Pattern Instructions for Kansas—

CRIMINAL 2d

(Cite as PIK 2d)

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SUPPLEMENTAL FOREWORD

The preparation and publication of this 1984 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, the publication of PIK-Criminal 2d in 1982, and the 1983 supplement to that book have been of great assistance to the bench and bar of this state in the preparation of jury instructions in criminal cases.

This 1984 supplement covers statutes through the 1984 legislative session; Supreme Court decisions through Vol. 236, No. 2; and Court of Appeals decisions through Vol. 9, No. 7. 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
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PREFACE TO 1984 SUPPLEMENT

The 1984 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 1983 Supplement to PIK-Criminal 2d. The supplement contains several new and revised patterns 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 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 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
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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

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

In *State v. Williams*, 234 Kan. 233, 238, 670 P.2d 1348 (1983), the defendant claimed error in that the trial judge allowed the State to admit serology testimony of its experts who showed some disagreements. As part of the opinion that this was not an abuse of discretion by the trial judge, the burden of proof instruction as given was set out. That instruction expanded PIK 51.01 by including specific factors the jury might consider, those often mentioned in instructions that were common many years ago.

Although the instruction was neither approved nor disapproved, *Williams* could be considered as an approval of it simply because it was reproduced. We do not consider that to be so, and we adhere to the brevity of 51.01. If specific factors were appropriate for inclusion, it would seem they would be those not mentioned but related to the serology tests: methodology, quality control, condition of blood, etc. (State's contention, 234 Kan. at 237). All of which simply points out one of the negative aspects of attempts to expand PIK 51.01.

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

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).

While there is no need to repeat this complete instruction, the burden of proof needs to be mentioned again when the State relies upon, and the court instructs upon, a rebuttable statutory presumption that tends to show a defendant's guilt. It would seem sufficient that, in addition to the instruction which sets out the presumption, the trial judge add that this presumption is not conclusive and may be overcome by evidence introduced and it does not change the obligation of the State to prove the defendant is guilty. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 706 (1983) and *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

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

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.

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

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

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

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

For examples, see *State v. King*, 111 Kan. 140, 206 Pac. 883 (1922) (where the circumstances surrounding the deaths of three victims were very similar); *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973) (where the burglar followed a similar elaborate ritual in four separate burglaries); *State v. Johnson*, 210 Kan. 288, 502 P.2d 802 (1972) (where two prior homicides were accomplished in a manner almost identical to the offense charged); and *State v. Williams*, 234 Kan. 233, 670 P.2d 1348 (1983) (where 12 year old Idaho conviction held sufficiently similar.)

(8) *absence of mistake or accident.* Absence of mistake simply denotes an

absence of honest error; evidence of prior acts illustrates that the doing of the criminal act in question was intentional. *State v. Faulkner*, 220 Kan. at 156-157; Slough, 20 Kan. L. Rev. at 422.

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

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. at 686; *State v. Marquez*, 222 Kan. at 447-448. The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. Reversal may also be required where no limiting instruction is given, even though not requested by the defendant. *State v. Roth*, 200 Kan. 677, 680, 438 P.2d 58 (1968). When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984).

If evidence of another crime is admissible, independent of K.S.A. 60-455, no limiting instruction is appropriate. See section III.

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

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

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

probative value of the evidence of the former offense. Then such evidence should not be admitted. *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981).

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

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

52.14 EXPERT WITNESS

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

Comment

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

52.15 IMPEACHMENT

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

Comment

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

See PIK 2d 2.30, Impeachment.

54.10 INSANITY—MENTAL ILLNESS OR DEFECT

The defendant has denied criminal responsibility because of lack of mental capacity at the time the offense was committed. In law, this is called insanity. The defendant is not criminally responsible for his acts if because of mental illness or defect, he lacked the capacity either

(a) to understand the nature of his acts, or

(b) to understand that what he was doing was prohibited by law.

If you have a reasonable doubt as to his capacity to understand either, then you should find the defendant not guilty because of insanity.

If you have no reasonable doubt that the defendant had the mental capacity at the time of the alleged offense to understand both what he was doing and that it was prohibited by law, then you should find the defendant was not insane.

Notes on Use

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

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

Comment

For authority see *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960) in which the M'Naghten rule is discussed and applied. In *State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), the court reaffirmed the M'Naghten test, saying ". . . no other test better protects society as well as serves its need." (p. 211.)

A proposed change to the American Law Institute test was not adopted in the Kansas Criminal Code. See KANSAS JUDICIAL COUNCIL BULLETIN, April, 1968, page 35. For a most informative analysis of the American Law Institute test see the dissent in *Smith*, supra, (pp. 211-219).

In *State v. Boan*, 235 Kan. 800, 686 P.2d 160 (1984) the court emphasized that "wrong" under the "right or wrong" half of the M'Naghten test means prohibited by law and not morally or socially wrong.

Even an adjudged lunatic is criminally responsible for acts committed during a lucid interval. *Fisher v. Fraser*, 171 Kan. 472, 233 P.2d 1066 (1951). The question of defendant's insanity at the time of the alleged crime is one of fact to be tried by the jury. *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960), and *State v. Coltharp*, 199 Kan. 598, 433 P.2d 418 (1967).

Nonexpert witnesses who are shown to have had special opportunities to

observe the defendant may give opinion evidence as to sanity. *State v. Shultz*, 225 Kan. 135, 587 P.2d 901 (1978).

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

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

CHAPTER 56.00

CRIMES AGAINST PERSONS

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

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

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

56.07-A AGGRAVATED VEHICULAR HOMICIDE

The defendant is charged with the crime of aggravated vehicular homicide.

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

1. That defendant unintentionally killed _____ by the operation of an (automobile) (airplane) (motorboat) (other motor vehicle);
2. That the unintentional killing took place while defendant (engaged in reckless driving) (drove under the influence of alcohol or drugs) (attempted to elude a police officer);
3. That the death occurred as a result of and within one year of the incident; and
4. That defendant's act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3405a.

The three parenthetical phrases in element two can apply to either the state statute or city ordinance.

This instruction must be accompanied by a definition of the proscribed act. For a definition of "reckless driving" see PIK 2d 70.04, Reckless Driving. For a definition of "driving under the influence of alcohol or drugs" see PIK 2d 70.01, Traffic Offense—Driving Under the Influence of Alcohol or Drugs. For a definition of "attempt to elude a police officer" see K.S.A. 8-1568 and *State v. Russell*, 229 Kan. 124, 126, 622 P.2d 658 (1981).

Aggravated vehicular homicide is a class E felony.

Comment

The statute uses the phrase "without malice" but that language is omitted because if the killing is unintentional there could be no malice.

56.08 ASSISTING SUICIDE

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

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

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

Notes on Use

For authority, see K.S.A. 21-3406.
Assisting suicide is a class E Felony.

Comment

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

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

56.22 PERMITTING DANGEROUS ANIMAL TO BE AT LARGE

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

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

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

Notes on Use

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

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

56.23 TERRORISTIC THREAT

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

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

1. **That the defendant threatened to commit violence;**
2. **That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]);**

   or

   That such threat was communicated in wanton disregard of the risk of causing (terror to _____) (the evacuation of a [building] [place of assembly] [facility of transportation]); and
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

[Under this instruction, a statement that defendant has already committed violence is the same as a threat to commit violence.]

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3419.

Terroristic threat is a class E felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

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

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

The 1984 amendment also added a proscription against threatening to adulterate or contaminate food or drink. Since this new crime requires no specific intent, a separate instruction was deemed necessary. See PIK 2d 56.23-A.

56.23-A TERRORISTIC THREAT—ADULTERATION OR CONTAMINATION OF FOOD OR DRINK

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

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

1. **That the defendant threatened to adulterate or contaminate a (food) (beverage) (public water supply);**
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

[Under this instruction, a statement that defendant has already committed the act described in claim 1 is the same as a threat to commit the act.]

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3419.

Terroristic threat is a class E felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-2319, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

The 1984 legislature added the crime defined by this instruction to former K.S.A. 21-3419. Note that unlike a threat to commit violence, this crime requires no specific intent.

The committee has grave reservations about the validity of the amendment because of the lack of any required intent to affect other persons, and also because of the potential ambiguity in the term "adulterate."

56.24 KIDNAPPING

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

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

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

Notes on Use

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

Comment

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

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

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

56.25 AGGRAVATED KIDNAPPING

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

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

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

Notes on Use

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

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

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

If there is a fact issue as to whether bodily harm is sustained by the victim or as to the extent of the harm, the above instruction should include the definition of "bodily harm", otherwise failure to define it does not constitute error. State v. Royal, 234 Kan. 218, 222, 670 P.2d 1337 (1983).

Comment

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

56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY—OTHER CIRCUMSTANCES

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

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

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

   or

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

   or

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

   or

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

   or

   That the defendant detained or concealed the child in a place unknown to _____, either inside or outside this state.
6. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Comment

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

56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON

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

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

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

Notes on Use

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

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

Comment

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

56.31 AGGRAVATED ROBBERY

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

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

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

Notes on Use

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

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

Comment

See comment in PIK 2d 56.30, Robbery.

In *State v. Mitchell*, 234 Kan. 185, 190, 672 P.2d 1 (1983) the court approved the use of "deadly weapon" as being synonymous with the statutory use of "dangerous weapon".

56.32 BLACKMAIL

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

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

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

Notes on Use

For authority, see K.S.A. 21-3428.
Blackmail is a class E felony.

CHAPTER 57.00

SEX OFFENSES

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 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, and PIK 54.01-A, General Criminal Intent, should be given.

Comment

The pattern has been amended by deleting the word "intentionally" from claim number two. In *State v. Cantrell*, 234 Kan. 426,434, 673 P.2d 1147 (1983) the Kansas Supreme Court held that the crime of rape under K.S.A. 21-3502 did not require a specific intent to commit rape. Language to the contrary in *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974) and *State v. Carr*, 230 Kan. 322, 634 P.2d 1104 (1981) was overruled.

The Kansas Legislature made three key amendments to the crime of rape in 1983. Sex discrimination, spousal immunity, and the requirement of resistence 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 resistence 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. Schriner*, 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 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). However, the holding in *Marks* was reaffirmed by a narrow majority in *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984). In *McQuillen* the dissent stressed that the rule in *Marks* had caused confusion and was an indirect circumvention of the rape shield statute. In stating that *Marks* should be overruled the dissent quoted with approval decisions from other states that held that the existence of the rape trauma syndrome was irrelevant and inadmissible. See State v. Saldana, 324 N. W. 2d 227 (Minn. 1982); State v. McGee, 324 N. W. 2d 232 (Minn. 1982); State v. Taylor, 663 S. W. 2d 235 (Mo. 1984); and People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

Unless the defense is consent and the expert presenting the testimony has special training in psychiatry evidence of the rape trauma syndrome is inadmissable. Even if the evidence is admissable the expert is not permitted to express an opinion as to whether the victim was raped. See *State v. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984).

See PIK 57.05, Indecent Liberty With A Child.

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).

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.

57.05-A INDECENT LIBERTIES WITH A CHILD—SODOMY

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 (oral) (anal) sexual relations with _____, a child;
   or
   That the defendant penetrated the anal opening of _____, a child, with (_____, a body part) (_____, an object);
2. That there was actual penetration;
3. That _____ was then a child under the age of 16 years and not the married to the defendant; and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

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

[Indecent liberties with a minor 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. 1984 Supp. 21-3503(b). Indecent liberties with a child is a class C 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.

57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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 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 married to the defendant;
3. That the defendant was the [guardian] [(proprietor) (employee) of a foster home, orphanage, or other public or private institution for the care and custody of minor children,] to whose charge the child had been committed or entrusted by a court, probation officer, department of social and rehabilitation services or other agency acting under the color of law; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1984 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 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 crime of aggravated indecent liberties with a child as defined in K.S.A. 1984 Supp. 21-3504 was amended in 1984 by deleting the category of defendants who were parents, adoptive parents, stepparents, or grandparents of the child. At the same time the crime of incest as defined in K.S.A. 1984 Supp. 21-3602 was expanded to include additional biological relatives of the child and the crime of aggravated incest as defined in K.S.A. 1984 Supp. 21-3603 was substantially enlarged by including certain biological, step or adoptive relatives of the child.

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).

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 18 or more years of age, known to the defendant to be biologically related to the defendant as (parent) (child) (grandparent of any degree) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece) and

   or

   That the defendant engaged in (sexual intercourse) (sodomy) (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) with _____, a person 18 or more years of age, known to the defendant to be related to the defendant as (parent) (child) (grandparent of any degree) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece) and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

As used in this instruction (sexual intercourse) (sodomy) (rape) (indecent liberties with a child) (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. 1984 Supp. 21-3602. Incest is a class E felony.

Reference should be made to PIK 57.02 for definition of sexual intercourse, or PIK 57.18 for a definition of sodomy or any unlawful sexual act.

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 married _____ a person who was known to the defendant to be related to the defendant as [(biological) (adopted) (step)] (child) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece); and

   or

   That the defendant engaged in (sexual intercourse) (sodomy) (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) with _____, who defendant knew was related to defendant as [(biological) (adopted) (step)] (child) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece); and

   or

   The defendant engaged in lewd fondling or touching of the person of either _____ or the defendant, done or submitted to with the intent to arouse or to satisfy the sexual desires of either _____ or the defendant or both; and that the defendant knew that _____ was related to defendant as [(biological) (adopted) (step)] (child) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece); and
2. That _____ was 18 or more years of age; and
3. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

As used in this instruction (sexual intercourse) (sodomy) (rape) (indecent liberties with a child) (aggravated indecent liberties with a child) (criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) (lewd fondling or touching) means: _____.

Notes on Use

For authority see K.S.A. 1984 Supp. 21-3603. Aggravated incest is a class D felony.

Reference should be made to PIK 57.02, for a definition of sexual intercourse or PIK 57.18 for a definition of sodomy or any unlawful sexual act. Lewd fondling or touching has been defined as: "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 a specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 573 P.2d 580. Also refer to PIK 57.05, Notes on Use.

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.

58.11 ABUSE OF A CHILD

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

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

1. **That the defendant willfully (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) a child under the age of eighteen years; and**
2. **That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3609. Abuse of a child is a class D felony.

Comment

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App.2d 726, 602 P.2d 99 (1979).

58.12 FURNISHING INTOXICANTS TO A MINOR

The defendant is charged with the crime of furnishing intoxicants to a minor. The defendant pleads not guilty.

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

1. **That the defendant directly or indirectly (sold to) (bought for) (gave or furnished to) a person under the age of twenty-one years any intoxicating liquor; and**
2. **That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3610. Furnishing intoxicants to a minor is a class B misdemeanor.

Comment

K.S.A. 41-102 may be referred to for a definition of intoxicating liquor. There is a related misdemeanor created by K.S.A. 41-2704, which relates to permitting a person under the age of eighteen years to buy or drink any cereal malt beverage at any place of business licensed to sell such beverages.

Notes on Use

For authority see K.S.A. 1982 Supp. 21-3611. Aggravated juvenile delinquency is a class E felony. In case the prosecution is under K.S.A. 21-3611(3), the judge will need to instruct on the elements of aggravated assault or aggravated battery. See PIK 2d 56.14, Aggravated Assault or PIK 2d 56.18, Aggravated Battery.

Comment

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

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

A defendant may be charged under K.S.A. 21-3611 because of a second escape, although he departs from a hospital while in custody rather than from an institution or a facility. *State v. Pritchett*, 222 Kan. 719, 567 P.2d 886 (1977).

58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION

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

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

1. **That _____ was a child under 18 years of age;**
2. **That the defendant intentionally (caused) (encouraged) _____**
   (a) **to become or remain a [(delinquent) (miscreant) (wayward) (deprived) child] [traffic offender] [truant] [child in need of care] [juvenile offender];**
   or
   (b) **to commit an act which if committed by an adult would be a (felony) (misdemeanor).**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 1984 Supp. 21-3612. Contributing to a child's misconduct or deprivation is a class A misdemeanor, except that if the child is caused or encouraged to commit an act which, if committed by an adult, would be a felony, the offense is a class E felony.

The juvenile code as it existed in Article 8, Chapter 38, was substantially revised in 1982. Article 15, Chapter 38, K.S.A. 1984 Supp. is cited as the Kansas code for the Care of Children and Article 16, Chapter 38, K.S.A. 1984 Supp. is to be known as the Kansas Juvenile Offenders Code. The conduct caused or encouraged by the defendant in a prosecution pursuant to K.S.A. 21-3612(1)(a) is described by reference to definitions appearing in all three of these codes.

For a definition of a Child in Need of Care, see K.S.A. 1984 Supp. 38-1502.

For a definition of Juvenile Offender, see K.S.A. 1984 Supp. 38-1602.

Comment

Although repealed January 1, 1983, K.S.A. 38-802 should still be referred to for a definition of delinquent, miscreant, wayward, deprived child, traffic offender or truant. K.S.A. 1983 Supp. 21-3612 (1)(a) was amended in the 1984 Session Laws to read: "To become *or remain* a delinquent, miscreant, wayward or deprived child or a traffic offender, truant, child in need of care or juvenile offender, as defined by the Kansas Juvenile Code, The Kansas Code for Care of Children or the Kansas Juvenile Offender's Code; or . . ."

The 1984 amendment apparently results from the decision in *State v. Chance*, 4 Kan. App. 2d 283, 287, 604 P.2d 756, wherein the Court referring to K.S.A. 1978 Supp. 21-3612, stated "the clear language of this statute requires that an accused encourage a child 'to become' wayward, not 'to become or to remain' so. The statute does not make it a criminal act to provide aid and assistance to a child under 18 years of age even though that child is a runaway from home and perhaps is a wayward child."

59.01 THEFT

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

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

1. That _____ was the owner of the property;
2. That the defendant (obtained) (exerted) unauthorized control over the property,

   or

   That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant,

   or

   That the defendant obtained by threat control over property,

   or

   That the defendant obtained control over property knowing the property to have been stolen by another;
3. That the defendant intended to deprive _____ permanently of the use or benefit of the property;
4. That the value of the property was (one hundred and fifty dollars or more) (less than one hundred and fifty dollars); and
5. That this act occurred on or about the ____ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1984 Supp. 21-3701. Theft of property of the value of one hundred and fifty dollars or more is a class E felony. Theft of property of the value of less than one hundred and fifty dollars is a class A misdemeanor except that theft of property of a value of less than one hundred and fifty dollars is a class E felony if committed by a person who has, within five years immediately preceeding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution it is necessary to provide the jury with the alternative of finding misdemeanor theft if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

For a definition of "deprive permanently" see Chapter 53, Definitions and Explanations of Terms.

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

In situations where there is a question in the mind of the prosecutor as to what the evidence will disclose at trial, the correct procedure in a prosecution for theft under K.S.A. 21-3701 is to charge in the alternative under those subsections of the consolidated theft statute which may possibly be established by the evidence. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

Comment

PIK 2d 59.01 is approved in *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976).

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

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

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

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

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

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

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701(b) violation are *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980) where concealment of merchandise in a toy box was deceptive because the cashier was unaware of the concealed merchandise; and *State v. Hamilton*, 6 Kan. App.2d 646, 631 P.2d 1255 (1981) where a check given after the receipt of merchandise as a false promise to pay cannot be a basis for theft by deception.

59.03 THEFT OF SERVICES

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

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

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

Notes on Use

For authority see K.S.A. 1984 Supp. 21-3704. Theft of services of the value of one hundred and fifty dollars or more is a class E felony. Theft of services of the value of less than one and fifty hundred dollars is a class A misdemeaor.

In the prosecution of felony theft of services it is necessary to provide the jury with the alternative of finding misdemeanor theft of services if value might be in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant.

State v. Saylor, 228 Kan. 498, 618 P.2d 1166 (1980) and *State v. Hamilton*, 6 Kan. App.2d 646, 631 P.2d 1255 (1981) are additional cases relating to the requirements of "deception" and "reliance" in theft cases.

59.04 UNLAWFUL DEPRIVATION OF PROPERTY

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

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

1. That _____ was the owner of the property in question;
2. That the defendant (obtained) (exerted) unauthorized control over the property without the owner's consent;
3. That the defendant intended to temporarily deprive the owner of the use or benefit of the property; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3705. Unlawful deprivation of property is a class A misdemeanor.

For definition of "temporarily deprive" see Chapter 53, Definitions and Explanations of Terms.

Comment

In 1972, K.S.A. 21-3705 was amended to permit the removal in a lawful manner of personal property unlawfully placed or left upon real property.

59.05 FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT

The defendant is charged with the crime of fraudulently obtaining execution of a document. The defendant pleads not guilty.

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

1. That the defendant intentionally caused _____ to execute a _____;
2. That the defendant did so by deception or threat;
3. That when _____ signed the _____ (he disposed of his interest in _____) (he became indebted to pay money); and
4. That this act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3706. Fraudulently obtaining execution of a document is a class A misdemeanor.

59.06 WORTHLESS CHECK

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

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

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;

   or

   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;
3. That the defendant intended to defraud _____;
4. That the amount of the (check) (order) (draft) was (one hundred and fifty dollars or more) (less than one hundred fifty dollars); and
5. That this act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 1984 Supp. 21-3707. Giving a worthless check in the amount of one hundred and fifty dollars or more is a class E felony. Giving a worthless check of less than one hundred and fifty dollars is a class A misdemeanor.

Defenses to the charge of a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(2), then PIK 2d 59.06-A should be given and modified accordingly.

Comment

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

59.07 WORTHLESS CHECK—DEFENSE

It is a defense to the charge of giving a worthless check, draft, or order (if it was postdated) (if the person receiving the check, draft, or order knew when he accepted it that there were not sufficient funds on deposit to cover it upon presentation.)

Notes on Use

For statutory authority, see K.S.A. 21-3707(3). If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

59.08 HABITUALLY GIVING A WORTHLESS CHECK WITHIN TWO YEARS

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

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

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;
   or
   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for the payment in full of the (check) (order) (draft) on its presentation;
3. That the defendant had the intent to defraud _____;
4. That the check was drawn for less than one hundred and fifty dollars;
5. That the defendant had been convicted twice between the _____ day of _____, 19____, and the _____ day of _____, 19____ for giving a worthless check; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1984 Supp. 21-3708(a).

Habitually giving a worthless check is a class E felony.

Defenses to the charge of giving a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

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

Comment

State v. Loudermilk, 221 Kan. 157, 557 P.2d 1229 (1976) recognizes that prior convictions are a necessary element of the offense.

59.09 HABITUALLY GIVING WORTHLESS CHECKS—ON SAME DAY

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

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

1. That two or more (checks) (orders) (drafts) were (made) (drawn) (issued) (delivered) on the _____ day of _____, by the defendant to _____;

   or

   That two or more (checks) (orders) (drafts) were caused or directed to be (made) (drawn) (issued) (delivered) on the _____ day of _____, by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) at the time of the (making) (drawing) (issuing) (delivering) of the (checks) (orders) (drafts) for the payment in full of the (checks) (orders) (drafts) on their presentation;
3. That the defendant had the intent to defraud _____;
4. That each of the checks was drawn for less than one hundred and fifty dollars, but together they totalled one hundred and fifty dollars or more; and
5. That these acts occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1984 Supp. 21-3708(b).

Habitually giving worthless checks is a class E felony.

Defenses to the charge of giving a worthless check are set forth in PIK 2d 59.07, Worthless Check—Defense.

59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK

The defendant is charged with the crime of unlawful prosecution for worthless check.

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

1. That the defendant (filed a complaint before a judge upon which _____ was charged with the crime of giving a worthless check);
   or
   (gave information upon which _____ was charged with the crime of giving a worthless check);
2. That the defendant knew when he accepted it (that the [check] [draft] [order] was dated later than the date on which it was actually accepted);
   or
   (that _____ did not have [any] [sufficient] funds on deposit with the _____ to make the [check] [draft] [order] good);
   and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3709. Causing an unlawful prosecution is a class A misdemeanor and any person convicted of the violation of this statute shall pay the taxable cost of the prosecution.

Comment

See K.S.A. 21-3707.

59.11 FORGERY-MAKING OR ISSUING A FORGED INSTRUMENT

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

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

1. That the defendant knowingly made, altered or endorsed a _____ so that it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);

   or

   That the defendant issued or delivered a _____ which he knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (with different provisions) (by the authority of _____, who did not give such authority);
2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1984 Supp. 21-3710(a), (b). Forgery is a class E felony. This section should not be used for K.S.A. 21-3710(c).

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

Comment

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a) and (b) were held to be constitutional against a claim of being vague and indefinite.

59.12 FORGERY—POSSESSING A FORGED INSTRUMENT

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

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

1. That the defendant possessed a _____ which he knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);
2. That the defendant intended to issue or deliver the _____;
3. That the defendant did so with the intent to defraud; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 1984 Supp. 21-3710(c). Forgery is a class E FELONY. This section should not be used for K.S.A. 1984 Supp. 21-3710(a), (b).

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

59.13 MAKING A FALSE WRITING

The defendant is charged with the crime of making a false writing. The defendant pleads not guilty.

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

1. That the defendant (made) (caused to be made) a false _____;
2. That the defendant knew that such _____ (falsely stated or represented some material matter) (was not what it purported to be);
3. That the defendant intended to (defraud) (induce official action) based upon such _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3711. Making a false writing is a class D felony.

Comment

See Judicial Council notes, K.S.A. 21-3710.

59.22 AGGRAVATED ARSON

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

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosive);
2. That the defendant did so without the consent of _____;
3. That at said time there was a human being in the (building) (property); and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

Comment

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

A dead person is a "human being" within the meaning of K.S.A. 21-3719. *State v. Case*, 228 Kan. 733, 620 P.2d 821 (1980).

59.23 CRIMINAL DAMAGE TO PROPERTY—WITHOUT CONSENT

The defendant is charged with the crime of criminal damage to property. The defendant pleads not guilty.

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

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

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3720(1)(a). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred and fifty dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred and fifty dollars or is of the value of one hundred and fifty dollars or more and is damaged to the extent of less than one hundred and fifty dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred and fifty dollars. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

See PIK 2d Civil—Chapter 9 for instructions as to property damage and value.

Comment

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

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than fifty dollars, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemake*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(1)(a) is a lesser included offense of arson. Where the cause of damage is in issue a charge in the alternative may be appropriate. Cases supporting this view are *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

59.24 CRIMINAL DAMAGE TO PROPERTY—WITH INTENT TO DEFRAUD AN INSURER OR LIENHOLDER

The defendant is charged with the crime of criminal damage to property. The defendant pleads not guilty.

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

1. **That the defendant intentionally (damaged) (defaced) _____ by means other than by fire or explosive;**
2. **That _____ was an insurer of the property;**
   or
   That _____ had an interest in the property because he had a lien thereon;
3. **That the defendant did so with the intent to (injure) (defraud) _____;**
4. **That the property was damaged to the extent of (one hundred and fifty dollars or more) (less than one hundred and fifty dollars);**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3720(1)(b). Criminal damage to property is a class E felony if the property is damaged to the extent of one hundred and fifty dollars or more. Criminal damage to property is a class A misdemeanor if the property damaged by such acts is of the value of less than one hundred and fifty dollars or is of the value of one hundred and fifty dollars or more and is damaged to the extent of less than one hundred and fifty dollars.

In a prosecution of felony criminal damage to property where the extent of damage is in issue, it is necessary to provide the jury with the alternative of finding misdemeanor criminal damage to property by a finding that either the value of the property or the damage to the property was less than one hundred and fifty dollars. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

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

See PIK 2d Civil—Chapter 9 for instructions as to property damage and value.

59.33-B UNLAWFUL HUNTING—DEFENSE

It is a defense to the charge of unlawful hunting that the defendant went upon the land of another while following or pursuing a wounded (bird) (animal).

Notes on Use

For authority, see K.S.A. 21-3728 or K.S.A. 32-142a. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

The defense of pursuit of a wounded animal or bird is permitted in situations involving unlawful hunting, as well as unlawful hunting on posted land.

59.34 UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER

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

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

1. **That the defendant used a _____ financial card;**
2. **That the cardholder _____, had not consented to the use of the financial card by the defendant;**
3. **That the defendant used the financial card for the purpose of obtaining _____;**
4. **That the defendant did so with the intent to defraud;**
5. **That the financial card was unlawfully used in an amount of (one hundred and fifty dollars or more) (less than one hundred and fifty dollars) between _____, 19____, and _____, 19____;**
6. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3729(1)(a). Unlawful use of a financial card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of one hundred and fifty dollars or more, otherwise the crime is a class A misdemeanor.

This instruction should not be used for K.S.A. 1984 Supp. 21-3729(1)(b) or (c).

In a prosecution for the unlawful use of a financial card of another it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card of another if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 21-3729(1)(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

59.35 UNLAWFUL USE OF FINANCIAL CARD—CANCELLED

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

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

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

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3729(1)(b). Unlawful use of a financial card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defined by K.S.A. 21-3745, obtained within any seven-day period are of the value of one hundred and fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 1984 Supp. 21-3729(1)(a) or (c).

In a prosecution for the unlawful use of a financial card which had been revoked or cancelled, it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which had been revoked or cancelled if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

Using the number taken off a stolen financial card constitutes unlawful use of a financial card as prohibited by K.S.A. 21-3729(1)(a). PIK 59.34 cited. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

59.36 UNLAWFUL USE OF FINANCIAL CARD—ALTERED OR NONEXISTENT

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

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

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

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3729(1)(c). Unlawful use of a credit card is a class E felony if the money, goods, property, services or communication services, other than telecommunication services as defind by K.S.A. 21-3745, obtained within any seven-day period are of the value of one hundred and fifty dollars or more, otherwise the crime is a class A misdemeanor.

This section should not be used for K.S.A. 1984 Supp. 21-3729(1)(a) or (b).

In a prosecution for the unlawful use of a financial card which is altered or is nonexistent it is necessary to provide the jury with the alternative of finding misdemeanor unlawful use of a financial card which is altered or is nonexistent if value is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in issue should be used and modified accordingly.

60.08 OBSTRUCTING LEGAL PROCESS

The defendant is charged with the crime of obstructing legal process. The defendant pleads not guilty.

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

1. **That _____ was authorized by law to serve _____;**
2. **That the defendant knowingly and willfully (obstructed) (resisted) (opposed) _____ in the (service) (execution) of the _____;**
3. **That at the time the defendant knew or should have known that _____ was authorized by law to _____; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

In the second blank of 1 and 2, the court should insert the name of the paper or instrument involved in the particular case such as writ, warrant, or summons.

In the second blank of 3, the court should insert the particular act the person was authorized by law to perform.

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

Obstructing legal process in a felony case is a class E felony.

Obstructing legal process in a misdemeanor or a civil case is a class A misdemeanor.

Comment

In *State v. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

60.09 OBSTRUCTING OFFICIAL DUTY

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

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

1. **That _____ was authorized by law to _____;**
2. **That the defendant knowingly and willfully (obstructed) (resisted) (opposed) _____ in the _____ which was the official duty of _____;**
3. **That the act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty;**
4. **That at the time the defendant knew or should have known that _____ was a law enforcement officer; and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

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

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

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

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

Comment

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

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), it is held that K.S.A. 21-3808 encompasses illegal obstruction by any means including oral statements.

63.10 GIVING A FALSE ALARM

The defendant is charged with the crime of giving a false alarm. The defendant pleads not guilty.

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

1. That the defendant (initiated) or (circulated) a report or warning of an impending (bombing) (specify other crime or catastrophe) under such circumstances that it was likely to cause (evacuation of a building, place of assembly or facility of public transportation) (public inconvenience or alarm);
2. That the defendant did so knowing that the report or warning was baseless; and

or

1. That the defendant transmitted in any manner to the fire department of any (city) (township) (other municipality) an alarm of fire;

or

That the defendant made a call in any manner for (police) (fire) (medical) (specify other emergency service from K.S.A. 12-5301) emergency service assistance.

2. That the defendant did so knowing that there was no reasonable ground to believe (a fire existed) (emergency service assistance was needed); 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. 1984 Supp. 21-4110. Giving a false alarm is a class A misdemeanor. See PIK 2nd 56.23, Terroristic Threat, which provides felony penalties for persons who threaten to commit violence with intent to terrorize or to cause evacuation of buildings or transportation facilities.

Comment

State v. Long, 234 Kan. 580, 675 P.2d 832 (1984) distinguishes a lesser included offense from a lesser degree of the same crime. The committee does not believe that giving a false alarm is either a lesser included offense or a lesser degree of the crime of terroristic threat.

63.11 CRIMINAL DESECRATION

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

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

(A) 1. That the defendant purposely desecrated a (public monument or structure) (any place of worship); and

or

(B) 1. That the defendant purposely and publicly desecrated the (national flag) (state flag) (_____, which is an object venerated by the public or a substantial segment of the public); and

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

As used in this instruction, "desecrate" means to deface, damage, pollute or otherwise physically mistreat in a way that will outrage the sensibilities of persons likely to observe or discover the action.

Notes on Use

For authority, see K.S.A. 21-4111. Criminal desecration is a class C misdemeanor. See also PIK 2d 59.28, Tampering with a Landmark. If the charge is based upon desecration of an object venerated by the public, specify the object in the appropriate blank.

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

65.01 PROMOTING OBSCENITY

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

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

1. That the defendant knowingly or recklessly (manufactured) (issued) (sold) (gave) (provided) (lent) (mailed) (delivered) (transmitted) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) obscene material; and

   or

   That the defendant knowingly or recklessly possessed obscene material with intent to (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) the same; and

   or

   That the defendant knowingly or recklessly (offered) (agreed) to (manufacture) (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) obscene material; and

   or

   That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which is obscene or which contributed to its obscenity; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4301. Promoting obscenity is a class A misdemeanor for the first and second offenses. For the third and subsequent offenses committed within two years after a previous conviction, this offense is a class E felony.

Comment

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

The statutory definition of obscenity as originally contained in K.S.A. 21-4301(2)(*a*)(1974) was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77

65.03 PROMOTING OBSCENITY—DEFINITIONS

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

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

"Material" means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or other manner.

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

"Prurient interest" means an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex.

Notes on Use

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

Comment

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

A jury may not understand the meaning of the term "prurient interest." The definition of prurient interest is adopted from *State v. Great American Theater*, 227 Kan. 633, 608 P.2d 951 (1980).

65.04 PROMOTING OBSCENITY—PRESUMPTION OF KNOWLEDGE AND RECKLESSNESS FROM PROMOTION

If you find that defendant promoted obscene materials by emphasizing their prurient or sexually provocative aspects, there is a presumption that the defendant did so knowingly or recklessly. This presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the required criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

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

In the statute the words "prurient appeal or sexually provocative aspects" are used. See *State v. Great American Theater*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word "prurient" is discussed.

indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the state of Kansas by an organization licensed by the state of Kansas to manage, operate or conduct games of bingo.

K.S.A. 21-4302(3) declares that the term "consideration" shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the state of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate, or conduct bingo games under the laws of the state of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

Comment

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program, does not involve valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 49-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization thus making the club eligible for a bingo license.

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

In *Games Management, Inc. v. Owens*, 233 Kan. 444, 662 P.2d 260 (1983), the court named three requirements for "gambling devices" in K.S.A. 21-4302(4) and held that the video games known as "Double-Up" and "Twenty-One" which gave only free replays as a prize were not gambling devices. The replays, as they could not be exchanged for money or property, were not considered something of value. The court did state that the games were games of chance and thus represented gambling devices if something of value were received as a reward for winning.

65.08 COMMERCIAL GAMBLING

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

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

1. That defendant intentionally (operated) (received all or part of the earnings of) a gambling place; and

   or

   That the defendant intentionally (received, recorded, or forwarded bets or offers to bet) (possessed facilities with intent to receive, record, or forward bets); and

   or

   That the defendant for gain intentionally became a custodian of any thing of value bet or offered to be bet; and

   or

   That the defendant intentionally (conducted a lottery) (possessed facilities with intent to conduct a lottery); and

   or

   That the defendant intentionally (set up for use) (collected the proceeds of) a gambling device; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-4304.

Commercial gambling is a class E felony. Appropriate definitions in PIK 2d 65.07, Gambling Definitions, should be given with this instruction.

65.10-A DEALING IN GAMBLING DEVICES—DEFENSE

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

Notes on Use

For authority see K.S.A. 21-4306. If this instruction is used PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

65.11 DEALING IN GAMBLING DEVICES—PRESUMPTION FROM POSSESSION

If you find that the defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, there is a presumption that the defendant had possession with the intent to transfer the same. The presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority see K.S.A. 21-4306 (2).

65.17 UNLAWFUL DISPOSITION OF ANIMALS

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

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

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

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

Notes on Use

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

65.18 UNLAWFUL CONDUCT OF DOG FIGHTING

The defendant is charged with the crime of unlawful conduct of dog fighting. The defendant pleads not guilty.

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

1. **That the defendant caused for (amusement) (gain), a dog to (fight with) (injure) another dog; and**
   or
   that the defendant knowingly permitted a dog to (fight with) (injure) another dog, for (amusement) (gain), on premises under the defendant's (ownership) (charge) (control); and
   or
   that the defendant (trained) (owned) (kept) (transported) (sold) any dog (for the purpose) (with the intent) of having it fight with or injure another dog; 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. 1984 Supp. 21-4315. Unlawful conduct of dog fighting is a class E felony.

Comment

In 1984, the word "pit" was deleted from the statute and the former crime of unlawful conduct of pit dog fighting became unlawful conduct of dog fighting.

65.19 ATTENDING THE UNLAWFUL CONDUCT OF DOG FIGHTING

The defendant is charged with the crime of attending the unlawful conduct of dog fighting. The defendant pleads not guilty.

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

1. That the defendant knowingly attended a dog fight; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction dog fighting means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-4315. Attending the unlawful conduct of dog fighting is a class C misdemeanor.

Comment

In 1984, the word "pit" was eliminated from the statute, and the crime became unlawful conduct of dog fighting.

65.20 ILLEGAL OWNERSHIP OR KEEPING OF A DOG

The defendant is charged with the crime of illegal ownership or keeping of a dog. The defendant pleads not guilty.

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

1. That the defendant (owned) (kept) on his premises a dog; and
2. That the defendant has been convicted of unlawful conduct of dog fighting under K.S.A. 1984 Supp. 21-4315 and amendments thereto within the last five 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. 1984 Supp. 21-4315.

Comment

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(3) requires the trial court to instruct on a lesser offense which may be a "lesser degree of the same crime" when there is evidence introduced to reasonably support a conviction of the lesser offense. State v. Long, 234 Kan. 580 675 P.2d 832 (1984).

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).

Notes on Use

This instruction is a modification of PIK 2d 10.20 suggested for use in civil cases when there is apparent failure of a jury to reach a verdict. The instruction can be given in substance with the other instructions at the conclusion of the case. If it is used after the jury has commenced deliberations, it should be done so with caution. The Committee recommendation that PIK 10.20 not be given in criminal cases in the 1968 Supplement to PIK is modified in conformity to these notes and comment.

Comment

It was held there was no error in giving PIK 10.20 in *State v. Oswald,* 197 Kan. 251, 417 P.2d 261 (1966). "However," said the Court, "as a word of caution, this instruction quite properly could have been given at the time of the original charge." The practice of lecturing a jury in a criminal case after reported disagreement was not commended. Oral comments accompanying this instruction were held to be coercive and prejudicial error in *State v. Earsery,* 199 Kan. 208, 428 P.2d 794 (1967), but their effect, standing alone in that case, was not determined. A belated instruction was criticized, but, under attending circumstances indicating that the judge's remarks had no immediate coercive effect, the instruction was held not to be reversible error in *State v. Basker,* 198 Kan. 242, 424 P.2d 535 (1967).

In *Bush v. State,* 203 Kan. 494, 454 P.2d 429 (1969) PIK 10.20 was submitted to the jury after it had deliberated for some time and failed to reach a verdict. The holding in *State v. Earsery,* supra, to the effect that PIK 10.20 standing alone would not constitute prejudicial error is discussed.

In *State v. Boyd,* 206 Kan. 597, 481 P.2d 1015 (1971) the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward."

In *State v. Roadenbaugh,* 234 Kan. 474, 483, 673 P.2d 1166 (1983) the court held it is not error to give the Allen charge before the jury retires.

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law—Jury Instructions—The Allen Charge," 6 Washburn L.J. 517 (1967).

68.13 POSTTRIAL COMMUNICATION WITH JURORS

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Notes on Use

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

Supreme Court Rule No. 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized if possible.

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)

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

CHAPTER 70.00

SELECTED MISDEMEANORS

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

The defendant is charged with the crime of operating a vehicle while under the influence of alcohol or drugs, or a combination thereof. The defendant pleads not guilty.

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

1. **That the defendant drove a vehicle;**
2. **That the defendant while driving was under the influence of alcohol or any drug, or a combination of alcohol and any drug, and the control of (his) (her) mental or physical function was thereby inpaired to the extent that (h) (she) was incapable of safely driving a vehicle; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 1984 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. 1984 Supp. 8-1567(b).

The word "operate" as used in K.S.A. 1984 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).

Reckless driving is not a lesser included offense of D.U.I. *State v. Mourning*, 233 Kan. 678, 682, 664 P.2d 857 (1983).

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

70.02 DRIVING WHILE INTOXICATED—IF CHEMICAL TEST USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. (If a test shows there was .10 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that [he] [she] was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.) (If a test shows there was less than .10 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of [alcohol] [drugs] [a combination of alcohol and drugs].)

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used.

Comment

The constitutionality of a presumption is described in the comment to PIK 2d 54.00 and 54.01-B.

The Committee believes that "prima facie" evidence as used in K.S.A. 8-1005 creates a presumption, and the suggested instruction is worded accordingly. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

The above instruction has been approved in dicta in *State v. Price*, 233 Kan. 706, 711, 664 P.2d 869 (1983).

70.03 TRANSPORTING LIQUOR IN AN OPENED CONTAINER

The defendant is charged with the crime of transporting alcoholic liquor in an opened container. The defendant pleads not guilty.

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

1. **That the defendant transported a container of alcoholic liquor in a vehicle upon a highway or street;**
2. **That the container had been opened;**
3. **That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;**
4. **That the defendant knew or had reasonable cause to know he was transporting an opened container of alcoholic liquor; and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 41-804. A person convicted of this offense shall be punished by a fine of not more than two hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition, the court shall suspend the defendant's license or impose conditions on the privilege of operating a motor vehicle.

"Highway" and "street" are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

Comment

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), held that a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

K.S.A. 41-2719, which prohibits transportation of an open container of cereal malt beverage in a vehicle on the highway or street, applies to passengers as well as to the driver of the vehicle. *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982).

70.04 RECKLESS DRIVING

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

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

1. **That the defendant was driving a vehicle;**
2. **That the defendant was driving in a reckless manner;**
3. **That this act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.**

As used in this instruction, the term "reckless" means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a reckless disregard or complete indifference and unconcern for the probable consequences of such conduct.

Notes on Use

For authority, see K.S.A. 1984 Supp. 8-1566. Upon a first conviction, an offender shall be sentenced to not less than five days nor more than 90 days imprisonment or fined not less than $25 nor more than $500, or both such fine and imprisonment. On a second or subsequent conviction the sentence shall be not less than 10 days nor more than six months imprisonment, or a fine of not less than $50 nor more than $500, or both such fine and imprisonment.

Comment

"Reckless" is defined as an indifference to whether or not wrong is done. To be reckless, the conduct must show disregard of or indifference to the consequences under circumstances involving danger to life or safety of others, although no harm was intended. *Montgomery v. Barton*, 212 Kan. 368, 370, 510 P.2d 1187 (1973).

See also *Hanson v. Swain*, 172 Kan. 105, 238 P.2d 517 (1951), and *Bailey v. Resner*, 168 Kan. 439, 214 P.2d 323 (1950).

70.05 VIOLATION OF CITY ORDINANCE

The ordinance of the City of _____, Kansas, makes it unlawful for any person to (state offense charged) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

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

1. (List the
2. various elements
3. of the offense)
4. That this act occurred on or about the _____ day of _____, 19____, within the City of _____, Kansas.

Notes on Use

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

PIK CRIMINAL INDEX