Pattern Instructions for Kansas—

CRIMINAL 2d

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SUPPLEMENTAL FOREWORD

The preparation and publication of this 1985/1986 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 and 1984 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 1985/1986 supplement covers statutes through the 1986 legislative session; Supreme Court decisions through Vol. 240, No. 1; and Court of Appeals decisions through Vol. 11, 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
Mary Beck Briscoe
William D. Clement
Herbert W. Walton
Robert G. Frey
Joe Knopp
Robert H. Cobean
Jack E. Dalton
Marvin E. Thompson

PREFACE TO 1985/1986 SUPPLEMENT

The 1985/1986 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 1984 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 membership of the committee for this supplement is: Herbert W. Walton, chairman, Olathe; Bob Abbott, Topeka; Michael A. Barbara, Topeka; Robert L. Bishop, Winfield; J. Patrick Brazil, Topeka; James J. Noone, Wichita; David Prager, Topeka, and Frederick Woleslagel, Lyons. With regret, we note the death of former member Chief Judge J. Richard Foth. We recognize his excellent counsel and draftmanship during the preparation of a part of this supplement. We benefited often from his scholarly views and we miss him.

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
Instructions

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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.

51.10 PENALTY NOT TO BE CONSIDERED BY JURY

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

Notes on Use

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

Comment

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

51.11 CAMERAS IN THE COURTROOM

Under rules of the Supreme Court the news media is permitted to bring cameras and recording equipment into the courtroom to photograph or record public proceedings in the district courts of Kansas. The reason for these rules is to increase the public knowledge of court proceedings and to make the court as open as possible.

These rules are very strict and are closely monitored. In general what is permitted is photographs of the courtroom scene and the participants in the trial setting, including the attorneys, the judges, the court reporter and persons who might be in the audience. The rules do not permit photographing individual jurors and limit photographing, where the jury might appear in the background, if individual jurors could be identified by such a photograph. The photographing of certain witnesses is also prohibited.

I would like to introduce to you (insert person's name) who is a (photographer) (cameraman) from (insert name of station, newspaper, etc.). (insert person's name) will be taking pictures during the course of the day. I do not expect any noise or disruption, but if you hear any noise or see movement of the equipment, please ignore it and continue with your duties as jurors.

Comment

See Supreme Court Order 86 SC 35 and its appendix (February 13, 1986).

52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

The State has the burden of proving the defendant is guilty. The defendant is not required to prove he is not guilty. You must assume the defendant is not guilty unless the evidence convinces you of the defendant's guilt.

Your determination should be made in accordance with these instructions, and this is the test you should apply: 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 reasonable doubt as to any of the claims made by the State, you should find the defendant not guilty.

Notes on Use

This instruction must be given in each criminal case and should follow the element instruction for the crime charged. See K.S.A. 21-3109 on presumption of innocence and reasonable doubt, and K.S.A. 60-401(d) on burden of proof.

The substance of this instruction is unchaged from the original draft in PIK 2d 52.02 and in PIK 2d 52.02 (1984 Supplement). Those drafts have been approved. See *State v. Laughlin*, 232 Kan. 110, 114, 652 P.2d 690 (1982).

The change now made in substituting the term "not guilty" for the term "innocent" as they appear in the first paragraph of the 1984 supplement, complies with *State v. Keeler*, 238 Kan. 356, Syl. ¶ 5, 710 P.2d 1279, (1985).

This instruction does not need to be repeated for separate offenses. *State v. Peoples*, 227 Kan. 127, 135, 605 P.2d 135 (1980). The State's burden, however, should be mentioned when a rebuttable presumption is utilized. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 702 (1983) and *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

See PIK 2d 52.03 and 52.04 relating to Presmption of Innocence and Reasonable Doubt.

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

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

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

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

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

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

Accost: To approach and speak to.

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

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

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

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

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

Believes: See Reasonable Belief.

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

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

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

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

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

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

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

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

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

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

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

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

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

Copulation: Sexual relations.

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

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

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

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

Criminal Solicitation: PIK 2d 55.09, Criminal Solicitation.

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

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

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

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

Deadly Weapon: A weapon dangerous to life or likely to produce bodily injury from the use made of it or with which death may easily and readily be produced. *Parman v. Lemmon,* 119 Kan. 323, 327, 244 Pac.227 (1925). See also *State v. Hanks,* 236 Kan. 524, 694 P.2d 407 (1985); *State v. Bowers,* 239 Kan. 417, 721 P.2d 268 (1986).

Death: A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or

condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and in this event, death will have occurred at the time these functions ceased; or

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

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

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

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

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

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

Deliberately: PIK 2d 56.04, Homicide Definitions.

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

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

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

Entice: K.S.A. 21-3509

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

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

Feloniously: The doing of the act with a deliberate intent to commit a crime which crime is of the grade or quality of a

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

Felony: K.S.A. 21-3105 (1)

Forcible Felony: K.S.A. 21-3110 (8)

Gambling: K.S.A. 21-4303

Gambling Device: K.S.A. 21-4302 (4), PIK 2d 65.07, Gambling Definitions.

Gambling Place: K.S.A. 21-4302 (5), PIK 2d 65.07, Gambling Definitions.

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

Hearing Officer: K.S.A. 21-3110 (19) (*d*)

Heat of Passion: Any intense or vehement emotional excitement which was spontaneously provoked from the circumstances. *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); PIK 2d 56.04 (*e*), Homicide Definitions; *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979).

Hypnosis: K.S.A. 21-4007 (2)

Intent to Defraud: K.S.A. 21-3110 (9)

Intentional: K.S.A. 21-3201 (2), exclusion 21-3202.

Intoxication or Intoxicated: K.S.A. 21-3208.

Jeopardy: K.S.A. 21-3108 (1) (*c*)

Judicial Officer: K.S.A. 21-3110 (19) (*c*)

Knowing or Knowingly: K.S.A. 21-3201 (2)

Law Enforcement Officer: K.S.A. 21-3110 (10)

Lewd Fondling or Touching: In a prosecution for indecent liberties with a child (K.S.A. 21-3503 [1]), *lewd fondling or touching* may be defined as "a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977).

Lottery: K.S.A. 21-4302 (2)

Maliciously: PIK 2d 56.04, Homicide Definitions.

Material: K.S.A. 21-4301 (2) (*b*) (for obscenity)

Merchandise: K.S.A. 21-4403 (2) (*a*)

Misdemeanor: K.S.A. 21-3105

Negligent Disregard: A failure to observe, to notice and to heed that which a careful and prudent person would discern or

consider as tending to endanger the safety of others. *State v. Miles,* 203 Kan. 707, 457 P.2d 166 (1969), as used in K.S.A. 8-529.

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

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

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

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

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

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

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

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

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

Peace Officer: See Law Enforcement Officer.

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

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

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

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

Possession: Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz,* 107 Kan. 593, 193 Pac. 177 (1920); *City of Hutchinson v. Weems,* 173 Kan. 152, 249 P.2d 633 (1952). Definition approved in *State v. Adams,* 223 Kan. 254, 256, 573 P.2d 604 (1977) (citing earlier approval in *State v. Neal,* 215 Kan. 737, 529 P.2d 114 [1974]). See also *State v. Flinchpaugh,* 232 Kan. 831, 833, 659 P.2d 208 (1983). See comment under PIK 2d 64.06, Unlawful Possession of a Firearm—Felony.

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

Premeditation: See PIK 2d 56.04, Homicide Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sports Participant: K.S.A. 21-4406 (2) (*b*)
State: K.S.A. 21-3110 (22)
Stolen Property: K.S.A. 21-3110 (23)
Temporarily Deprive: To take from the owner the possession, use or benefit of his property with intent to deprive the owner of the temporary use thereof. See PIK 2d 59.04, Unlawful Deprivation of Property.
Terror: An extreme fear that agitates body and mind. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
Terrorize: To reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
Threat: K.S.A. 21-3110 (24)
Unlawful Sexual Act: K.S.A. 21-3501 (2)
Wanton Conduct: K.S.A. 21-3201 (3)
Wanton Negligence: K.S.A. 21-3201 (3)
Wholesaler: K.S.A. 21-4404 (2) (*b*)
Willful Conduct: K.S.A. 21-3201 (2)
Willfully: K.S.A. 21-3201 (2) PIK 2d 56.04, Homicide Definitions.
Woman: K.S.A. 21-3501 (3)
Written Instrument: K.S.A. 21-3110 (25)

54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE

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

(a) that person gives false identification or fictitious name, address or place of employment at the time of obtaining control over property.

or

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

or

(c) that person fails to return the book(s) or other material borrowed from a library within 30 days after receiving a (registered) (certified) letter from the library requesting its return.

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

The word "notice" means notice in writing. Notice will be presumed to have been given three days following deposit of the notice as registered or certified matter in the U.S. mail, addressed to the person who has (leased or rented the property) (borrowed the book(s) or other material from a library) as it appears in the information supplied by the person at the time of the (leasing or renting) (borrowing) or (his) (her) last known address.

Notes on Use

For authority see K.S.A. 21-3702(1)(a) on false identification, (1)(b) on failure to return property and (2) failure to return the book(s) or other material from a library. Notice is defined in paragraph (2). See PIK 2d Chapter 59, Crimes Against Property, for the use of this instruction. Paragraph (c) is to be used only for prosecution of a misdemeanor under K.S.A. 21-3701 and amendments thereto.

Comment

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

54.12 INTOXICATION

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

Notes on Use

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

Comment

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

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

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

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

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

54.13 COMPULSION

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

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

Notes on Use

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

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

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

Comment

In *State v. Hundley,* 236 Kan. 461, 693 P.2d 475 (1985) the Court disapproved PIK Crim. 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate".

The court accepted the fine distinction between the two terms but thought it better to utilize the statutory term of "imminent" rather than "immediate" in self-defense instruction. *State v. Hundley,* 236 Kan. 469, 470.

The Committee is of the option that the same rationale the court applied in *Hundley* be applicable in compulsion cases.

54.16 RESTITUTION

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

Comment

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

54.17 USE OF FORCE IN DEFENSE OF A PERSON

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

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

Notes on Use

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

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475, (1985) the court disapproved PIK Crim. 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate".

The court accepted the fine distinction between the two terms but thought it better to utilize the statutory term of "imminent" rather than "immediate" in self-defense instructions. *State v. Hundley*, 236 Kan. 469, 470. See also *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

Comment

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

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

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

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

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

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

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

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

No all-purpose definition for "overt act" may be established. Each case must depend largely on its particular facts and the inferences which the jury may reasonably draw therefrom. *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985).

55.02 ATTEMPT—IMPOSSIBILITY OF COMMITTING OFFENSE—NO DEFENSE

The Committee recommends that no separate instruction be given.

Notes on Use

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

Comment

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

CHAPTER 56.00

CRIMES AGAINST PERSONS

56.02 MURDER IN THE FIRST DEGREE—FELONY MURDER

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

In *State v. Lashley*, 233 Kan. 620, 633, 664 P.2d 1358 (1983), the following crimes were held as not inherently dangerous to human life: theft of loss or mislaid property (21-3703); unlawful deprivation of property (21-3705); obtaining by deception control over property (21-3701[b]); theft by control over stolen property (21-3701[d]).

In *Smith v. State*, 8 Kan. App.2d 684, 688, 666 P.2d 730 (1983), burglary is considered inherently dangerous to human life to support a felony murder conviction (when viewed in the abstract).

The crime of child abuse under K.S.A. 21-3609 did not constitute a merger with the homicide in a felony first-degree murder charge under the facts of the case. Whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder was not decided by the court. *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985).

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.

In *State v. Peck*, 237 Kan. 756, 764, 703 P.2d 781 (1985), the Court approved this instruction.

56.35 AIRCRAFT PIRACY

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

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

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

Notes on Use

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

56.36 HAZING

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

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

1. That the defendant participated in (coercing) (demanding) (encouraging) another person _____, to perform as a condition of membership in a social or fraternal organization any act which could reasonably be expected to result in great bodily harm, disfigurement or death.

   or

1. That the defendant participated in (coercing) (demanding) (encouraging) another person _____, to perform as a condition of membership in a social or fraternal organization any act in a manner whereby great bodily harm, disfigurement or death could be inflicted.
2. That defendant did so purposely and intentionally, realizing the imminence of danger, and with a reckless disregard, indifference or unconcern for the consequences.
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3434. Hazing is a class B misdemeanor.

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.

In *State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985) the Kansas Supreme Court held that the rape statute as amended in 1983 was constitutional. The new law, K.S.A. 21-3502, was not vague or overbroad and did not constitute an ex post facto law as applied.

Lewd and lascivious behavior consists of elements separate and distinct from the crime of rape. The trial court committed no error when it failed to give an instruction on lewd and lascivious behavior when the defendant was charged with rape. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1984).

Two acts of rape perpetrated by the same accused against the same victim on the same afternoon may support two separate rape convictions. *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984). The result in this case is distinguished from *State v. Dorsey*, 224 Kan. at 152.

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. 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).

See also Wason, "Survey of Kansas Law: Criminal Law," 32 Kan. L. Rev. 395 (1984).

A charge of attempted rape may be proven without evidence of attempted penetration if the surrounding circumstances provide sufficient evidence from which a rational factfinder could conclude that the attacker intended to rape the victim. *State v. Hanks*, 236 Kan. 524, 694 P.2d 407 (1985).

57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

The Committee recommends that no separate instruction be given.

Comment

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

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

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

The rape shield statute as contained in K.S.A. 1983 Supp. 21-3525 was originally enacted into law in 1976 in K.S.A. 60-447a. The statute prohibits the admission into evidence of previous sexual conduct of the victim unless its relevancy has been determined at a pre-trial hearing. It requires the defendant to file a written motion within 7 days before the commencement of the trial if such inquiry will be made and requires the court to have a hearing on the relevancy of the proffered evidence. The statute was expanded by the Kansas Legislature in 1983 to cover several additional sex crimes. Reference to the statute should be made to determine whether the crime charged is covered by the statute. The statute was further held to be constitutional in *In re Nichols*, 2 Kan. App.2d 431, 580 P.2d 1370 (1978); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); and in *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979). Furthermore, in *State v. Cook*, 224 Kan. 132, 578 P.2d 257 (1978), the Supreme Court interpreted the provisions of K.S.A. 60-422(c) to prohibit cross-examination on sexual morality as it was not relevant to the honesty or veracity of a witness.

In *State v. Williams*, 235 Kan. 485, 681 P.2d 660 (1984), the Supreme Court held that a prosecutrix could not be cross-examined as to prior sexual contact with the accused when the provisions of the rape shield statute, 1983 Supp. 21-3525(2), had not been complied with because the affidavit was inadequate. The Court further held that the incident was irrelevant because it was too remote.

To stop further sexual assaults upon her, the statement of the prosecutrix that she had gonorrhea did not justify inquiry into her prior history of gonorrhea in order to attack her credibility. *State v. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984). A ruling that excludes evidence of a victim's prior sexual conduct will be overturned only if the ruling is a clear abuse of discretion. See *State v. Zuniga*, 237 Kan. 788, 703 P.2d 805 (1985).

57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

Comment

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

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

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.

See also, McNeil, "The Admissibility of Child Victim Hearsay in Kanas: A Defense Perspective," 23 Washburn L. J. 265 (1984).

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Supreme Court held that the child hearsay exception, K.S.A. 60-460(dd), did not violate the defendant's Sixth Amendment Right to confrontation. The case also lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. See also, *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

The Legislature amended K.S.A. 21-4619(c) to provide that there shall be no expungement of a conviction for indecent liberties with a child. In addition, K.S.A. 21-3106(2) provides that prosecution for indecent liberties with a child must be commenced within five years after its commission if the victim is less than sixteen years of age.

57.05-A INDECENT LIBERTIES WITH A CHILD—SODOMY

This instruction has been deleted due to the 1985 amendment of K.S.A. 21-3503. The legislature deleted the section in K.S.A. 21-3503 which referred to sodomy since the crime of sodomy with a child is covered by K.S.A. 21-3506, Aggravated Criminal Sodomy. See PIK 57.08 (Aggravated Criminal Sodomy—Nonmarital Child Under Sixteen).

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. 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.

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the crime of aggravated indecent liberties with a child. In addition, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of aggravated indecent liberties with a child must be commenced within five years after its commission if the victim is less than sixteen years of age.

Comment

See comment under PIK 2d 57.07, Sodomy.

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

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

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

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

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

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

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

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

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

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

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

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

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

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v.Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 were amended to provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission if the victim is less than sixteen years of age.

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

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

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

1. That the defendant caused _____, a child under sixteen years of age, to have (oral) (anal) sexual relations with _____;
   or
   That the defendant caused _____, a child under sixteen years of age, to have (oral) (anal) sexual intercourse with an animal;
   or
   That the defendant caused _____, a child under sixteen years of age, to penetrate the anal opening of _____, with (_____, a body part) (_____, an object);
2. That there was actual penetration; and
3. That the act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

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

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

Notes on Use

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

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

Comment

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 were amended to provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission if the victim is less than sixteen years of age.

57.08-B AGGRAVATED CRIMINAL SODOMY—NO CONSENT

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

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

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

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

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

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

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

Notes on Use

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

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

Comment

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 were amended to provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission if the victim is less than sixteen years of age.

57.09 ADULTERY

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

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

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

Notes on Use

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

Comment

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

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

57.10 LEWD AND LASCIVIOUS BEHAVIOR

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

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

1. **That the defendant engaged in an act of (sexual intercourse) (sodomy) with (_____) (an animal) with knowledge or reasonable anticipation that the participants were being viewed by others; and**
   or
   The defendant exposed (his) (her) sex organ in a (public place) (in the presence of a person not [his] [her] spouse and who had not consented thereto) with the intent to arouse or gratify the sexual desires of the defendant or another; and
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

Comment

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

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

Lewd and lascivious behavior is not a lesser included offense of rape or sodomy. *State v. Davis*, 236 Kan. 538, 694 P.2d 418 (1985).

57.11 ENTICEMENT OF A CHILD

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

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

1. That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter a (vehicle) (building) (secluded place) with the intent to commit an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) upon or with the person of _____;

2. That _____ was then a child under the age of 16 years; and

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

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

Notes on Use

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

Comment

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

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

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the offense of enticement of a child. Furthermore, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of enticement of a child must be commenced within five years after its commission.

57.12 INDECENT SOLICITATION OF A CHILD

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

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

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

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

Notes on Use

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

Comment

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

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

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

The provisions of K.S.A. 21-4619(c) were amended to provide that there shall be no expungement of convictions for the offense of indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of indecent solicitation of a child must be commenced within five years after its commission.

57.12-A SEXUAL EXPLOITATION OF A CHILD

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

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) a child to engage in sexually explicit conduct for the purpose of promoting a performance;

   or

   That the defendant possessed a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) in which a real child is shown engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another;

   or

   That the defendant was a (parent) (guardian) (other person having custody or control of a child) and knowingly permitted the child to (engage in) (assist another to engage in) sexually explicit conduct for the purpose of: [promoting any performance;] or [possessing a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another].
2. That _____ was then a child under the age of sixteen years; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

These definitions apply to this instruction:

a. "Sexually explicit conduct" means actual or simulated: exhibition in the nude; sexual intercourse; or sodomy. It includes [(genital-genital) (oral-genital) (oral-anal) (anal-genital) contact, whether between persons of the same or opposite sex] [masturbation]

[sado-masochistic abuse for the purpose of sexual-stimulation] [lewd exhibition of the genitals or pubic area of any person].

b. "Promoting" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, disseminating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising:

(i) for pecuniary profit;

or

(ii) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender, the child or another.

c. "Performance" means any film, photograph, negative, slide, book, magazine, or other printed or visual medium, or any play or other live presentation.

d. "Nude" means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

Notes on Use

For authority see K.S.A. 21-3516. The newer version includes references to live performances and makes it a crime to possess child pornography as described in the statute.

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

Comment

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of sexual exploitation of a child. In addition, the provisions of K.S.A. 21-3106(2) provide that the prosecution for the crime of sexual exploitation of a child must be commenced within five years after its commission if the victim is less than sixteen years of age.

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

The defendant is charged with the crime of promoting sexual performance by a minor. The defendant pleads not guilty.

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

1. That the defendant promoted a performance that included sexually explicit conduct by a minor;
2. That the defendant did so knowing the character and content of the performance;
3. That the minor was then a child under the age of eighteen years of age; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

These definitions apply to this instruction:

a. "Sexually explicit conduct" means actual or simulated: exhibition in the nude; sexual intercourse; or sodomy. It includes [(genital-genital) (oral-genital) (oral-anal) (anal-genital) contact, whether between persons of the same or opposite sex] [masturbation] [sado-masochistic abuse for the purpose of sexual stiumlation] [lewd exhibition of the genitals or pubic area of any person].

b. "Promoting" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, disseminating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising:

(i) for pecuniary profit;

or

(ii) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender, the child or another.

c. "Performance" means any film, photograph, negative, slide, book, magazine, or other printed or visual medium, or any play or other live presentation.

d. "Nude" means any state of undress in which the

human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

Notes on Use

For authority see K.S.A. 21-3519.

Promoting sexual performance by a minor is a class E felony. The applicable parenthetical or bracketed words under the definition should be selected.

57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

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

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

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

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

Notes on Use

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

Comment

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

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

The provisions of K.S.A. 21-4619(C) were amended to provide that there shall be no expungement of convictions for the offense of aggravated indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of aggravated indecent solicitation of a child must be commenced within five years after its commission.

57.14 PROSTITUTION

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

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

1. **That the defendant intentionally (performed for hire) (offered to perform for hire) (agreed to perform for hire) the act of (sexual intercourse) (sodomy) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of any person); and**
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3512. Prostitution is a class B misdemeanor. If the act under claim number one is sexual intercourse, 57.02, Sexual Intercourse—Definition, should be given. If the act under claim number one is sodomy, 57.18, Sex Offenses—Definitions, should be given.

Comment

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

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), the Kansas Supreme Court held that K.S.A. 21-3512, which prohibits prostitution, is not unconstitutionally vague or overbroad. The language gives a definite warning as to the conduct proscribed when measured by common understanding and practice.

57.15 PROMOTING PROSTITUTION

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

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

1. That the defendant
   (*a*) (established) (owned) (maintained) (managed) a house of prostitution; and
   or
   (*b*) participated in the (establishment) (ownership) (maintenance) (management) of a house of prostitution; and
   or
   (*c*) permitted any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; and
   or
   (*d*) procured a prostitute for a house of prostitution; and
   or
   (*e*) induced another to become a prostitute; and
   or
   (*f*) solicited a patron for a prostitute or for a house of prostitution; and
   or
   (*g*) procured a prostitute for a patron; and
   or
   (*h*) (procured transportation for) (paid for the transportation of) (transported) a person assisting or promoting that person's engaging in prostitution; and
   or
   (*i*) was employed to perform any act of [set out applicable section of (*a*) through (*h*)]; and
2. That this act occured on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3513. Promoting prostitution is a Class A misdemeanor when the prostitute is sixteen or more years of age. Promoting prostitution is a Class E felony when the prostitute is under sixteen years of age.

The appropriate category of the offense should be selected.

57.16 HABITUALLY PROMOTING PROSTITUTION

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

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

1. **That the defendant promoted prostitution by _____;**
2. **That this act occurred on or about the _____ day of _____; 19____, in _____ County, Kansas.**
3. **That prior to that date the defendant had been convicted of promoting prostitution.**

Notes on Use

For authority see K.S.A. 21-3514. Habitually promoting prostitution is a class E felony. The applicable category from PIK 2d 57.15, Promoting Prostitution, should be included in claim number one.

57.17 PATRONIZING A PROSTITUTE

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

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

1. **That the defendant knowingly (entered) (remained) in a house of prostitution with the intent to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior) with a prostitute; and**
   or
   That the defendant hired a prostitute to engage in (sexual intercourse) (sodomy) (lewd and lascivious behavior); and
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

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

Notes on Use

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

Comment

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

57.18 SEX OFFENSES—DEFINITIONS

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

B. Unlawful sexual acts are defined as follows:

(*a*) Rape. "Rape" means sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(*b*) Indecent liberties with a child. "Indecent liberties with a child" means engaging in either of the following acts with a child who is not married to the offender and who is under 16 years of age: (1) sexual intercourse; or (2) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

(*c*) Aggravated indecent liberties with a child. "Aggravated indecent liberties with a child" means the commission of indecent liberties with a child by: (1) a (parent) (adoptive parent) (stepparent) (grandparent) of the child or (2) any [guardian] [(proprietor) (employee) of any foster home, orphanage, or other public or private institution for the care of minor children,] to whose charge the child has been committed or entrusted by (any court) (any

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

58.01 BIGAMY

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

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

1. That the defendant entered into a marriage in Kansas while married to another; and
   or
   That the defendant entered into a marriage with a person in Kansas knowing that person was the spouse of another; and
   or
   That the defendant, after marrying in another state or country, cohabited within this state with a spouse while having another spouse living at the time of the cohabitation; and
   or
   That the defendant, after marrying in another state or country, cohabited within this state with a spouse while knowing such spouse was a spouse of another at the time of the cohabitation; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3601(1). Bigamy is a class E felony.

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 under 18 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.

58.06 NONSUPPORT OF A CHILD

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

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

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

As used in this instruction "necessitous circumstances" mean needing the necessaries of life, which cover not only basic physical needs, things absolutely indispendable to human existence and decency, but those things also which are in fact necessary to the particular person left without support.

[To establish parentage it is only necessary that you be satisfied that the fact of parentage is more probably true than not true. Proof beyond a "reasonable doubt" as set forth in Instruction _____ herein does not apply to the issue of parentage.]

Notes on Use

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

See K.S.A. 21-3605(1)(f), "Proof of the nonsupport of such child in necessitous circumstances or neglect or refusal to provide for the support and maintenance of such child shall be prima facie evidence that such neglect or refusal is willful."

Comment

Whether the legislature believed that there was a difference between "without lawful excuse" in the nonsupport of a child provision and "without just cause" in the nonsupport of a spouse provision PIK 2d 58.07, Nonsupport of a Spouse, is not known. It is arguable that a juror might have no difficulty understanding what is meant by the term "without just cause," but would have some difficulty in

understanding the term "without lawful excuse." Since the Committee does believe that "without just cause" is more understandable to jurors than "without lawful excuse," and since there are no statutory "lawful excuses," it has concluded "without just cause" should be used.

One who is outside the state may be chargeable with nonsupport of a child within this state even though he did not know the child was within this state.

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances, if they would have been in such condition had they not been provided for by someone else." *State v. Wellman,* 102 Kan. 503, 170 Pac. 1052 (1918); *State v. Knetzer,* 3 Kan. App.2d 673, 600 P.2d 160 (1979).

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

The omission from K.S.A. 21-3605(1) of the term "destitute" does not change existing case law that interprets the phrase "destitute or necessitous circumstances." *State v. Knetzer,* supra.

Necessitous circumstances was defined in *State v. Walker,* 90 Kan. 829 (1913), and was cited with approval in *State v. Knetzer,* supra.

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).

In a felony murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge of abuse of a child may meet the *Rueckert* test for merger into a charge of felony first degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder."

58.12 FURNISHING INTOXICANTS TO A PERSON UNDER 21

The defendant is charged with the crime of furnishing intoxicants to a person under twenty-one.

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;**
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 person under 21 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 age to buy or drink any cereal malt beverage at any place of business licensed to sell such beverages.

58.12-A FURNISHING CEREAL MALT BEVERAGE TO A PERSON UNDER LEGAL AGE

The defendant is charged with the crime of furnishing cereal malt beverage to a person under legal age for consumption. The defendant pleads not guilty.

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

1. **That the defendant directly or indirectly (bought) (sold) (gave) (furnished) cereal malt beverage (for)(to) a person under the age of ____ years.**
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3610a(a). Furnishing cereal malt beverage to a person under legal age is a class B misdemeanor. For definition of cereal malt beverage and legal age for consumption of cereal malt beverage, see K.S.A. 41-2701.

Comment

K.S.A. 21-3610a(c) excepts from prosecution under this statute the parents or legal guardians of the minor or ward.

58.13 AGGRAVATED JUVENILE DELINQUENCY

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

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

1. That the defendant is 16 or more years of age;
2. That the defendant has been adjudicated to be a delinquent or miscreant child under the Kansas Juvenile Code or a juvenile offender under the Kansas Juvenile Offenders Code;
3. That the defendant was confined in (insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.);
4. That the defendant intentionally (burned or attempted to burn) (set fire to any combustible material for the purpose of burning) a building at (insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.);

   or

   That the defendant intentionally (burned) (destroyed) (otherwise damaged) property belonging to the State of Kansas exceeding the value of $100;

   or

   That the defendant committed an (aggravated assault) (aggravated battery) upon an (officer of) (attendant of) (employee of) (person confined in) (here insert name of training or rehabilitaton facility under jurisdiction and control of S.R.S.);

   or

   That the defendant intentionally (ran away) (escaped) from (here insert name of training or rehabilitation facility under jurisdiction and control of S.R.S.) after previously having run away or escaped; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

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] [child in need of care] [juvenile offender];**
   or
   (b) **to not attend school as required by law;**
   or
   (c) **to commit an act which if committed by an adult would be a (felony) (misdemeanor).**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

The juvenile code as it existed in Article 8, Chapter 38, was substantially revised in 1982. Article 15, Chapter 38, K.S.A. 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."

Under the Kansas Code for Care of Children, the term "child in need of care" replaces deprived, wayward and truant children. K.S.A. 38-1502(a). Under the Kansas Juvenile Offenders Code, the term juvenile offender replaces the term delinquent and miscreant. K.S.A. 38-1602(b). Notwithstanding these changes, K.S.A. 21-3612 continues to refer to delinquent, miscreant, wayward and deprived children.

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).

In *State v. Hanks*, 10 Kan. App. 2d 666, 708 P.2d 991 (1985), the court rejected the defendant's arguments that (1) proof of two prior theft convictions is an element of a class E felony theft which should have been included in the jury instructions and (2) that "theft" is a lesser included offense of "theft after having been convicted of theft two or more times within the preceding five years."

When instructing on the lesser included offense of unlawful deprivation of property (PIK 59.04) see PIK 68.09 for form and PIK 68.10 for verdict form.

This instruction should be given in cases charging welfare fraud under K.S.A. 39-720. *State v. Ambler*, 220 Kan. 560, 552 P.2d 896 (1976).

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.

In *State v. Keeler*, 238 Kan. 356, Syl. ¶ 8, 710 P.2d 1279 (1985), the court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved.

In *State v. Ringi*, 238 Kan. 523, Syl. ¶ 2, 712 P.2d 1223 (1986), the court held: "The charge of theft by deception under K.S.A. 1984 Supp. 21-3701(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3707." In that case a defendant could be charged with both offenses when they occurred on different days.

59.01-A THEFT—KNOWLEDGE PROPERTY STOLEN

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

Notes on Use

The instruction should be used with PIK 2d 59.01, Theft, in a prosecution for violation of K.S.A. 21-3701 (d), receiving stolen property.

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

Comment

Stolen property, once recovered either by the owner or law enforcement officers, is no longer stolen property as contemplated in K.S.A. 21-3701(d). Therefore, one cannot be convicted of theft by obtaining control over stolen property when actual physical possession of the stolen property has been recovered by the owner or by law enforcement officers as agents for the owner, before delivery of the property to the accused. *State v. Sterling,* 230 Kan. 790, 640 P.2d 1264 (1982).

For a discussion of the definition of "obtain" found in K.S.A. 21-3110(11), (which relates to K.S.A. 21-3701(d)) and a definition of "obtains or exerts control" as found in K.S.A. 21-3110(12), (which relates to K.S.A. 21-3701(a)), see *State v. Myers,* 6 Kan. App. 2d 906, 908, 636 P.2d 213 (1981).

59.02 THEFT OF LOST OR MISLAID PROPERTY

The defendant is charged with the crime of theft of lost or mislaid property. The defendant pleads not guilty.

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

1. **That _____ was the owner of the property;**
2. **That the property was lost or mislaid;**
3. **That the defendant came into possession of the property;**
4. **That the defendant (knew) (learned) that _____ was the owner of the property;**
5. **That the defendant failed to take reasonable measures to restore the property to _____;**
6. **That the defendant intended to deprive _____ permanently of the use or benefit of the property; and**
7. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For statutory authority, see K.S.A. 21-3703. Theft of lost or mislaid property is a class A misdemeanor.

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

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.

When instructing on this crime as a lesser included offense of theft see PIK 68.09 for form and PIK 68.10 for verdict form.

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.

In *State v. Keeler*, 238 Kan. 356, Syl. ¶ 8, 710 P.2d 1279 (1985), the court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved.

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. 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).

Imprisonment for a worthless check offense does not violate either Section 16 in the Bill of Rights of the Kansas Constitution, or the Fourteenth Amendment to the United States Constitution. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973), *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982).

For a discussion of the intent of the worthless check statute, K.S.A. 21-3707, what constitutes the gravamen of the offense and the proof required by the defendant to rebut the statutory presumption, see *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

In *State in Ringi*, 238 Kan. 523, Syl. ¶¶ 1, 2, 712 P.2d 1223 (1986), the court held: (1) "Under K.S.A. 1984 Supp. 21-3707, it is not necessary for the worthless check or draft to be used to obtain possession of money, merchandise or anything of value in order to constitute the crime of passing a worthless check." and (2) "The charge of theft by deception under K.S.A. 1984 Supp. 21-3707(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3703." A defendant may be charged with both offenses when they occur as separate transactions."

59.06-A STATUTORY PRESUMPTION OF INTENT TO DEFRAUD—KNOWLEDGE OF INSUFFICIENT FUNDS

Where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds there is a presumption that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with a [bank] [credit union] [savings and loan association] [depository]) where the defendant failed to pay the holder of a (check) (order) (draft) the amount due thereon and a service charge not exceeding $3 for each (check) (order) (draft) within seven days after notice had been given to the defendant that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository).

[There is a presumption that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds where the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (draft) (order).]

The presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had (the intent to defraud) (knowledge of insufficient funds in, or on deposit with the [bank] [credit union] [savings and loan association] [depository]). This burden never shifts to the defendant.

Notes on Use

For authority see K.S.A. 21-3707(2). If an issue exists as to the receipt of written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

Comment

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973) upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(2) which enables the State to establish a prima facie case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment in PIK 2d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976) recognizes that K.S.A. 21-3707(2) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(2). *State v. Calhoun*, supra.

Haremza is cited for the proposition that the statutory presumption created by K.S.A 21-3707(2) can be rebutted by defendant's knowing that he or she had a reasonable expectation that the check would be paid on presentation. *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

59.16 POSSESSION OF FORGERY DEVICES

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

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

1. That the defendant (made) (possessed) a _____;
2. That the device could be used to (make) (alter) _____ in such a way that it would purport to have been made (by _____) (at another time) (with different provisions) (by authority of _____, who did not give such authority);
3. That the defendant knew of the use of the _____, and intended to (use) (aid or permit another to use) it for the purpose of (making) (altering) _____; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

Comment

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

59.17 BURGLARY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3715. Burglary is a class D felony.

The phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 2d 59.18, Aggravated Burglary, Notes on Use.

Comment

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

A hog pen was held not to be a "structure" within the purview of the burglary statute, K.S.A. 21-3715. *State v. Fisher*, 232 Kan. 760, 658 P.2d 1021 (1983).

The opening of the bay door of a truck and reaching into the bay compartment to remove cases of beer constituted "entry" within the purview of K.S.A. 21-3715. *State v. Zimmerman and Schmidt*, 233 Kan. 151, 660 P.2d 960 (1983).

Where the consent to enter any of the structures or vehicles listed in K.S.A. 21-3715 and 21-3716 is obtained by fraud, deceit or pretense, the entry is not an authorized entry under the statute in that it is based on an erroneous or mistaken consent. Any such entry is unauthorized, and when accompanied by the requisite intent is sufficient to support a burglary or aggravated burglary conviction. *State v. Maxwell*, 234 Kan. 393, 672 P.2d 590 (1983).

An information which charges burglary is defective in form unless it specifies the felony intended by an accused in making the unauthorized entry. However, if the felony intended in a burglary is made clear at the preliminary hearing or by the context of the other charge or charges in the information, the failure to allege the specific intended felony does not constitute reversible error. Such failure cannot result in surprise or be considered prejudicial to the defendant's substantial rights at trial when the intended felony was made clear in advance of trial. *State v. Maxwell*, supra.

In a prosecution for burglary, the manner of the entry, the time of day, the

character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if any, are all relevant in determining whether the intruder intended to commit a theft. The intent with which any entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. *State v. Harper,* 235 Kan. 825, 685 P.2d 850 (1984).

Burglary is inherently dangerous to human life and will sustain a conviction for murder in the first degree under the felony murder rule. *Smith v. State,* 9 Kan. App. 2d 684, 666 P.2d 730 (1983).

59.18 AGGRAVATED BURGLARY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a class C felony.

As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App.2d 556, 630 P.2d 731 (1981). See also *State v. Mogenson*, 10 Kan. App. 2d 470, 473, 701 P.2d 1339 (1985), which cites this note with approval. When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

Comment

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

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

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

The crime of aggravated burglary occurs whenever a human being is present in a building during the course of the burglary. An information that charges the offense of aggravated burglary need not specify the point in time at which a victim was present, so long as it alleges that a human being was present sometime during the course of the burglary. *State v. Reed*, 8 Kan. App. 2d 615, 663 P.2d 680 (1983).

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson,* 10 Kan. App. 2d 470, 701 P.2d 1339 (1985).

59.19 POSSESSION OF BURGLARY TOOLS

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

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

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

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

Notes on Use

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

Comment

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

For a discussion of the distinction between possession of burglary tools, (K.S.A. 21-3717), and possession of drug paraphernalia, K.S.A. 65-4150(c)(12), see *State v. Dunn*, 233 Kan. 411, 416, 662 P.2d 1286 (1983).

59.20 ARSON

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

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

1. **That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosive);**
2. **That the defendant did so without the consent of _____; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

Comment

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

Under K.S.A. 21-3718(1)(a), the state must prove that the defendant knowingly damaged a building and that another person had some interest in that building. The state is not required to prove the defendant knew who owned the building. *State v. Powell*, 9 Kan. App. 2d 748, 687 P.2d 1375 (1984).

59.21 ARSON—DEFRAUD AN INSURER OR LIENHOLDER

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

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

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

Notes on Use

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

Comment

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

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).

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the court found that K.S.A. 21-3720(1)(a) is a general intent crime whereas K.S.A. 21-3720(1)(b) is a specific intent crime. Therefore an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(1)(a). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abetter. Under those circumstances a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel and Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

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. 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.

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the court found that K.S.A. 21-3720(1)(a) is a general intent crime whereas K.S.A. 21-3720(1)(b) is a specific intent crime. Therefore an instruction on voluntary intoxication would not

ordinarily be appropriate under K.S.A. 21-3720(1)(a). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abetter. Under those circumstances a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel and Owens,* 228 Kan. 172, 612 P.2d 1231 (1980).

59.25 CRIMINAL TRESPASS

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

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

1. **That _____ (was the owner) (had authorized control) of the property;**
2. **That the property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry);**
   or
   That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;
   or
   That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;
   or
   That the defendant had been restrained and personally served by a court order from (entering into) (remaining on) the property;
3. **That the defendant intentionally, without authority (entered into) (remained on) the property; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3721. Criminal Trespass is a class B misdemeanor.

Comment

Amendments to K.S.A. 21-3721 in 1979, 1980 and 1986 added the protection of property from criminal trespass by persons restrained by certain Court orders; and the protection of property from criminal trespass where the premises or property is locked, shut, or secured against passage or entry.

59.26 LITTERING—PUBLIC

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

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

1. **That the defendant (threw) (placed) (deposited) (left) _____ (on a public _____) (in a public _____);**
   or
   That the defendant introduced _____ into _____, which would tend to pollute the water;
2. **That the defendant was not acting with the permission of any public officer or public employee who had authority to grant such permission; and**
3. **This act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

59.61 DEFRAUDING AN INNKEEPER

The defendant is charged with the crime of defrauding an innkeeper. The defendant pleads not guilty.

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

1. **That _____ (was the innkeeper) (was the owner) (was the manager) (had authorized control) of a (restaurant) (hotel) (boardinghouse) (apartment house) (rooming house);**
2. **That the defendant obtained (food) (lodging) (services) (accommodations) from _____ by means of (trick) (deception) (false representation, statement, or pretense);**
3. **That the defendant intended to defraud _____;**
4. **That the value of the (food) (lodging) (services) (accommodations) was (more than $50.00) ($50.00 or less); and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 36-206. Defrauding an innkeeper is a class A misdemeanor if the value involved is $50.00 or less, and a class E felony if the value involved is over $50.00

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

59.62 GRAIN EMBEZZLEMENT

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

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

1. **That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);**
2. **That the defendant embezzled or wilfully misappropriated grain;**

   or

   That the defendant aided or abetted a (warehouseman) ([officer] [agent] [employee] of a warehouseman) to embezzle or wilfully misappropriate grain;
3. **That defendant did so with the intent to injure or defraud _____;**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Embezzlement means the wrongful appropriation or conversion of property belonging to another by a person who has been entrusted with the property.

Notes on Use

For authority, see K.S.A. 21-3753. Grain embezzlement is a Class C felony.

Comment

For cases discussing the nature of embezzlement, see *Watkins v. Layton*, 182 Kans. 702, 707, 324 P.2d 130 (1958); *State v. Bean*, 181 Kan. 1044, 1051, 317 P.2d 480 (1957); *State v. Hoffman*, 171 Kan. 116, 118, 229 P.2d 768 (1951); *State v. James*, 157 Kan. 703, 706, 143 P.2d 642 (1943). See also G.S. 1949, 21-545 (Embezzlement) Repealed L. 1969, ch. 180.

59.63 MAKING FALSE PUBLIC WAREHOUSE RECORDS AND STATEMENTS

The defendant is charged with the crime of making false public warehouse records and statements. The defendant pleads not guilty.

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

1. That the defendant is a public warehouseman;
2. That the defendant (made) (maintained) (caused to be [made] [maintained]) any written entry (in a book or other record of account) (in any financial statement) (or statement stored or prepared on computer disc, tape or other electronically accessed media);
3. That he did so knowing that it falsely stated or represented some material matter;

   or

   That he did so knowing that it was not what it purported to be;
4. That he did so with intent to defraud or to induce official action; and
5. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Public warehouseman means a person lawfully engaged in the business of storing grain for the public.

Notes on Use

For authority, see K.S.A. 21-3754(a). Making false public warehouse financial records and statements is a Class D felony.

59.63-A MAKING FALSE PUBLIC WAREHOUSE REPORTS

The defendant is charged with the crime of making false public warehouse reports. The defendant pleads not guilty.

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

1. **That the defendant is a public warehouseman;**
2. **That the defendant (made) (caused to be made) any written report required to be prepared and submitted under law to the Kansas State Grain Inspection Department;**
3. **That defendant did so knowing that it falsely stated some material matter;**

   or

   That defendant did so knowing that it was not what it purported to be;
4. **That he did so with the intent to defraud or to induce official action; and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Public warehouseman means a person lawfully engaged in the business of storing grain for the public.

Notes on Use

For authority, see K.S.A. 21-3754(b). Making false public warehouse reports is a Class D felony.

59.64 COMPUTER CRIME

The defendant is charged with computer crime. The defendant pleads not guilty.

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

1. That the defendant (gained) (attempted to gain) access to and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (_____, which is computer related property);
2. That defendant did so willfully and without authority;

or

1. That defendant used a (computer) (computer system) (computer network) or any other property for the purpose of (devising) (executing) a (scheme) (artifice) (with the intent to defraud) (for the purpose of obtaining [money] [property] [services] or any other thing of value);
2. That defendant did so by means of false or fraudulent pretense or representation;

or

1. That defendant wilfully exceeded the limits of authorization and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) or any other property; and
2. That defendant did so willfully; 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. 21-3755(2). Computer crime which causes a loss of the value of less than $150.00 is a Class A misdemeanor. Computer crime which causes a loss of the value of $150.00 or more is a class E felony.

If warranted PIK Crim. 2d 59.64-A Computer Crime—Defense should be given.

59.64-A COMPUTER CRIME—DEFENSE

It is a defense if the defendant appropriated the property or services openly and under a claim of title made in good faith.

Notes on Use

For authority, see K.S.A. 21-3755(3). If this instruction is given PIK 52.08 Affirmative Defenses—Burden of Proof should be given.

59.64-B UNLAWFUL COMPUTER ACCESS

The defendant is charged with unlawful computer access. The defendant pleads not guilty.

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

1. **That defendant (gained) (attempted to gain) access to any (computer) (computer system) (computer network)**

   or

   That defendant (gained) (attempted to gain) access to any (computer software) (program) (documentation) (data) (property) contained in any (computer) (computer system) (computer network);
2. **That defendant did so wilfully, fraudulently and without authorization; 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. 21-3755(4). Unlawful computer access is a Class A misdemeanor.

59.70 VALUE IN ISSUE

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

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

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

Notes on Use

It is necessary to use this instruction with PIK 2d 68.11, Verdict Form—Value in Issue, when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

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

Comment

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

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

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

60.06-A INTIMIDATION OF A WITNESS OR VICTIM

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

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

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

   OR

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

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

   or

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

   or

   causing a probation, parole or assignment to a community correctional services program violation to be reported and prosecuted and assisting in its prosecution.

   or

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

   or

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

2. That the defendant did so knowingly and maliciously.

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

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

Notes on Use

For authority see K.S.A. 21-3832.

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

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

Insert type of "other proceeding or inquiry—" in 1.

Insert name of individual in blank spaces.

60.06-B AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM

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

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

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

   AND
2. That the act was accompanied by an express or implied threat of force or violence against the (person) (property) of a (witness) (victim) (other person);
   OR
   That the act was in furtherance of a conspiracy;
   OR
   That the defendant had been previously convicted of _____;
   OR
   That the (witness) (victim), _____, was under 18 years of age;
   OR
   That the act was committed for (pecuniary gain) (other consideration) by the defendant acting upon the request of another person.
3. That the defendant did so knowingly and maliciously; and
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

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

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.

60.10 ESCAPE FROM CUSTODY

The defendant is charged with the crime of escape from custody. The defendant pleads not guilty.

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

1. **That the defendant was being held in custody (on a written charge of a misdemeanor) (after being convicted of a misdemeanor);**
2. **That the defendant intentionally departed from custody without lawful authority; and**
   or
   That the defendant intentionally failed to return to custody following lawfully authorized temporary leave; and
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

As used in this instruction "custody" includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order, or imposed as a specific condition of probation or parole or imposed as a specific condition of assignment to a community correctional services program) (insert any other detention for law enforcement purposes).

Notes on Use

For authority see K.S.A. 21-3809.

Escape from custody is a class A misdemeanor.

The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

Comment

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1971), the court discussed and defines "escape" and states what constitutes "escape". The court, in this case, also stated when a person is in "lawful custody".

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that

escape statutes 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the state is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

60.11 AGGRAVATED ESCAPE FROM CUSTODY

The defendant is charged with the crime of aggravated escape from custody. The defendant pleads not guilty.

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

A. 1. That the defendant was being held in custody (on a written charge of a felony) (after being convicted of a felony);

2. That the defendant intentionally departed from custody without lawful authority;

or

That the defendant intentionally failed to return to custody following lawfully authorized temporary leave; and

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

or

B. 1. That the defendant was being held in custody (on a written charge of a crime) (after being convicted of a crime);

2. That the defendant intentionally departed from custody by use of violence or the threat of violence against any person; and

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

As used in this instruction "custody" includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order, imposed as a specific condition of probation or parole or imposed as a specific condition of assignment to a community correctional services program) (insert any other detention for law enforcement purposes).

Notes on Use

For authority see K.S.A. 21-3810 and K.S.A. 21-3809.

Aggravated escape from custody is a class E felony.

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

Comment

See comment to PIK 2d 60.10.

60.27 TRAFFIC IN CONTRABAND IN A PENAL INSTITUTION

The defendant is charged with the crime of traffic in contraband in a penal institution. The defendant pleads not guilty.

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

1. **That the defendant intentionally (took) (attempted to take) (sent) (attempted to send) _____ (into) (upon the grounds of) (from) (possessed _____ in) (distributed _____ within) an institution under the control of the director of penal institutions or a jail;**
2. **That the defendant did so without the consent of the (warden) (superintendent) (jailer) of such institution or jail; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A 21-3826.

Contraband is defined as any narcotic, synthetic narcotic, drug, stimulant, sleeping pill, barbiturate, nasal inhaler, alcoholic liquor, intoxicating beverage, firearm, ammunition, gun powder, weapon, hypodermic needle, hypodermic syringe, currency, coin, communication, or writing.

The particular contraband involved should be designated in the space in the first element of this crime.

Traffic in contraband in a penal institution is a class E felony.

60.28 UNLAWFUL DISCLOSURE OF A WARRANT

The defendant is charged with the crime of unlawful disclosure of a warrant. The defendant pleads not guilty.

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

1. **That the defendant intentionally disclosed the fact that a (search warrant) (warrant for arrest) had been (applied for) (issued);**
   or
   That the defendant intentionally disclosed the content of the (affidavit) (testimony) upon which a (search warrant) (warrant for arrest) had been (applied for) (issued);
2. **That such disclosure was made before the execution of the warrant and was not necessary for the execution thereof; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-3827.

Unlawful disclosure of a warrant is a class B misdemeanor.

Comment

Criminal sanctions of this section may not be imposed for publishing information obtained from public records. *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 541, 543, 545, 546, 547, 548, 592 P.2d 891 (1979).

Disclosure by personnel of a law enforcement agency for the purpose of encouraging the person named in the warrant to voluntarily surrender is not prohibited by this statute.

A 1986 legislative amendment excepted warrants issued in child abduction cases from the application of this statute, unless the court issuing such warrant specifically prohibited such disclosure.

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

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

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

1. **That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ which (simulated) (purported to be) (was designed so as to cause others reasonably to believe it to be) an identification document;**
2. **That such _____ bore a fictitious name or other false information; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

As used in this instruction "identification document" means any card, certificate or document which identified or purports to identify the bearer of such document, whether or not intended for use as identification.

Notes on Use

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

The document which the defendant is charged with manufacturing, selling or offering for sale should be described with particularity in the blank spaces.

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

Dealing in false identification documents is a class E felony.

Comment

The 1986 legislature amended K.S.A. 21-3830 by expanding the definition of "identification documents" beyond those issued by a governmental agency.

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

62.01 EAVESDROPPING

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

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

1. That the defendant knowingly and without lawful authority

(*a*) entered into a private place with intent to listen secretly to private conversations or to observe the personal conduct of any other person; and

or

(*b*) installed or used a device for hearing, recording, amplifying or broadcasting sounds originating in a private place which would not ordinarily be audible or comprehensible outside, without the consent of the person entitled to privacy therein; and

or

(*c*) installed or used a device for the interception of a (telephone) (telegraph) communication without the consent of the person in possession or control of the facilities for such communication; and

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

As used in this instruction, "private place" means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a public place.

Notes on Use

For authority, see K.S.A. 21-4001. Eavesdropping is a class A misdemeanor.

Comment

For extensive comment, see 1968 Judicial Council notes following K.S.A. 21-4001.

Installation or use of an electronic device to record communications transmitted by telephone, with consent of the person in possession or control of the facilities for such communication is not unlawful, and a recorded telephone conversation under these circumstances is admissible in evidence. *State v. Wigley*, 210 Kan. 472, 502 P.2d 819 (1972).

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

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

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

In *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984), defendant sought to suppress evidence obtained by a search warrant based on information received through use of a transmitting device concealed on the person of a police informant who entered defendant's home. It was held the use of the concealed transmitter did not violate K.S.A. 21-4001(1)(a) and (b) or 21-4002(1)(a) and (b). Any party to a private conversation may waive the right of privacy and a non-consenting party has no Fourth Amendment or statutory right to challenge that waiver. Interception of a private message requires the consent of either sender or receiver, not both.

62.02 EAVESDROPPING—DEFENSE OF PUBLIC UTILITY EMPLOYEE

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

Notes on Use

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

62.03 BREACH OF PRIVACY—INTERCEPTING MESSAGE

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

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

1. **That the defendant knowingly and without lawful authority intercepted a message by (telephone) (telegraph) (letter) (other means of private communication);**
2. **That defendant did so without the consent of either the sender or receiver; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4002. Breach of privacy is a class A misdemeanor. This offense does not apply to telephone party lines or telephone extensions.

Comment

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Privacy of communication protected hereunder not violated by electronic recording where consent of sender alone obtained; admissible evidence. *State v. Wigley*, 210 Kan. 472, 474, 476, 502 P.2d 819 (1972).

No violation hereunder by telephone company monitoring its property to protect its interests therein; search warrant based on evidence therefrom legal. *State v. Hruska*, 219 Kan. 233, 237, 238, 240, 241, 547 P.2d 732 (1976).

See Comment under PIK 62.01. *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984).

62.04 BREACH OF PRIVACY—DIVULGING MESSAGE

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

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

1. **That the defendant knowingly and without lawful authority made known to a third person the existence or contents of a message by (telephone) (telegraph) (letter) (other means of private communication);**
2. **That defendant did so without the consent of either the sender or receiver;**
3. **That defendant (knew the message had been illegally intercepted by another) (illegally learned of the message in the course of his employment with the transmitting agency); and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4002. Breach of privacy is a class A misdemeanor.

The committee is unaware of what the legislature intended by use of the terms "illegally intercepted" or "illegally learned" as contained in K.S.A. 21-4002. The instruction should be modified to specifically identify the claimed illegality.

This offense does not apply to telephone party lines or telephone extensions.

Comment

K.S.A. 21-4002 seeks to protect private communications. It prohibits wiretapping except where authorized by court order. Tampering with private mail is prohibited, as well as unauthorized disclosures.

Also see Comment citing cases under PIK 2d 62.03, Breach of Privacy—Intercepting Message.

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

64.01 UNLAWFUL USE OF WEAPONS—FELONY

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

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

1. **That defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a shotgun with a barrell less than 18 inches in length; and**
   or
   a firearm (designed to discharge) (capable of discharging) automatically more than once by a single function of trigger; and
   or
   That the defendant knowingly, (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight; and
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 1982 Supp. 21-4201(g) and (h).
K.S.A. 21-4201(h) was enacted in 1982 to cover plastic-coated bullets.

Comment

K.S.A. 21-4201(g) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. The second alternative under Paragraph 1 is required by K.S.A. 21-4201(h). It should be noted that the offense under 21-4201(h) does not apply to a governmental laboratory or to solid plastic bullets.

64.02 UNLAWFUL USE OF WEAPONS—MISDEMEANOR

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

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

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

   or

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

   or

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

   or

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

   or

   That the defendant knowingly set a spring gun; and

   or

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

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

Notes on Use

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

It should be noted that under the 1986 amendment to the statute, possession of a shotgun with a barrel less than 18 inches in length and possession of a plastic-coated bullet are now felonies. See PIK 2d 64.01, Unlawful Use of Weapons—Felony.

K.S.A. 21-4201(8) defines "throwing star" to mean "any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond or other geometric shape, manufactured for use as a weapon for throwing".

Comment

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

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

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

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

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

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

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

64.02-A UNLAWFUL DISCHARGE OF A FIREARM

The defendant is charged with the crime of unlawful discharge of a firearm. The defendant pleads not guilty. To establish this charge, the following claims must be proved:

1. **That defendant discharged a firearm upon the land of another or from a public road or railroad right-of-way that adjoins land of another; and**
2. **That defendant did so without having first obtained permission from the owner or person in possession of such land; 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. 21-4217(a). Unlawful discharge of a firearm is a class C misdemeanor. For affirmative defenses see PIK 64.02-B.

64.02-B UNLAWFUL DISCHARGE OF A FIREARM—AFFIRMATIVE DEFENSE

It is a defense to the charge of unlawful discharge of a firearm that at the time of the commission of the act defendant was a _____ and discharged the firearm while acting (within the scope of [his] [her] authority) (in the performance of duties of [his] [her] office or employment).

Notes on Use

For authority see K.S.A. 21-4217(b) which lists persons exempt from application of the statute. There should be inserted in the blank space of the instruction a description of an exempt person under the statute. If this instruction is given, PIK Crim. 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Ordinarily, whether a person falls within an exempt category is a question of law for the court. This instruction is provided for use in the event a question of fact is presented.

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

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

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

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

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

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

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

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

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

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

It is unlawful for a defendant in a criminal case to possess a firearm under

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

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

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

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

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

In *State v. Pondexter*, 234 Kan. 208, 213, 671 P.2d 539 (1983), the court stated that possession of a firearm prohibited by K.S.A. 21-4204 is not the innocent handling of the weapon but a willful or knowing possession of a firearm with the intent to control the use and management thereof. See also *State v. Flinchpaugh*, 232 Kan. 831, 833, 659 P.2d 208 (1983).

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 or an obscene device; and

   or

   That the defendant knowingly or recklessly possessed obscene material, or an obscene device 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 or an obscene device; and

   or

   That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which was 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 offense. For the second and subsequent offenses, this offense is a Class E felony. For affirmative defenses see PIK 2d 65.05. For definations see PIK 65.03. Promoting Obscenity-Definations.

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

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

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

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

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

to preserve the constitutionality of the statute. See also *State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979).

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

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-3401 was upheld against allegations that the statute is unconstitutional as a violation of due process, because the definition of "obscenity" is vague and overbroad and the statute is an invalid exercise of the police power.

65.02 PROMOTING OBSCENITY TO A MINOR

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

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

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

Notes on Use

For authority see K.S.A. 21-4301a. Promoting obscenity to a minor is a Class A misdemeanor for the first offense. For the second and subsequent offenses, this offense is a Class E felony. For affirmative defenses see PIK 65.05-A.

For definitions see PIK 65.03, Promoting Obscenity—Definitions.

Comment

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

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

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

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-3401 was upheld against allegations that the statute is unconstitutional as a violation of due process, because the definition of "obscenity" is vague and overbroad and the statute is an invalid exercise of the police power.

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 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, including sexual intercourse or sodomy, or masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals, and 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.

"Obscene device" means a device, including a dildo or artificial vagina, designed or marketed to be used primarily for the stimulation of human genital organs.

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

"Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or 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 performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

"Sodomy" means oral or anal copulation or sexual intercourse between a person and an animal; or any penetration of the anal opening by any body part or object. Any penetration, however slight, is sufficient to constitute sodomy. It does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care prac-

tices, or a body cavity search conducted by law enforcement officers.

"Wholesaler" means a person who sells, distributes or offers for sale or distribution obscene materials or devices only for resale and not to the consumer and who does not manufacture, publish or produce such materials or devices.

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

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).

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-3401 was upheld against allegations the statute unconstitutionality violated due process guaranteed by the Fourteenth Amendment because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of police power in violation of the First and Fourteenth Amendment to the Constitution of the United States.

65.04 PROMOTING OBSCENITY—PRESUMPTION OF KNOWLEDGE AND RECKLESSNESS FROM PROMOTION

If you find that defendant promoted obscene materials or devices by emphasizing their prurient appeal or sexually provocative aspects or if you find the defendant is not a wholesaler, and promoted the materials or devices in the course of (his) (her) business, 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.

65.05 PROMOTING OBSCENITY—AFFIRMATIVE DEFENSES

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

or

(*b*) (It is a defense to the charge of promoting obscenity that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.)

or

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

or

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

Notes on Use

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

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 2d 58.02, Affirmative Defenses—Burden of Proof, should be given.

Comment

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

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-3401(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

65.05-A PROMOTING OBSCENITY TO A MINOR—AFFIRMATIVE DEFENSES

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

or

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

or

(*c*) (It is a defense to the charge of promoting obscenity to a minor that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.)

or

(*d*) (It is a defense to the charge of promoting obscenity to a minor that an exhibition in a state of nudity was for a bona fide scientific or medical purpose or for an educational or cultural purpose for a bona fide school, museum or library.)

Notes on Use

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

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 2d 58.02, Affirmative Defenses—Burden of Proof, should be given.

Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-3401(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

Notes on Use

For authority see K.S.A. 21-4303a. An illegal bingo operation is a class A misdemeanor. The definition of bingo set forth in the instruction is that contained in K.S.A. 79-4701(a).

Comment

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

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

65.07 GAMBLING—DEFINITIONS

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

(A "bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.)

(A "lottery" is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance.)

("Consideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.)

(A "gambling device" is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.)

(A "gambling place" is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices.)

Notes on Use

For authority see K.S.A. 21-4302. This instruction contains the statutory definitions applicable to gambling offenses. All statutory definitions are provided, any of which may be used in an appropriate case.

K.S.A. 21-4302(1)(a), (b), (c), and (d) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation

for loss caused by the happening of the chance including, but not limited to contracts of 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.

See also, *State v. Durst,* 235 Kan. 62, 678 P.2d 1126 (1984), where the same principle was applied to electronic video card games.

In *Lambath v. Levens,* 237 Kan. 614, 623, 702 P.2d 320 (1985), K.S.A. 25-3108, providing for breaking a tie vote in an election by lot, was held not a form of an unconstitutional lottery because campaign expenses were not included in the definition of "consideration" contained in K.S.A. 21-4302(3).

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.

65.12 POSSESSION OF A GAMBLING DEVICE

The defendant is charged with the crime of possession of a gambling device. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed or had custody or control as (owner) (lessee) (agent) (employee) (bailee) of a gambling device; and**
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-4307.

Possession of a gambling device is a class B misdemeanor. Appropriate definitions in PIK 2d 65.07, Gambling—Definitions, should be given with this instruction.

In *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), the State sought to sell or destroy confiscated electronic video card games. The Kansas Supreme Court held the State may not seek sale or destruction of property under K.S.A. 22-2512 without a notice or hearing for those having a property interest in the machines.

65.12-A POSSESSION OF A GAMBLING DEVICE—DEFENSE

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

Notes on Use

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

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. 21-4315. Attending the unlawful conduct of dog fighting is a class B misdemeanor.

Comment

In 1984, the word "pit" was eliminated from the statute, and the crime became attending the 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.

67.01-67.12

The first edition of *PIK Criminal* contained instructions 67.01 through 67.12. The statutes on which those instructions were based were repealed effective July 1, 1972. Thus, they are not included in this second edition.

67.13 NARCOTIC DRUGS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to a narcotic drug known as _____. The defendant pleads not guilty.

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

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

Notes on Use

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

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

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

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

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

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

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

A violation of K.S.A. 65-4127a is a class C felony; upon conviction for a second

offense, such person shall be guilty of a class B felony; and upon conviction for a third or subsequent offense, such person shall be guilty of a class A felony, punishable by life imprisonment. Some prior drug convictions from other jurisdictions may be used to increase an offender's punishment. *State v. Miles*, 233 Kan. 287, 662 P.2d 1227 (1983).

It should be noted that K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation either of federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas.

Comment

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

Presence of a controlled substance in an accused's blood is not possession or control of the substance within K.S.A. 65-4127a. *State v. Finchpaugh*, 232 Kan. 831, 835, 659 P.2d 208 (1983).

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

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

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

67.13-A NARCOTIC DRUGS—SALE DEFINED

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

Notes on Use

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

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

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

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

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

Notes on Use

For authority, see K.S.A. 1983 Supp. 65-4127b(*b*). The section refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are involved. For example, it refers to K.S.A. 1983 Supp. 65-4105(*d*) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

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

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

Comment

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

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

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

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

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

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

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

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

Notes on Use

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

A violation of K.S.A. 65-4127b(*a*) is a class A misdemeanor, "except that upon conviction for a second or subsequent offense, or if the substance prescribed for or administered, was delivered, distributed, or dispensed to a child under 18 years of age, such person shall be guilty of a class D felony." "Prior conviction of possession of narcotics is not an *element* of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and thus to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." Syl. ¶ 1, *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1975). Some prior drug convictions from other jurisdictions may be used to increase an offender's punishment. *State v. Miles*, 233 Kan. 287, 662 P.2d 1227 (1983).

K.S.A. 65-4129 provides that if a violation of the Kansas act is a violation of either federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in Kansas.

K.S.A. 21-3201 provides that as used in the Kansas Criminal Code, "the terms

'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'willful.' "

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

Comment

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

Presence of a controlled substance in an accused's blood is not possession or control of the substance within K.S.A. 65-4127a. *State v. Finchpaugh*, 232 Kan. 831, 835, 659 P.2d 208 (1983).

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

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 or attempting to operate 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 or attempted to drive a vehicle;**
2. **That the defendant, while driving or attempting to drive, was under the influence of (alcohol), (a drug), (a combination of drugs), (a combination of alcohol and any drug, or drugs),**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

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

Notes on Use

For authority, see K.S.A. 8-1567 and K.S.A. 8-1005. If the evidence is limited to either alcohol, a drug, a combination of drugs or a combination of alcohol and any drugs, reference to the inapplicable category or categories should be deleted from the instruction.

The legislature has imposed a different definition for under the influence of alcohol than for the other categories; thus, one or both of the definitional standards may be applicable, depending on the evidence.

For the definition of "attempt," see PIK 55.01.

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. 8-1567(b).

The word "operate" as used in K.S.A. 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 phrase "driving under the influence" is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984).

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

70.01-A TRAFFIC OFFENSE—ALCOHOL CONCENTRATION .10 OR MORE

The defendant is charged with the crime of operating or attempting to operate a vehicle while the alcohol concentration in (his) (her) blood or breath [at the time or within two hours after (he) (she) operated or attempted to operate the vehicle] is .10 or more. The defendant pleads not guilty.

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

1. **That the defendant drove or attempted to drive a vehicle;**
2. **That the defendant, while driving [or within two hours after (he) (she) operated or attempted to operate the vehicle] had an alcohol concentration in (his) (her) blood or breath of .10 or more;**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

As used in this instruction, the phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

Notes on Use

For authority, see K.S.A. 8-1567 and K.S.A. 8-1005.

Comment

The committee is of the opinion the alcohol concentration in the defendant's blood or breath must result from alcohol consumed before or while operating or attempting to operate a vehicle.

70.01-B B.A.T. .10 OR MORE OR DUI CHARGED IN THE ALTERNATIVE

The defendant is charged in the alternative with (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .10 or more or (operating) (attempting to operate) a vehicle while under the influence of alcohol. You are instructed that the alternative charges constitute one crime.

You should first consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .10 or more. If you find defendant guilty of that charge you should sign the appropriate verdict form and you need not consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol.

If you do not agree that the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .10 or more you should then consider if defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol. If you find the defendant is guilty of that charge, you should sign the verdict form.

If you find the defendant is not guilty of both charges, you should sign the indicated verdict form.

Notes on Use

The Committee believes that K.S.A. 8-1567 defines a single offense. The State may, however, charge the offense in the alternative. See PIK 70.01, Traffic Offense—Driving Under The Influence of Alcohol or Drugs, and PIK 70.01-A—A Traffic Offense—Alcohol Concentration .10.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978) and *State v. McCowan*, 226 Kan. 753, 764, 602 P.2d 1363 (1979).

70.02 DRIVING UNDER THE INFLUENCE—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).

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