercourse with an animal;
2. That there was actual penetration;
3. That the act of sodomy was committed intentionally without the consent of _____ when (She) (he) was overcome by (force) (fear); and
or
(She) (he) was unconscious or physically powerless; and
or
(She) (he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and
or
(She) (he) was incapable of giving a valid consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to (her)

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(him) by the defendant, or another with the defendant's knowledge, unless (she) (he) voluntarily consumed or allowed the administration of the substance with knowledge of its nature; and

4. That the 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.]

[Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of: (a) Generally recognized health care practices; or (b) A body cavity search directed in accordance with law.]

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3506. The crime of aggravated criminal sodomy is a class B felony.

If the crime is oral sex and there is an issue concerning penetration, the first bracketed clause should be given. If the crime is penetration of the anal opening by a body part or object, the second bracketed clause should be given, if applicable. If the crime is sexual intercourse with an animal, 57.02, Sexual Intercourse—Definition, should be given.

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57.09 ADULTERY

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

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

1. That the defendant (had sexual intercourse) (engaged in sodomy) with _____,
2. That the defendant was then married to a person other than _____; and
or
That the defendant was not then married and knew that _____ was married; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3507. Adultery is a class C misdemeanor. If the charge is based on sexual intercourse, 57.02, Sexual Intercourse—Definition, should be given. If the charge is based on sodomy, the definition of sodomy in 57.18, Sex Offenses—Definitions, should be given.

Comment

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

The legislature amended K.S.A. 21-3507 in 1983 to include sodomy in the crime of adultery.

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57.09 ADULTERY

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

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

1. That the defendant (had sexual intercourse) (en-
gaged in sodomy) with _____,
2. That the defendant was then married to a person
other than _____; and

or

That the defendant was not then married and knew
that _____ was married; and

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

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3507. Adultery is a class C misde-
meanor. If the charge is based on sexual intercourse, 57.02, Sexual Inter-
course—Definition, should be given. If the charge is based on sodomy, the
definition of sodomy in 57.18, Sex Offenses—Definitions, should be given.

Comment

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

The legislature amended K.S.A. 21-3507 in 1983 to include sodomy in the
crime of adultery.



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57.10 LEWD AND LASCIVIOUS BEHAVIOR

The defendant is charged with the crime of lewd and lascivious behavior. The defendant pleads not guilty.

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

1. That the defendant engaged in an act of (sexual intercourse) (sodomy) with (_____) (an animal) with knowledge or reasonable anticipation that the participants were being viewed by others; and
or

The defendant exposed (his) (her) sex organ in a (public place) (in the presence of a person not [his] [her] spouse and who had not consented thereto) with the intent to arouse or gratify the sexual desires of the defendant or another; and

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

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3508. Lewd and lascivious behavior is a class B misdemeanor. If the act under claim number one is sexual intercourse, PIK 2d 57.02, Sexual Intercourse—Definition, should be given. If the act under claim number one is sodomy, PIK 2d 57.18(b), Sex Offenses—Definitions, should be given.

Comment

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977). *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979), and *State v. Robinson, Lloyd, and Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

The crime of lewd and lascivious behavior was enlarged in 1983 to include the exposure of the sex organ in a public place.

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57.11 ENTICEMENT OF A CHILD

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

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

1. That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter a (vehicle) (building) (secluded place) with the intent to commit an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) upon or with the person of _____;
2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: _____.

Notes on Use

For authority see K.S.A. 21-3509. Enticement of a child is a class D felony. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction.

Comment

See the Judicial Council comment following K.S.A. 21-3511 which distinguishes the crimes of enticement of a child, indecent solicitation of a child and aggravated indecent solicitation of a child.

The Legislature enlarged the definition of an unlawful sex act in 1983.

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57.12 INDECENT SOLICITATION OF A CHILD

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

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

1. That the defendant (invited) (solicited) _____ to (commit) (submit to) an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);
2. That _____ was then under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: _____.

Notes on Use

For authority see K.S.A. 21-3510. Indecent solicitation of a child is a class A misdemeanor. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction.

Comment

See Comment PIK 2d 57.11, Enticement of a Child.

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

The Legislature enlarged the definition of an unlawful sex act in 1983.

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57.12-A SEXUAL EXPLOITATION OF A CHILD

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

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) a child to engage in sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium);
or
That the defendant was a (parent) (guardian) (other person having custody or control of a child) and knowingly permitted the child to (engage in) (assist another to engage in) sexually explicit conduct for the purpose of promoting a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium);
2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, the following words mean:

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

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Notes on Use

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

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57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

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

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

1. That the defendant (invited) (solicited) _____ to (commit) (submit to) the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);
2. That _____ was then a child under the age of 12 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: _____.

Notes on Use

For authority see K.S.A. 21-3511. Aggravated indecent solicitation of a child is a class E felony. The applicable unlawful sexual act as defined in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction. The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

Comment

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

The Legislature enlarged the definition of an unlawful sex act in 1983.

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57.14 PROSTITUTION

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

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

1. That the defendant intentionally (performed for hire) (offered to perform for hire) (agreed to perform for hire) the act of (sexual intercourse) (sodomy) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of any person); 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. 1983 Supp. 21-3512. Prostitution is a class B misdemeanor. If the act under claim number one is sexual intercourse, 57.02, Sexual Intercourse—Definition, should be given. If the act under claim number one is sodomy, 57.18, Sex Offenses—Definitions, should be given.

Comment

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

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57.15 PROMOTING PROSTITUTION

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

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

1. That the defendant

(a) (established) (owned) (maintained) (managed) a house of prostitution; and

or

(b) participated in the (establishment) (ownership) (maintenance) (management) of a house of prostitution; and

or

(c) permitted any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; and

or

(d) procured a prostitute for a house of prostitution; and

or

(e) induced another to become a prostitute; and

or

(f) solicited a patron for a prostitute or for a house of prostitution; and

or

(g) procured a prostitute for a patron; and

or

(h) (procured transportation for) (paid for the transportation of) (transported) a person assisting or promoting that person's engaging in prostitution; and

or

(i) was employed to perform any act of [set out applicable section of (a) through (h)]; and

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

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57.17 PATRONIZING A PROSTITUTE

The defendant is charged with the crime of patronizing a prostitute. The defendant pleads not guilty.

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

1. That the defendant knowingly (entered) (remained) in a house of prostitution with the intent to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior) with a prostitute; and

or

That the defendant hired a prostitute to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior); and

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

As used in this instruction the act of (sodomy) (lewd and lascivious behavior) means: _____.

Notes on Use

For authority see K.S.A. 21-3515. Patronizing a prostitute is a class C misdemeanor. If the act is sodomy or lewd and lascivious behavior, the applicable definition of such crime in PIK 2d 57.18, Sex Offenses—Definitions, should be added to the concluding part of the above instruction. If the act is sexual intercourse, the concluding definition should be deleted.

Comment

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

57.18 SEX OFFENSES—DEFINITIONS

A. The word “spouse” means a lawful husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance, or divorce, or for relief under the Protection From Abuse Act.

B. Unlawful sexual acts are defined as follows:

- (a) Rape. “Rape” means sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender’s knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.
- (b) Indecent liberties with a child. “Indecent liberties with a child” means engaging in either of the following acts with a child who is not married to the offender and who is under 16 years of age: (1) 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.
- (c) Aggravated indecent liberties with a child. “Aggravated indecent liberties with a child” means the commission of indecent liberties with a child by: (1) a (parent) (adoptive parent) (stepparent) (grandparent) of the child or (2) any [guardian] [(proprietor) (employee) of any foster home, orphanage, or other public or private institution for the care of minor children,] to whose charge the child has been committed or entrusted by (any court) (any

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probation officer) (the department of social and rehabilitation services) (an agency acting under the color of law).

- (d) Sodomy. "Sodomy" means: (1) having oral or anal sexual relations between persons; (2) having oral or anal sexual relations between a person and an animal; (3) having sexual intercourse with an animal; or (4) penetration of the anal opening by any body part or object. Any penetration, however slight, is sufficient to constitute sodomy. Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search conducted in accordance with law.
- (e) Criminal sodomy. "Criminal sodomy" means sodomy between persons who are members of the same sex or between a person and an animal.
- (f) Aggravated criminal sodomy. "Aggravated criminal sodomy" means: (1) sodomy with a child who is not married to the offender and who is under 16 years of age; (2) causing a child under 16 years of age to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease, which was known by the offender or was reasonably apparent to the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.
- (g) Lewd and lascivious behavior. "Lewd and lascivious behavior" means:

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vious behavior” means: (1) engaging in sexual intercourse or sodomy with any person or animal with knowledge or reasonable anticipation that the participants are being viewed by others, or (2) the exposure of a sex organ in a public place or in the presence of a person who is not the spouse of the offender and who has not consented thereto, with an intent to arouse or gratify the sexual desires of the offender or another.

- (h) Sexual battery. “Sexual battery” is the unlawful and intentional touching of the person of another who is not the spouse of the offender and who does not consent to the touching, with the intent to arouse or satisfy the sexual desires of the offender or another.
- (i) Aggravated sexual battery. “Aggravated sexual battery” means: (1) the unlawful, intentional application of force to the person of another who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another; (2) sexual battery against a person under 16 years of age; (3) sexual battery committed in another’s dwelling by one who entered into or remained in the dwelling without authority; (4) sexual battery of a person who is unconscious or physically powerless; or (5) sexual battery of a person who is incapable of giving consent because of mental deficiency or disease which condition was known by, or was reasonably apparent to the offender.

Notes on Use

Authority for the definitions is contained in several statutes: rape, K.S.A. 1983 Supp. 21-3502; indecent liberties with a child, K.S.A. 1983 Supp. 21-3503; Aggravated indecent liberties with a child, K.S.A. 1983 Supp. 21-3504; sodomy, K.S.A. 21-3501(2); criminal sodomy, K.S.A. 1983 Supp. 21-3505; aggravated criminal sodomy, K.S.A. 1983 Supp. 21-3506; and lewd and lascivious behavior, K.S.A. 1983 Supp. 21-3508; sexual battery, K.S.A. 1983 Supp. 21-3517; and aggravated sexual battery, K.S.A. 1983 Supp. 21-3518.

In defining the term spouse only the applicable language should be used.

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57.19 SEXUAL BATTERY

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

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

1. That the defendant intentionally touched the person of _____, who was not (his) (her) spouse and who did not consent to the touching;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or (another); 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. 1983 Supp. 21-3517. Sexual battery is a class A misdemeanor. The definition of a spouse as contained in 57.18, Sex Offenses—Definitions, should be given.

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57.20 AGGRAVATED SEXUAL BATTERY—FORCE

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

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

1. That the defendant intentionally applied force to the person of _____, who was not (his) (her) spouse and who did not consent to the force;
2. That the force was applied with the intent to arouse or satisfy the sexual desires of the defendant or (another) ; 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. 1983 Supp. 21-3518(a). Aggravated sexual battery is a class D felony.

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**57.21 AGGRAVATED SEXUAL BATTERY—CHILD
UNDER 16**

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

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

1. That the defendant intentionally touched the person of _____, who was not (his) (her) spouse and who did not consent to the touching;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or (another) _____;
3. That _____ was a child under 16 years of age; 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. 1983 Supp. 21-3518(b). Aggravated sexual battery is a class D felony. The definition of a spouse as contained in 57.18, Sex Offenses—Definitions, should be given.

Comment

Note the similarity of the elements of this crime and the elements of Indecent Liberties With a Child, PIK 57.05.

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57.22 AGGRAVATED SEXUAL BATTERY—DWELLING

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

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

1. That the defendant intentionally touched the person of _____, who was not (his) (her) spouse and who did not consent to the touching;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or (another);
3. That the touching occurred at a time when the defendant was in the dwelling of (another) without authority; 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. 1983 Supp. 21-3518(c). Aggravated sexual battery is a class D felony. The definition of spouse as contained in 57.18, Sex Offenses—Definitions, should be given.

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**57.23 AGGRAVATED SEXUAL BATTERY—VICTIM
UNCONSCIOUS OR PHYSICALLY POWERLESS**

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

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

1. That the defendant intentionally touched the person of _____, who was not (his) (her) spouse and who did not consent to the touching;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or (another) _____;
3. That _____ was (unconscious) (physically powerless); 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. 1983 Supp. 21-3518(d). Aggravated sexual battery is a class D felony. The definition of spouse as contained in 57.18, Sex Offenses—Definitions, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

57.24 AGGRAVATED SEXUAL BATTERY—MENTAL DEFICIENCY OF VICTIM

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

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

1. That the defendant intentionally touched the person of _____, who was not (his) (her) spouse;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or (another);
3. That _____ was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by, or was reasonably apparent to, the defendant; 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. 1983 Supp. 21-3518(e). Aggravated sexual battery is a class D felony. The definition of a spouse as contained in 57.18, Sex Offenses—Definitions, should be given.

PATTERN INSTRUCTIONS FOR KANSAS

58.02 AFFIRMATIVE DEFENSES TO BIGAMY

It is a defense to the charge of bigamy that at the time of the (marriage) (cohabitation) the defendant reasonably believed that the earlier marriage had been dissolved by (death) (divorce) (annulment).

This belief must have been based on circumstances which would have led a reasonable person to conclude that the earlier marriage had been dissolved.

Notes on Use

For authority see K.S.A. 21-3601(2). This instruction should be given whenever there is evidence that the defendant believed an earlier marriage was dissolved. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be used.

Comment

For discussion of “reasonable belief” see *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

PATTERN INSTRUCTIONS FOR KANSAS

58.03 INCEST

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

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

1. That the defendant married _____, a person 16 or more years of age, known to the defendant to be related to the defendant as (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece) and
or
That the defendant engaged in (sexual intercourse) (sodomy) with _____, a person 16 or more years of age, known to the defendant to be related to the defendant as (brother) (sister) (uncle) (aunt) (nephew) (niece) and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3602. Incest is a class E felony.

If claimed, reference should be made to PIK 57.18, Sex Offenses—Definitions, for a definition of sexual intercourse or sodomy.

PATTERN INSTRUCTIONS FOR KANSAS

58.04 AGGRAVATED INCEST

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

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

1. That the defendant engaged in (sexual intercourse) (sodomy) (rape) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) with _____, who defendant knew was defendant's (natural parent) (natural child) (natural grandparent) (natural grandchild); and
2. That _____ was 16 or more years of age; 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. 1983 Supp. 21-3603. Aggravated incest is a class D felony. In order to constitute the crime of incest, the victim must be 16 or more years of age and known to the defendant to be related as natural parent or child, or as natural grandparent or grandchild of any degree, regardless of legitimacy.

Reference should be made to PIK 57.18, Sex Offenses—Definitions, for a definition of the claimed sexual intercourse or unlawful sexual act.

PATTERN INSTRUCTIONS FOR KANSAS

58.05 ABANDONMENT OF A CHILD

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

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

1. That the defendant was a (parent) (guardian) of _____.

or

That the defendant was a person to whom the care and custody of _____ had been entrusted.

2. That the defendant left the child in a place where it might suffer because of neglect;
3. That the defendant left the child with intent to abandon the child;
4. That the child at the time was under the age of sixteen years; and
5. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3604. Abandonment of a child is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

58.09 ENCOURAGING JUVENILE MISCONDUCT

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

PATTERN INSTRUCTIONS FOR KANSAS

58.10 ENDANGERING A CHILD

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

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

1. That the defendant willfully and unreasonably caused or permitted a child under the age of eighteen years to be placed in a situation in which his life, body or health might be injured or endangered; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3608(1)(b). Endangering a child is a class A misdemeanor. It should be noted that by virtue of K.S.A. 21-3608(1)(c), an exception is made relative to lack of treatment or cure of disease resulting in pain, mental distress, endangerment or injury when caused by one guided by spiritual doctrines in accordance with the belief of a recognized church or religious denomination.

Comment

The constitutionality of K.S.A. 21-3608(1)(b) was upheld upon the finding that the purpose of the statute is to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common-sense interpretation, is not vague. *State v. Fisher*, 213 Kan. 192, 631 P.2d 239 (1981).

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 reasonable 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).

PATTERN INSTRUCTIONS FOR KANSAS

59.18 AGGRAVATED BURGLARY

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

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

1. That the defendant knowingly (entered) (remained in) _____;
2. That the defendant did so without authority;
3. That the defendant had the intent to commit (theft) (_____, a felony), therein;
4. That at the time there was a human being in _____; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a class C felony. As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App.2d 556, 630 P.2d 731 (1981). When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

Comment

It should be noted that the legislature did not make "breaking" an element of this crime.

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

In *State v. Walters*, 8 Kan. App.2d 237, 655 P.2d 948 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

PATTERN INSTRUCTIONS FOR KANSAS

59.19 POSSESSION OF BURGLARY TOOLS

The defendant is charged with the crime of possession of burglary tools. The defendant pleads not guilty.

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

1. That the defendant intentionally possessed _____, a device suitable for use in entering into (an enclosed structure) (a vehicle);
2. That the defendant did so with the intent to commit a burglary; and
3. That the defendant possessed these tools on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, burglary means to knowingly and without authority enter into or remain within any building, mobile home, tent, or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a theft or other felony therein.

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS

59.45 WAREHOUSE RECEIPT FRAUD—ORIGINAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a warehouse receipt for goods;
or
That the defendant caused or directed a warehouse receipt to be (made) (drawn) (issued) (delivered) for goods;
3. That the defendant knew that the goods shown on the receipt had not been received by him at the time he issued the receipt;
or
That the defendant knew that the goods shown on the receipt were not under his actual control at the time he issued the receipt;
or
That the defendant knew that the receipt contained a false statement; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736 (a) and (b).
Warehouse receipt fraud is a class E felony.

PATTERN INSTRUCTIONS FOR KANSAS

59.46 WAREHOUSE RECEIPT FRAUD—DUPLICATE OR ADDITIONAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a duplicate or additional warehouse receipt for goods without placing on its face the word "duplicate;"

or

That the defendant caused or directed a duplicate or additional warehouse receipt to be (made) (drawn) (issued) (delivered) for goods without placing on its face the word "duplicate";

3. That the defendant knew that there was an uncancelled and outstanding receipt for the same goods; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 Supp. 21-3736(c). Warehouse receipt fraud is a class E felony.

K.S.A. 1983 Supp. 21-3736(c) provides for an exception in the case of a lost, stolen or destroyed receipt after proceedings as provided in K.S.A. 34-257 or 84-7-601(l). Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, sec. 2, it would appear that the statute referred to is K.S.A. 34-257a.

PATTERN INSTRUCTIONS FOR KANSAS

59.47 UNAUTHORIZED DELIVERY OF STORED GOODS

The defendant is charged with the crime of unauthorized delivery of stored goods. The defendant pleads not guilty.

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

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant delivered goods to _____;
3. That the defendant knew that there was a negotiable receipt for the goods outstanding and uncanceled;
4. That the defendant did not have possession of the receipt at the time he delivered the goods; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 Supp. 21-3737. Unauthorized delivery of stored goods is a class A misdemeanor.

Comment

K.S.A. 1983 Supp. 21-3737 lists five exceptions which are:

(a) In case of lost, stolen or destroyed receipts, after proceedings have been had as provided in K.S.A. 84-7-601(2), or (b) in the case of delivery in good faith as proved in K.S.A. 84-7-601(2), or (c) in the case of optional termination of storage as provided in K.S.A. 84-7-206, or (d) in the case of a lost or destroyed receipt, after proceedings have been had as provided in K.S.A. 34-257, or (e) in case of sale as provided in K.S.A. 34-276.

Note that in subparagraph (d) above reference is made to K.S.A. 34-257. Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, sec. 2, it would appear that the statute referred to is K.S.A. 34-257a.

Where a criminal statute sets forth an exception which is not a part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden is on the accused to show the applicability of the exception. Accordingly, the prosecution owes no duty to prove in its case in chief that the accused is not within the exception. This is a mere rule of procedure and does not relieve the State of its burden of proving guilt. 22A C.J.S., Criminal Law, sec. 572, pages 316-317; *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 270 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932); *7 Fifths Old Grand-Dad Whiskey v. United States*, 158 F.2d 34 (1946).

PATTERN INSTRUCTIONS FOR KANSAS

59.48 AUTOMOBILE MASTER KEY VIOLATION

The defendant is charged with the crime of automobile master key violation. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered to sell) a motor vehicle master key to _____;
or
That the defendant possessed a motor vehicle master key;
2. That the defendant knew that the master key was designed to fit the ignition switch of more than one motor vehicle; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3738. Automobile master key violation is a class C misdemeanor.

Comment

The exceptions in subparagraph (2) should be considered. This subparagraph provides that it shall not be unlawful for the owner of two (2) or more vehicles to possess a motor vehicle master key for any or all of the motor vehicles so owned, nor shall sale of such master keys to such owner be unlawful. The burden of claiming a status of exemption and introducing evidence that the defendant was exempt is upon the defendant.

In general, the accused has the burden of introducing evidence, as a matter of defense, that he is within an exception in the statute creating the offense where such exception is not a part of the description of the offense. Accordingly, the prosecution owes no duty to prove in its case in chief that accused is not within the exception. This is a mere rule of procedure and does not relieve the state of its burden of proving guilt. 22A C.J.S. Criminal Law, Sec. 572, pages 316-317; *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932).

CHAPTER 60.00
CRIMES AFFECTING GOVERNMENTAL
FUNCTIONS

	PIK Number
Treason	60.01
Sedition	60.02
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Permitting Premises to be used for Criminal Syndicalism	60.04
Perjury	60.05
Corruptly Influencing a Witness (Repealed)	60.06
Intimidation of a Witness or Victim	60.06-A
Aggravated Intimidation of a Witness or Victim ..	60.06-B
Compounding a Crime	60.07
Obstructing Legal Process	60.08
Obstructing Official Duty	60.09
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Aiding Escape	60.12
Aiding a Felon or Person Charged as a Felon ...	60.13
Aiding a Person Convicted of or Charged with Committing a Misdemeanor	60.14
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Interference With the Administration of Justice ...	60.17
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Falsely Reporting a Crime	60.19
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Simulating Legal Process	60.21
Tampering With a Public Record	60.22
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PATTERN INSTRUCTIONS FOR KANSAS

Aggravated False Impersonation	60.26
Traffic in Contraband in a Penal Institution	60.27
Unlawful Disclosure of a Warrant	60.28
Interference With the Conduct of Public Business in a Public Building	60.29
Dealing in False Identification Documents	60.30

PATTERN INSTRUCTIONS FOR KANSAS

60.05 PERJURY

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

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

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

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3805. Perjury is a class D felony if the false statement is made upon the trial of a felony. Perjury is a class E felony if the false statement is made in a proceeding other than the trial of a felony charge.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS

60.06 CORRUPTLY INFLUENCING A WITNESS

Prior editions of PIK Criminal contained instruction 60.06. The statute on which such instruction was based was repealed effective July 1, 1983. The crime of corruptly influencing a witness has been replaced with the crimes of intimidation of a witness or victim and aggravated intimidation of a witness or victim. See PIK instruction 60.06-A and 60.06-B for instruction on these offenses.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

It was held in *State v. Reed*, 213 Kan. 557, 559, 562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806.

In the *Reed* case the court stated that in a prosecution under 21-3806 where the state relies upon means other than bribery or threat, it should describe with particularity the "other means", in the information in order to enable the defendant to know what he is charged with and to defend against the charge.

The Committee believes that where "other means" is used it must relate to corrupt influence by the accused that is comparable to bribery or threat. A vicious or fraudulent intention to evade the prohibitions of the law seems to have been contemplated by the legislature.

PATTERN INSTRUCTIONS FOR KANSAS

60.06-A INTIMIDATION OF A WITNESS OR VICTIM

The Defendant is charged with the crime of intimidation of a (witness) (victim). The defendant pleads not guilty.

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

1. That the defendant prevented or dissuaded, or attempted to dissuade a (witness) (victim) _____ from attending or giving testimony at a (trial) (preliminary hearing) (other proceeding or inquiry authorized by law).

OR

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade a (witness) (victim) or (person acting on behalf of a victim) _____, from:

making a report of a (crime) (attempted crime) or (civil injury or loss) against an individual, _____, to any law enforcement, probation, parole, correctional or judicial officer.

OR

causing a complaint, indictment or information to be sought and prosecuted and assisting in its prosecution.

OR

causing a probation or parole violation to be reported and prosecuted and assisting in its prosecution.

OR

causing a civil action to be filed and prosecuted and assisting in its prosecution.

OR

arresting or causing or seeking the arrest of any person in connection with a (crime) (attempted crime) or (civil injury or loss) against an individual, _____.

2. That the defendant did so knowingly and maliciously.
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS

As used in this instruction the word “maliciously” means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3832, which became effective July 1, 1983.

Intimidation of a witness or victim is a class B misdemeanor.

Insert name of witness, victim or person acting on behalf of a victim in blank space in 1.

Insert type of “other proceeding or inquiry—” in 1.

Insert name of individual in blank spaces.

PATTERN INSTRUCTIONS FOR KANSAS

**60.06-B AGGRAVATED INTIMIDATION OF A WITNESS
OR VICTIM**

The defendant is charged with the crime of aggravated intimidation of a (witness) (victim). The defendant pleads not guilty.

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

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade a (witness) (victim) (person acting on behalf of a victim), _____, from:
(cite appropriate violation listed in 60.06-A)

AND

2. That the act was accompanied by an express or implied threat of force or violence against the (person) (property) of a (witness) (victim) (other person);

OR

That the act was in furtherance of a conspiracy;

OR

That the defendant had been previously convicted of _____;

OR

That the (witness) (victim), _____, was under 18 years of age;

OR

That the act was committed for (pecuniary gain) (other consideration) by the defendant acting upon the request of another person.

3. That the defendant did so knowingly and maliciously; and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction the word "maliciously" means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3833, which became effective July 1, 1983.

Aggravated intimidation of a witness or victim is a class E felony.

Conspiracy should be defined when the state alleges the act was committed in furtherance of a conspiracy. See PIK 55.05, Conspiracy-Defined, for definition.

Whether a prior conviction of defendant was for a crime included within the provision of Sec. 3(c) of K.S.A. 1983 Supp. is a question of law for the court. Where found to be included insert the crime in the blank space. Insert name of witness, victim or person acting on behalf of a victim in blank space.

PATTERN INSTRUCTIONS FOR KANSAS

60.07 COMPOUNDING A CRIME

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

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

1. That the defendant knew _____ had committed a crime;
2. That the defendant intentionally (accepted) (agreed to accept) anything of value as consideration for a promise not to (initiate the prosecution of _____) (aid in the prosecution of _____);
and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3807. Compounding a felony is a class E felony. Compounding a misdemeanor is a class A misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

The defendant is charged with the crime of dealing in false identification documents. The defendant pleads not guilty.

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

1. That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ which (simulated) (purported to be) (was designed so as to cause others reasonably to believe it to be) a _____ issued by a governmental agency; and

or

That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ bearing a fictitious name or other false information; and

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

Notes on Use

For authority see K.S.A. 1983 Supp. 21-3830.

The document which the defendant manufactured, sold, or offered for sale should be described with particularity in the blank space for the jury and the defendant to understand the nature of the charge against the defendant.

As used in this section, "identification document" means any card, certificate, or document which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be driver's license, birth certificates, and social security cards.

Unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

Prior to July 1, 1983, dealing in false identification documents was a class A misdemeanor. K.S.A. 21-3830 was amended, effective July 1, 1983, to make this offense a class E felony.

CHAPTER 61.00
CRIMES AFFECTING PUBLIC TRUSTS

	PIK Number
Bribery	61.01
Official Misconduct	61.02
Compensation for Past Official Acts	61.03
Compensation for Past Official Acts—Defense	61.04
Presenting a False Claim	61.05
Permitting a False Claim	61.06
Discounting a Public Claim	61.07
Unlawful Interest in Insurance Contract (Repealed)	61.08
Unlawful Procurement of Insurance Contract (Re- pealed)	61.09
Unlawful Collection by a Judicial Officer	61.10
Misuse of Public Funds	61.11
Unlawful Use of State Postage	61.12

PATTERN INSTRUCTIONS FOR KANSAS

61.01 BRIBERY

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

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

1. That the defendant offered, gave, or promised to give directly or indirectly to _____ a public (officer) (employee) a benefit or consideration;
2. That _____ was not legally entitled to such benefit or consideration;
3. That defendant did so with intent to influence _____ with respect to the performance of his powers and duties; and
or
1. That the defendant was a public (officer) (employee);
2. That the defendant (requested) (received) (agreed to receive) from _____ directly or indirectly a benefit or consideration;
3. That the benefit or consideration was (requested) (received) (agreed upon) with the intent that the defendant be influenced with respect to the performance of his powers or duties; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3901. The first part of the instruction is applicable when the crime charged is that of offering or giving a bribe. The name of the officer or employee sought to be influenced should be inserted in the blanks. The second part of the instruction is applicable when the crime charged is soliciting a bribe. Bribery is a class D felony. If the defendant is a public officer or employee he shall forfeit his office or employment in addition to the other penalties prescribed by law. For sports bribery, see PIK 2d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 2d 61.03, Compensation for Past Official Acts.

PATTERN INSTRUCTIONS FOR KANSAS

Comments

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

PATTERN INSTRUCTIONS FOR KANSAS

61.02 OFFICIAL MISCONDUCT

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

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

1. That defendant was a public (officer) (employee);
2. That defendant intentionally and maliciously committed an act of misconduct as follows: _____;
3. That defendant acted or appeared to act under authority of his (office) (employment); and
or
1. That the defendant was a public (officer) (employee);
2. That defendant intentionally demanded or received a fee or reward (for the execution of any official act) (for the performance of a duty imposed by law or the terms of his employment);
3. That defendant knew that to demand or receive the fee or reward was contrary to law;
4. That defendant acted or appeared to act under authority of his (office) (employment); and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3902. Official misconduct is a class A misdemeanor. In addition to the other penalty prescribed by law, a public officer or employee shall forfeit his office or employment upon conviction of official misconduct.

In element number (2) of the first part of the instruction, designate the act alleged to constitute "oppression, partiality, misconduct, or abuse of authority."

"Maliciously" is defined in PIK 2d 56.04, Homicide Definitions.

Comment

In *State v. Coburn*, 220 Kan. 743, 556 P.2d 376 (1976), it was held incumbent upon the state to prove the act of misconduct was committed while the defendant was acting in an official capacity or under color of his office. Defendant's conviction was reversed where it was alleged defendant came into possession of abandoned property as sheriff and the state's evidence would establish that he formed the intent to keep it for his own use only after he had resigned from office.

PATTERN INSTRUCTIONS FOR KANSAS

61.07 DISCOUNTING A PUBLIC CLAIM

The defendant is charged with the crime of discounting a public claim. The defendant pleads not guilty.

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

1. That the defendant was a public (officer) (employee);
2. That defendant in his private capacity either directly or indirectly intentionally purchased for less than full value a claim held by another against _____; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3906. Discounting a public claim is a class A misdemeanor.

In element number (2) designate the municipality, state, or subdivision against whom the claim is made.

PATTERN INSTRUCTIONS FOR KANSAS

**61.08 UNLAWFUL INTEREST IN INSURANCE
CONTRACT**

K.S.A. 21-3907 was repealed by L. 1983, Ch. 110, § 1, effective July 1, 1983.

PATTERN INSTRUCTIONS FOR KANSAS

**61.09 UNLAWFUL PROCUREMENT OF INSURANCE
CONTRACT**

K.S.A. 21-3908 was repealed by L. 1983, Ch. 110, § 1, effective July 1, 1983.

PATTERN INSTRUCTIONS FOR KANSAS

61.10 UNLAWFUL COLLECTION BY A JUDICIAL OFFICER

The defendant is charged with the crime of unlawful collection by a judicial officer. The defendant pleads not guilty.

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

1. That the defendant is a judicial officer;
2. That defendant was employed to collect a claim;
3. That defendant caused or permitted an action to enforce collection of the claim to be filed in a court over which he presides; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3909. Unlawful collection by a judicial officer is a class B misdemeanor. Upon conviction of unlawful collection the judicial officer shall forfeit his office.

PATTERN INSTRUCTIONS FOR KANSAS

“Possession” and “control” are discussed and defined. *State v. Bowman National Security Agency, Inc.*, 231 Kan. 631, 647 P.2d 1288 (1982).

A telephone company, having reasonable grounds to suspect its billing procedures are being bypassed by electronic device, may monitor any telephone from which it reasonably believes illegal calls are being placed. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976).

In *State v. Martin*, 232 Kan. 778, 658 P.2d 1024 (1983), on appeal from a trial court judgment of acquittal on the ground that the statute did not clearly proscribe defendant's actions, it was held that defendant's acts in inviting women to his attic studio to be photographed while modeling clothes and photographing them through a one-way mirror while they were changing clothes violated (1)(a) of the statute. “Entry” and “observe” are defined.

PATTERN INSTRUCTIONS FOR KANSAS

**62.02 EAVESDROPPING—DEFENSE OF PUBLIC
UTILITY EMPLOYEE**

It is a defense to the charge of eavesdropping that the defendant was (the operator of a switchboard) (an officer) (an employee) of a public utility providing telephone communication service and that he intercepted, disclosed, or used a communication in the performance of his legitimate duties.

Notes on Use

For authority, see K.S.A. 21-4001(3). If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

CHAPTER 63.00
CRIMES AGAINST THE PUBLIC PEACE

	PIK Number
Disorderly Conduct	63.01
Unlawful Assembly	63.02
Remaining at an Unlawful Assembly	63.03
Riot	63.04
Incitement to Riot	63.05
Maintaining a Public Nuisance	63.06
Permitting a Public Nuisance	63.07
Vagrancy	63.08
Public Intoxication	63.09
Giving a False Alarm	63.10
Criminal Desecration	63.11
Desecrating a Cemetery	63.12
Desecrating a Dead Body	63.13
Harassment by Telephone	63.14
Desecration of Flags	63.15

PATTERN INSTRUCTIONS FOR KANSAS

63.01 DISORDERLY CONDUCT

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

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

1. That the defendant
 - (a) engaged in brawling or fighting;
or
 - (b) disturbed an assembly, meeting, procession, not unlawful in its character;
or
 - (c) engaged in noisy conduct;
2. That the defendant acted with knowledge or reasonable cause to believe that his conduct would alarm, anger, or disturb others or provoke an assault or other breach of the peace; and
 1. That the defendant used offensive, obscene or abusive language, of such a nature that it would tend to provoke the listener to an immediate assault or other breach of the peace;
 2. That the defendant acted with knowledge or reasonable cause to believe that his words would tend to cause such an immediate assault or other breach of the peace; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The first version should be used when the charge is based on acts of the defendant and the second when only speech is involved. Under the first version claim 1 should be limited to the specific conduct alleged to constitute the offense.

PATTERN INSTRUCTIONS FOR KANSAS

Comment

In *State v. Hoffman*, 228 Kan. 186, 612 P.2d 630 (1980) the court found the statute as applied to conduct involving only speech was facially overbroad. It upheld the statute by authoritatively construing it to prohibit only speech amounting to "fighting words." In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942), the court upheld a state statute which, as authoritatively construed by the state court, prohibited only words "plainly likely to cause a breach of the peace by the addressee." See also, *State v. Heiskell*, 8 Kan. App.2d 667, 666 P.2d 207 (1983), disapproving former PIK 2d 63.01 as applied to speech.

PATTERN INSTRUCTIONS FOR KANSAS

64.02 UNLAWFUL USE OF WEAPONS—MISDEMEANOR

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

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

1. That defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a (bludgeon) (sand-club) (metal knuckles) (switchblade knife) (knife which has a blade that opens automatically by hand pressure applied to a [button] [spring] [other device] in the handle of the knife) (knife having a blade that [opens] [falls] [is ejected] into position by [the force of gravity] [an outward thrust] [a downward thrust] [centrifugal thrust or movement]); and
or

That the defendant knowingly (carried concealed on his person) (possessed with the intention to use the same unlawfully against another) a (dagger) (dirk) (billy) (blackjack) (slung shot) (dangerous knife) (straightedged razor) (stiletto) (any dangerous or deadly weapon or instrument); and
or

That the defendant knowingly carried (on his person) (in a [land] [water] [air] vehicle, a _____) with the intent to use the same unlawfully, a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]); and
or

That the defendant knowingly carried a (pistol) (revolver) (other firearm) concealed on his person when not on his own land or abode or fixed place of business; and
or

That the defendant knowingly set a spring gun; and
or

That the defendant knowingly possessed a device or attachment designed or intended for use in silencing the report of any firearm; and

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

PATTERN INSTRUCTIONS FOR KANSAS

Notes on Use

For authority see K.S.A. 21-4201(a) through (f). The instruction presents six alternative situations. The appropriate one should be used. Unlawful use of weapons under any of these circumstances is a class B misdemeanor. It should be noted that under (1)(b), an ordinary pocket knife with no blade more than four (4) inches in length shall not be construed to be a dangerous knife, or a dangerous or deadly weapon or instrument.

It should be noted that under the 1981 amendment to the statute, possession of a shotgun with a barrel less than 18 inches in length is now a felony. See PIK 2d 64.01, Unlawful Use of Weapons—Felony.

Comment

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

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

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

In *State v. Hargis*, 5 Kan. App.2d 608, 609, 611, 620 P.2d 1181 (1980), the court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

In *City of Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

State v. Hunt, 8 Kan. App.2d 162, 164, 651 P.2d 967 (1982), held that a scalpel is a dangerous weapon within the meaning of K.S.A. 21-4201(1)(b).

In *State v. Doile*, 7 Kan. App.2d 222, 648 P.2d 262 (1982), it was held that K.S.A. 21-4201(1)(d), prohibiting the carrying of firearms concealed on the person except by certain exempt persons or in specified exempt places, is a valid exercise of the police power and is not unconstitutional as overbroad, oppressive, or unreasonable.

PATTERN INSTRUCTIONS FOR KANSAS

The Supreme Court has consistently emphasized that the possession of a firearm proscribed by K.S.A. 21-4204 is not the innocent handling of the weapon but a willful or knowing possession of a firearm with the intent to control the use and management thereof. *State v. Farris*, 207 Kan. 785, 486 P.2d 1404 (1971); *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 (1972); *State v. Atkinson*, 215 Kan. 139, 523 P.2d 737 (1974); and *State v. Neal*, 215 Kan. 737, 529 P.2d 114 (1974).

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

State v. Birch, 221 Kan. 122, 558 P.2d 119 (1976), held that the failure to define possession was not reversible error since an instruction was given requiring the state to prove that the defendant "did willfully possess a firearm having a barrel less than 12 inches in length" and further instructing that "willfully means conduct that is purposeful and intentional and not accidental." In holding that this instruction was not clearly erroneous, the court observed that no objection had been lodged and no "innocent handling" of the weapon theory was presented by the defense.

In *State v. Jones*, 229 Kan. 618, 629 P.2d 181 (1981), the court held that possession and use of a firearm in self-defense was not, in itself, a defense to the charge of unlawful possession of a firearm under K.S.A. 21-4204.

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

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

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

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

In *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980), the court held that this section could not be used as the collateral felony for felony murder. The court reasoned that unlawful possession of a firearm, viewed in the abstract, is not an inherently dangerous felony as contemplated by the felony-murder doctrine. This case overrules *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976), and *State v. Guebara*, 220 Kan. 520, 553 P.2d 296 (1976).

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

PATTERN INSTRUCTIONS FOR KANSAS

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

In *State v. Chiles*, 226 Kan. 140, 142, 143, 595 P.2d 1130 (1979), the court held the classifications hereunder do not invidiously discriminate between felons and misdemeanants. The distinction between lengths of barrels of firearms was held to be reasonable.

In *State v. Boster*, 4 Kan. App.2d 355, 359, 361, 606 P.2d 1035 (1980), the court held an operable automatic pistol is a firearm, even though unloaded.

See *State v. Pelyer*, 230 Kan. 780, 640 P.2d 1261 (1982), for the definition of "firearm" under K.S.A. 21-4618, the Mandatory Sentencing Act.

In *State v. Carton*, 8 Kan. App.2d 142, 651 P.2d 27 (1982), in an appeal from a conviction for unlawful possession of a firearm within five years of release from imprisonment for a felony, it was held the five-year period commences to run from the latest date an accused is released from prison irrespective of the fact the accused had previously been paroled and that parole revoked.

PATTERN INSTRUCTIONS FOR KANSAS

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

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

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

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

K.S.A. 1979 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the court followed the obscenity standards of *Miller v. California*. Ferber held that the States are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

PATTERN INSTRUCTIONS FOR KANSAS

65.02 PROMOTING OBSCENITY TO A MINOR

The defendant is charged with the crime of promoting obscenity to a minor. The defendant pleads not guilty.

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

1. That the defendant knowingly and recklessly (allege any of the four violations listed in PIK 2d 65.01, Promoting Obscenity);
2. That _____ (the recipient of the obscene material) (a member of the audience of such obscene performance) was a minor child under the age of 18 years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

Comment

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

PIK 2d 65.02 contains the basic elements of the offense of promoting obscenity to a minor which are essentially the same under both the old statute and the statute enacted in 1976. With the exception of a minor change in a word in section 4 of 21-4301a, the statute was not changed except to modify the definition of the word "obscene."

K.S.A. 1977 Supp. 21-4301 was upheld as constitutional in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). In construing the statute as constitutional, the Court agreed with the appellant that the language "or other similar [justification]" found in subsection (3) was vague and indefinite but found that the phrase was mere surplusage and could be stricken from the statute to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

PATTERN INSTRUCTIONS FOR KANSAS

A violation of K.S.A. 65-4127a is a class C felony; upon conviction for a second offense, such person shall be guilty of a class B felony; and upon conviction for a third or subsequent offense, such person shall be guilty of a class A felony, punishable by life imprisonment.

It should be noted that K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation either of federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas. This statute and the preceding one are both silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction. A Kansas conviction after a conviction in another jurisdiction would not seem to be a conviction for a second offense because K.S.A. 65-4127 relates to convictions under the Kansas Uniform Controlled Substances Act.

Comment

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

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

The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101[e]), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See for example, K.S.A. 1983 Supp. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 1983 Supp. 65-4123, and K.S.A. 65-4138.

The committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense instruction, together with appropriate comment relative to a similar procedural setting, see PIK 2d 64.04, Unlawful Use of Weapons—Affirmative Defense.

PATTERN INSTRUCTIONS FOR KANSAS

67.13-A NARCOTIC DRUGS—SALE DEFINED

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

Notes on Use

For authority, see *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974).

PATTERN INSTRUCTIONS FOR KANSAS

**67.14 POSSESSION OF CONTROLLED STIMULANTS,
DEPRESSANTS AND HALLUCINOGENIC DRUGS
WITH INTENT TO SELL**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant possessed a (stimulant) (depressant) (hallucinogenic drug) known as _____;
2. That the defendant did so with the intent to sell it; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 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. 1983 Supp. 65-4105(d) relative to the hallucinogenic drugs involved, with subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among others.

A violation of K.S.A. 1983 Supp. 65-4127b(b) is a class C felony.

Comment

Possession of a drug prohibited by K.S.A. 1983 Supp. 65-4127b(b) is a lesser included offense of possession with intent to sell and when the evidence warrants it, PIK 2d 67.16 should be given. The accused cannot be convicted of both possession and possession with intent to sell when the sale is of the possessed, controlled substance. K.S.A. 21-3107; *State v. Hagan*, 3 Kan. App.2d 558, 598 P.2d 550 (1979).

The committee notes that the only substance incorporated under K.S.A. 1983 Supp. 65-4127b(b) that is defined in the "definitions" section of the uniform act is "marihuana." See K.S.A. 65-4101(o), where marihuana is defined in terms of the plant *cannabis*.

K.S.A. 1983 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

PATTERN INSTRUCTIONS FOR KANSAS

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. 65-4101[e]) may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See for example, K.S.A. 1983 Supp. 65-4116, K.S.A. 65-4117, K.S.A. 65-4122, K.S.A. 1983 Supp. 65-4123, and K.S.A. 65-4138.

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

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

The committee believes that it would be neither practical nor worthwhile to attempt to draft pattern instructions covering the great many affirmative defenses that a defendant might possibly raise when being prosecuted under the Uniform Controlled Substances Act. For an example of an affirmative defense pattern, together with appropriate comment relative to a similar procedural setting, see PIK 2d 64.04, Unlawful Use of Weapons—Affirmative Defense.

PATTERN INSTRUCTIONS FOR KANSAS

**67.15 SELLING OR OFFERING TO SELL
CONTROLLED STIMULANTS, DEPRESSANTS,
AND HALLUCINOGENIC DRUGS**

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant (sold) (offered to sell) (a stimulant) (a depressant) (a hallucinogenic drug) known as _____;
2. That the defendant did so with the intention to sell; 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. 1983 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. 1983 Supp. 65-4105(d) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

A violation of K.S.A. 1983 Supp. 65-4127b(b) is a class C felony.

See Notes on Use to PIK 2d 67.13, Narcotic Drugs.

Comment

See the comment to PIK 2d, 67.14, Possession of Controlled Stimulants, Depressants, and Hallucinogenic Drugs with Intent to Sell.

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

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

Claim (2) has been changed to comply with *State v. Werner*, 8 Kan. App.2d 364, 657 P.2d 1136 (1983).

PATTERN INSTRUCTIONS FOR KANSAS

67.16 MANUFACTURE, POSSESSION, OR DISPENSATION OF CONTROLLED STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to a (stimulant) (depressant) (hallucinogenic drug) known as _____. The defendant pleads not guilty.

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

1. That the defendant (manufactured) (possessed) (had under his control) (prescribed) (administered) (delivered) (distributed) (compounded) (a stimulant) (a depressant) (a hallucinogenic drug) known as _____;
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 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. 1983 Supp. 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. 1983 Supp. 65-4127b(a) is a class A misdemeanor, "except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony." "Prior conviction of possession of narcotics is not an *element* of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and thus to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." Syl. ¶ 1, *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1975).

K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation of either federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas. Both this statute and K.S.A. 1983 Supp. 65-4127b(a) are silent as to the effect of a conviction in Kansas after a prior conviction in another jurisdiction. A Kansas conviction would appear not to be a conviction for a second offense because K.S.A. 65-4127a relates to convictions under the Kansas Uniform Controlled Substances Act.

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

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

Comment

As discussed in the comment to PIK 2d 67.01, Narcotic Drugs, K.S.A. 21-3204 provides that no criminal intent is necessary if the crime is a misdemeanor "and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described." Although the unauthorized manufacturing, possessing, controlling, prescribing, administering, delivering, distributing, dispensing, or compounding of a substance covered by K.S.A. 1983 Supp. 65-4127b(a) constitutes a class A misdemeanor for a first offense, the committee does not find that the statute defining the offense "clearly indicates a legislative purpose to impose absolute liability for the conduct described." The statute does provide that, upon conviction of a second or subsequent offense, a person shall be guilty of a class D felony. The committee does not believe the legislature intended that no criminal intent is necessary for a first conviction but that criminal intent is essential for a second or subsequent conviction. Any other view would mean that a first conviction would have to be established as a condition precedent to the formation of the element of criminal intent on a second prosecution. Nothing in the statute indicates such a position.

PATTERN INSTRUCTIONS FOR KANSAS

67.17 SIMULATED CONTROLLED SUBSTANCES AND DRUG PARAPHERNALIA—USE OR POSSESSION WITH INTENT TO USE

The defendant is charged with the crime of (using) (possession with intent to use) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant (used) (possessed with the intent to use) any (simulated controlled substance) (drug paraphernalia);
2. That the defendant did so intentionally; and
3. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 Supp. 65-4152. A violation of K.S.A. 1983 Supp. 65-4152 is a class A misdemeanor.

An instruction defining “drug paraphernalia” should be given. K.S.A. 1983 Supp. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 1983 Supp. 65-4150(c) as “drug paraphernalia” should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 1983 Supp. 65-4151. This instruction should include only those factors in K.S.A. 1983 Supp. 65-4151 supported by evidence.

An instruction defining “simulated controlled substance” should be given. K.S.A. 1983 Supp. 65-4150(e).

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 1983 Supp. 65-4150 through 65-4157) is in substantial conformity with the “Model Drug Paraphernalia Act” drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 1983 Supp. 65-4156.

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**67.18 POSSESSION OR MANUFACTURE OF
CONTROLLED SUBSTANCE OR DRUG
PARAPHERNALIA**

The defendant is charged with the crime of (delivering) (possession with intent to deliver) (manufacturing with the intent to deliver) (causing to be delivered within Kansas) any (simulated controlled substance) (drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant knowingly (delivered) (possessed with the intent to deliver) (manufactured with the intent to deliver) (caused to be delivered within Kansas)
 - (a) a simulated controlled substance; and
 - or
 - (b) drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance; and
2. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see 1983 Supp. 65-4153.

A violation of K.S.A. 1983 Supp. 65-4153 is a class A misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered within this state drug paraphernalia or a simulated controlled substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the drug paraphernalia or simulated controlled substance is delivered is guilty of a class E felony.

An instruction defining "drug paraphernalia" should be given. K.S.A. 1983 Supp. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 1983 Supp. 65-4150(c) as "drug paraphernalia" should be included in the instruction.

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An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 1983 Supp. 65-4151. This instruction should include only those factors in K.S.A. 1983 Supp. 65-4151 supported by evidence.

An instruction defining "simulated controlled substance" should be given. K.S.A. 1983 Supp. 65-4150(e).

When paragraph 1(b) is given, any inapplicable words should be stricken.

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 1983 Supp. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 1983 Supp. 65-4156.

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67.19 PROMOTION OF SIMULATED CONTROLLED SUBSTANCES OR DRUG PARAPHERNALIA

The defendant is charged with the crime of promotion to sell (a simulated controlled substance) (objects designed or intended for use as drug paraphernalia). The defendant pleads not guilty.

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

1. That the defendant placed or caused to be placed an advertisement in (name of the newspaper, magazine or other publication) (a handbill) distributed in Kansas, or received by mail in Kansas, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, was to promote the sale of
 - (a) a simulated controlled substance; and
 - or
 - (b) objects designed or intended for use as drug paraphernalia; and
2. That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 Supp. 65-4154. Violation of K.S.A. 1983 Supp. 65-4154 is a class A misdemeanor.

An instruction defining "drug paraphernalia" should be given. K.S.A. 1983 Supp. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 1983 Supp. 65-4150(c) as "drug paraphernalia" should be included in the instruction.

An instruction setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. K.S.A. 1983 Supp. 65-4151. This instruction should include only those factors in K.S.A. 1983 Supp. 65-4151 supported by the evidence.

An instruction defining "simulated controlled substance" should be given. K.S.A. 1983 Supp. 65-4150(e).

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 1983 Supp. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement

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Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

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67.20 REPRESENTATION THAT A NONCONTROLLED SUBSTANCE IS A CONTROLLED SUBSTANCE

The defendant is charged with the crime of knowingly delivering or causing to be delivered a noncontrolled substance under circumstances that it would appear to be (name the controlled substance). The defendant pleads not guilty.

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

1. That the defendant knowingly delivered or caused to be delivered in Kansas a substance which was not (name the controlled substance); and
2. (a) that the defendant made an express representation that the substance delivered was (name the controlled substance); and
or
(b) that the substance delivered was of such nature or appearance that the recipient would be able to distribute it as (name the controlled substance); and
or
(c) that the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1983 Supp. 65-4155. Violation of K.S.A. 1983 Supp. 65-4155 is a class A misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this state a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the delivery is made is guilty of a class E felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 1983 Supp. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113 and amendments thereto. K.S.A. 1983 Supp. 65-4150. The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 1983 Supp. 65-4155(b).

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Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 1983 Supp. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 1983 Supp. 65-4156.

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To constitute a lesser included offense, all elements necessary to prove the lesser offense must be present and be elements of the greater offense. Second degree murder is a lesser included offense under murder in the first degree. *State v. Carpenter*, 215 Kan. 573, 527 P.2d 1333 (1974).

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

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

K.S.A. 21-3107 was amended effective July 1, 1983 to provide that if the defendant objects to the giving of instructions on lesser included offenses, the defendant shall be considered to have waived objection to any error in the failure to give them, and the failure shall not be a basis for reversal of the case on appeal.

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68.10 LESSER INCLUDED OFFENSES—VERDICT FORMS

We, the jury, find defendant guilty of (. . . principal offense charged . . .).

Presiding Juror

We, the jury, find defendant guilty of (. . . lesser included offense . . .).

Presiding Juror

We, the jury, find defendant not guilty.

Presiding Juror

Notes on Use

The guilty verdict forms should be completed by specifying the main charge and the lesser included offense. The court should submit one verdict form of guilty of the main charge, guilty of each lesser included offense, and one form of verdict of not guilty in event the jury fails to find defendant guilty of either the principal charge or of a lesser included offense.

The Committee recommends that each verdict be submitted on a separate form.

Comment

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

PATTERN INSTRUCTIONS FOR KANSAS

2. That it was done while in the commission of the unlawful act of shooting a firearm within the city of Lawrence, Kansas, under circumstances that show a realization of the imminence of danger to the person of another and a reckless disregard or complete indifference and unconcern for the probable consequences of the conduct.
3. That this act occurred on or about the 5th day of July, 1982, in Douglas County, Kansas.

The act of shooting a firearm in the city of Lawrence, Kansas, is against the ordinances of such city and is unlawful.

(PIK 2d 56.06)

Instruction No. 7

As used in these instructions the following words and phrases are defined as indicated:

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

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

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

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

(PIK 2d 56.04)

Instruction No. 8

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

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

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able doubt as to the truth of any of the claims made by the State, you should find the defendant not guilty.
(PIK 2d 52.02)

Instruction No. 9

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 2d 54.01)

Instruction No. 10

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.
(PIK 2d 51.05)

Instruction No. 11

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.
(PIK 2d 51.06)

Instruction No. 12

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

Instruction No. 13

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

PATTERN INSTRUCTIONS FOR KANSAS

Instruction 4.	PIK 2d 54.05, Responsibility for Crimes of Another.
Instruction 5.	PIK 2d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
Instruction 6.	PIK 2d 54.01, Presumption of Intent.
Instruction 7.	PIK 2d 68.01, Concluding Instruction.
Verdict Forms.	PIK 2d 68.11, Verdict of Guilty and Finding of Value of Property. PIK 2d 68.03, Not Guilty Verdict.

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them.
(PIK 2d 51.02)

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.
(PIK 2d 51.05)

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.
(PIK 2d 51.06)

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.
(PIK 2d 52.09)

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Instruction No. 2

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

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

1. That Acme Department Store was the owner of the property;
2. That the defendant exerted unauthorized control over the property;
3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;
4. That the value of the property was one hundred fifty dollars or more; and
5. That this act occurred on or about the 5th day of July, 1982, in Sedgwick County, Kansas.

(PIK 2d 59.01)

Instruction No. 3

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in the amount of one hundred dollars or more.

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

(PIK 2d 59.70)

Instruction No. 4

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

(PIK 2d 54.05)

Instruction No. 5

The law places the burden upon the State to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must

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assume that the defendant is innocent unless you are convinced from all of the evidence in the case that he is guilty.

You should evaluate the evidence admitted in this case and determine whether the defendant is guilty or not guilty entirely in accordance with these instructions. The test you must use is this: If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty. 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.
(PIK 2d 52.02)

Instruction No. 6

Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 2d 54.01)

Instruction No. 7

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19____.
(PIK 2d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

One hundred dollars (\$100) or more

Less than one hundred dollars (\$100)

(Place an × in the appropriate square.)

Presiding Juror

(PIK 2d 68.11)

We, the jury find the defendant not guilty of

_____.

Presiding Juror

(PIK 2d 68.03)

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CHAPTER 70.00

SELECTED MISDEMEANORS

	PIK Number
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PATTERN INSTRUCTIONS FOR KANSAS

70.01 TRAFFIC OFFENSE—DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

The defendant is charged with the crime of operating a vehicle while under the influence of alcohol. The defendant pleads not guilty.

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

1. That the defendant drove a vehicle;
2. That the defendant while driving was under the influence of alcohol, or any drug, or a combination of alcohol and any drug;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, the phrase "under the influence of alcohol, or any drug, or a combination of alcohol and any drug" means that defendant's mental or physical function was impaired by the consumption of alcohol or any drug or a combination of alcohol and any drug to the extent that he was incapable of safely driving a vehicle.

Notes on Use

For authority, see K.S.A. 1983 Supp. 8-1567. If the evidence is limited to either alcohol or drug use, reference to the other substance should be deleted from the instruction.

Comment

As to what is a "vehicle" under similar statutes, see 66 A.L.R.2d 1146.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved, and when applicable the jury should be so instructed. K.S.A. 1983 Supp. 8-1567(b).

The word "operate" as used in K.S.A. 1983 Supp. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980).

The instruction has been modified as suggested in *State v. Reeves*, 233 Kan. 702, 704, 664 P.2d 862 (1983).

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