Pattern Instructions for Kansas—

CRIMINAL 2d

(Cite as PIK 2d)

SUPPLEMENTAL FOREWORD

The preparation and publication of this 1987/1988 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, 1984 and 1985/1986 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 1987/1988 supplement covers statutes through the 1988 legislative session; Supreme Court decisions through Vol. 243, No. 4; and Court of Appeals decisions through Vol. 12, No. 12. 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.

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PREFACE TO 1987/1988 SUPPLEMENT

The Judicial Council has requested the Committee on Criminal Jury Instructions to update PIK-Criminal 2d. The 1987-1988 supplement has been prepared and reflects statutory changes and significant Appellate Court decisions from the time of the 1985-1986 supplement. The supplement contains several revised and new instructions. In addition, the notes on use and comments have been revised where appropriate.

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.

Pattern Instructions are readily accepted and used by the bench and bar. Recently the Kansas Supreme Court recognized their utility when it held that a trial court should use the PIK instructions ". . . unless there is some compelling and articulable reason not to do so." See *State v. Wilson*, 240 Kan. 606, 609-10, 731 P.2d 306 (1987).

The members of the committee for this supplement are: Judge Herbert W. Walton, chairman, Olathe; Chief Judge Bob Abbott, Topeka; Professor Michael A. Barbara, Topeka; Judge Robert L. Bishop, Winfield; Judge J. Patrick Brazil, Topeka; Judge David S. Knudson, Salina; Judge James J. Noone (ret.), Wichita; Chief Justice David Prager (ret.), Topeka; Judge Gary W. Rulon, Emporia; and Judge Frederick Woleslagel (ret.), Lyons.

The Committee is indebted to others who have made it possible to prepare the supplement. We extend our thanks to the Kansas Judicial Council for its financial support and its excellent Research Director, 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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51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining whether the defendant is guilty or not guilty. 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.

The Committee recommends that the instruction not be given when the defense of insanity is asserted.

Comment

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

Deletion of the second sentence of this instruction was approved when the jury was instructed on the defense of insanity in *State v. Alexander*, 240 Kan. 273, 286, 287, 729 P.2d 1126 (1986).

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).

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

54.01 PRESUMPTION OF INTENT

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

Notes on Use

For authority see *State v. Acheson*, 3 Kan. App.2d 705, 601 P.2d 375 (1979).

This instruction must not be confused with PIK 2d 54.01-A, General Criminal Intent. The above instruction is a rule of evidence and does not deal with the required element of criminal intent necessary for conviction in those cases where criminal intent is a necessary element of the offense. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

The instruction should not be given when no intent is required for the crime, that is, where the doing of the act prohibited is itself sufficient to constitute the crime, as provided by K.S.A. 21-3204. In that situation the recitals in the elements instruction provide all necessary information as to the offense and proof needed.

Comment

In *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), the Court held that from an instruction like the first sentence of prior PIK 54.01, standing alone, a jury could infer that it was incumbent upon the defendant to prove his lack of intent by some quantum of proof.

Sandstrom was not inconsistent with earlier Kansas cases holding that PIK 54.01, read as a whole, did not shift the burden to the defendant on the issue of intent. See *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), wherein the Court held PIK 54.01 valid where the jury is informed that the burden to prove criminal intent is on the prosecution beyond a reasonable doubt and that the presumption does not dispense with this burden nor nullify the presumption of innocence; and *State v. Woods*, 222 Kan. 179, 563 P.2d 1061 (1977), reaffirming *Lassley*. Nevertheless the present instruction is designed to make it crystal clear that the "presumption" is only a permissive inference, leaving the trier of fact free to consider or reject it.

This instruction has been approved in *State v. McDaniel and Owens*, 228 Kan. 172, 180, 612 P.2d 1231 (1980); *State v. Costa*, 228 Kan. 308, 320, 613 P.2d 1359 (1980); *State v. Robinson, Lloyd and Clark*, 229 Kan. 301, 306, 624 P.2d 964 (1981). It also has been thoroughly discussed in *State v. Mason*, 238 Kan. 129, 708 P.2d 963 (1985), and in *State v. Ransom*, 239 Kan. 594, 605, 722 P.2d 540 (1986).

54.01-A GENERAL CRIMINAL INTENT

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

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

Notes on Use

For authority see K.S.A. 21-3201 (1) and (2). This instruction is not recommended for general use. The PIK instruction defining the crime should cover either specific or general criminal intent as an element of the crime. This instruction should be used only where the crime requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

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

This instruction must not be confused with PIK 2d 54.01, Presumption of Intent, which is a rule of evidence and does not purport to charge the jury to find criminal intent necessary for conviction.

Comment

As to those offenses of guilt without criminal intent, in *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956), it is said: "The doing of an inhibited [sic] act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." See also *State v. Cruitt*, 200 Kan. 372, 436 P.2d 870 (1968), in which the Court said: "And where an act is made a crime by statute, without any express reference to intent, this court has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed."

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.

State v. Johnson, 233 Kan. 981, 986, 666 P.2d 706 (1983), again affirms that this instruction protects the defendant's rights when there exists a statutory presumption of intent to deprive.

54.04 IGNORANCE OR MISTAKE OF LAW—REASONABLE BELIEF

It is a defense to the charge made against the defendant if he reasonably believed that his conduct did not constitute a crime and

(the crime was defined by an administrative regulation or order which was not known to him and had not been published, as provided by law, and he could not have acquired such knowledge by the exercise of ordinary care.)

(he acted in reliance upon a statute which later was determined to be invalid.)

(he acted in reliance upon an order or opinion [of the Supreme Court of Kansas] or [a United States appellate court] later overruled or reversed.)

(he acted in reliance upon an official interpretation of the [statute] [regulation] or [order] defining the crime made by a [public officer] or [agency] legally authorized to interpret such statute.)

Notes on Use

For authority, see K.S.A. 21-3203 (2). If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof should be given.

Comment

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the state. The term "public officer" in subparagraph (d) of K.S.A. 21-3203 (2) does not include judges and magistrates. *State v. V.F.W. Post No.* 3722, 215 Kan. 693, 527 P.2d 1020 (1974).

54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

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

Notes on Use

For authority see K.S.A. 21-3205 (1). For a crime not intended see PIK 2d 54.06.

Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner,* 193 Kan. 189, 196, 392 P.2d 863 (1964); *State v. Jackson,* 201 Kan. 795, 799, 443 P.2d 279 (1968).

One who watches at a distance to prevent surprise while others commit a crime is deemed in law to be a principal and punishable as such. *State v. Neil,* 203 Kan. 473, 474, 454, P.2d 136 (1969). Mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green,* 237 Kan. 146, 697 P.2d 1305 (1985).

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

54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER—CRIME NOT INTENDED

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

Notes on Use

For authority see K.S.A. 21-3205(2):

Where voluntary intoxication is asserted as a defense to aiding or abetting, a general intent crime, PIK 54.12, Voluntary Intoxication—General Intent Crime, should also be given.

Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner,* 193 Kan. 189, 195, 392 P.2d 863 (1964); *State v. Payton,* 229 Kan. 106, 622 P.2d 651 (1981). The other crime must be reasonably foreseeable. *State v. Davis,* 4 Kan. App 2d 210, 604 P.2d 68 (1979). See Comment to PIK 2d 54.05, Responsibility for Crimes of Another.

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate absence of required intent or state of mind and be a defense. *State v. McDaniel and Owens,* 228 Kan. 172, 612 P.2d 1231 (1980). See also *State v. Sterling,* 235 Kan. 526, 680 P.2d 301 (1984).

54.07 RESPONSIBILITY FOR CRIME OF ANOTHER—ACTOR NOT PROSECUTED

It is not a defense that (another) (others) who participated in the commission of the wrongful act constituting the crime (lacked criminal capacity) (has or has not been convicted of the crime or any lesser degree) (has been acquitted).

Notes on Use

For authority see K.S.A. 21-3205(3). PIK 2d 54.05, Responsibility for Crimes of Another and PIK 2d 54.06, Responsibility for crimes of Another—Crime Not Intended, should be used where applicable to the particular case. This instruction makes clear that a contrary rule which prevailed at common law is not the law in the State of Kansas.

Comment

An accessory before the fact may be convicted after the trial and conviction of the principal of a higher degree of offense than the principal was convicted of, *State v. Gray*, 55 Kan. 135, 144, 145, 39 Pac. 1050 (1895).

54.10-A INSANITY—COMMITMENT

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

Notes on Use

For authority, see K.S.A. 22-3428.

This instruction must be given in any case where there is reliance on the defense of insanity.

Comment

See *State v. Hamilton*, 216 Kan. 559, 534 P.2d 226 (1975).

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

In *State v. Alexander*, 240 Kan. 273, 287, 729 P.2d 1126 (1986), the Court reasoned that people in general were aware of the meanings of verdicts of guilty and not guilty. A verdict of not guilty by reason of insanity has no such commonly understood meaning, hence, the purpose of this instruction is not to force the jury into considering disposition, but to educate them regarding the insanity defense.

54.11 INTOXICATION—INVOLUNTARY

Intoxication involuntarily produced is a defense if it renders the accused substantially incapable of knowing or understanding the wrongfulness of his conduct and of conforming his conduct to the requirements of law.

Notes on Use

For authority, see K.S.A. 21-3208(1). If this instruction is given PIK 2d 52.08, Affirmative Defenses-Burden of Proof, should be given.

Comment

Intoxication is defined in K.S.A. 21-4109 as being under the influence of intoxicating liquor, narcotics or other drug. Although there is no mention of a drugged condition in the statute above, it is logical that the same rule should apply to involuntary intoxication resulting from the administration of drugs.

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

54.12 VOLUNTARY INTOXICATION—GENERAL INTENT CRIME

Voluntary intoxication is not a defense to a charge of (set out general intent crime).

Voluntary intoxication however, may be a defense where the evidence indicates that a defendant acted only as an aider or abettor, and may be considered in determining whether such defendant was capable of forming the required intent to aid or abet the commission of (general intent crime charged).

Notes on Use

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

The second paragraph should be included in cases involving multiple defendants where one or more may have acted only as an aider or abettor. PIK 54.05, Responsibility for Crimes of Another, or PIK 54.06, Responsibility for Crimes of Another—Crime Not Intended, should also be given in such circumstances.

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 crimf 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).

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

Where evidence indicates defendant could only be found guilty as an aider or abettor, specific intent is an issue, and voluntary intoxication may indicate

absence of required intent or state of mind and be a defense. *State v. McDaniel and Owens*, 228 Kan. 172, 612 P.2d 1231 (1980). See also *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

54.12-A VOLUNTARY INTOXICATION—SPECIFIC INTENT CRIME

Voluntary intoxication may be a defense to the charge of (specific intent crime charged), where the evidence indicates that such intoxication impaired a defendant's mental faculties to the extent that he was incapable of forming the necessary intent (set out specific intent element of the crime).

Notes on Use

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

Comment

"Where the crime charged requires a specific intent, voluntary intoxication may be a defense and an instruction thereon is required where there is evidence to support that defense." *State v. Sterling*, 235 Kan. 526, Syl. ¶2, 680 P.2d 301 (1984). See also *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), and *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987).

"When the defense of voluntary intoxication is asserted in a criminal trial, the issue concerning the level of the defendant's intoxication is a question of fact for the jury." *State v. Falke*, 237 Kan. 668, Syl. ¶10, 703 P.2d 1362 (1985).

"A defendant in a criminal case may rely upon evidence of voluntary intoxication to show a lack of specific intent even though he also relies upon other defenses inconsistent therewith. *State v. Shehen*, 242 Kan. 127, 744 P.2d 824 (1987). "To require the giving of an instruction on voluntary intoxication there must be some evidence of intoxication upon which a jury might find that a defendant's mental faculties were impaired to the extent that he was incapable of forming the necessary specific intent required to commit the crime." Id.

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.

54.14 ENTRAPMENT

The defendant can rely on the defense of entrapment when he is (induced) (persuaded) to commit a crime which he had no previous (disposition) (intention) (plan) (purpose) to commit; however, he cannot rely on the defense of entrapment when he (originated) (began) (conceived) the plan to commit the crime or when he had shown (a) (an) (predisposition) (plan) (intention) (purpose) for committing the crime and was merely afforded (an) (the) opportunity to (consummate) (carry out his intention to complete) (complete his plan to commit) the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of _____ was likely to occur and the law enforcement officer or his agent did not mislead the defendant into believing his conduct to be lawful.

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the _____ by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the _____ by defendant.

Notes on Use

For authority see K.S.A. 21-3210. Insert the name of the article or substance sold in the blank spaces. If this instruction is given PIK 52.08, Affirmative Defenses-Burden of Proof, should be given.

Comment

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

For other cases discussing the availability of the defense of entrapment see *State v. Amodei*, 222 Kan. 140, 145, 563 P.2d 440 (1977), *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974); *State v. Smith*, 229 Kan. 533, 625 P.2d 1139 (1981).

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

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

See also *State v. Rogers*, 234 Kan. 629, 675 P.2d 71 (1984).

54.14A PROCURING AGENT

The defendant is not guilty of a sale of _____ if the defendant acted only as a procuring agent for the purchaser. A procuring agent for the purchaser is a person who, by agreement with the purchaser, buys or procures an article or a substance from a third party at the request of and for the purchaser. The agreement may be written, oral or implied by the behavior of the parties.

The defendant is not a procuring agent if the defendant acted as a seller or as an agent for a seller.

Notes on Use

Insert the name of the article or substance sold in the blank space.

Comment

In *State v. Osborn*, 211 Kan. 248, 253, 505 P.2d 742 (1973), it was held that, when the procuring agent theory has been properly raised by the evidence and a request for the instruction has been made, it should be given.

This instruction is favorably cited in a decision affirming the defense of procuring agent as available and appropriate in a drug case. *State v. Schilling*, 238 Kan. 593, 600, 712 P.2d 1233 (1986).

54.15 CONDONATION

It is not a defense that the (injured party) (victim) has (excused) (forgiven) (compromised and settled) (ratified) the offense committed.

Notes on Use

Use for this instruction will not ordinarly arise as evidence to support it is generally not admissible. The pretrial conference will normally provide opportunity to settle the question in advance of trial.

Comment

For authority, see *State v. Newcomer*, 59 Kan. 668, 51 Pac. 685 (1898), a statutory rape case in which the victim married the defendant; *State v. Craig*, 124 Kan. 340, 259 Pac. 802 (1927), in which a mother, owner of an undivided interest, subsequently ratified the act of arson and *State v. Dye*, 148 Kan. 421, 83 P.2d 113 (1938), in which it was held that evidence offered to show a compromise, settlement or ratification will not constitute a bar to conviction and punishment of a crime.

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 and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). 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).

The existence of the battered woman syndrome in and of itself does not operate as a defense to murder. In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. *State v. Stewart*, 243 Kan. 639, 703 P.2d 572 (1988).

CHAPTER 56.00

CRIMES AGAINST PERSONS

56.01 MURDER IN THE FIRST DEGREE

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 intentionally killed _____;
2. That such killing was done maliciously;
3. That it was done deliberately and with premeditation; 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. 21-3401. Murder in the first degree is a class A felony. For felony murder see PIK 2d 56.02, Murder in the First Degree—Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment in PIK 2d 56.02, for authority to instruct on both theories.

Instructions on definitions of terms should be given as defined in PIK 2d 56.04, Homicide Definitions.

Comment

"In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him." Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1986).

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

The words "maliciously" and "premeditation" are not defined in the code, but are to be given the meaning established by the decisions of the Supreme Court of Kansas.

The Committee has inserted the word "intentionally" in paragraph one of the elements. K.S.A. 21-3401 defines murder in the first degree as the ". . . killing of a human being committed maliciously, willfully, deliberately and with premeditation. . . ." The term "maliciously" is defined in PIK 2d 56.04 as ". . . willfully doing a wrongful act without just cause or excuse." It would appear redundant to state an element of willfullness and one of malice and then define malice as willful conduct.

Since all felonies require proof of criminal intent and the same may be established by proof that the conduct was willful, under K.S.A. 21-3201, a jury would more likely understand the term "intentional" than "willful". A definition, then, of malice and the use of the word "intentional" should suffice, and if caution abounds, the trial court may desire to define "intentional" as "willful conduct that is purposeful and not accidental."

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

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. For a thorough analysis on lesser included offenses see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977). See also, Barbara, *Kansas Criminal Law Handbook* (1974).

The duty only arises when the evidence and trial would support a conviction of the lesser offense. *State v. Yarrington*, 238 Kan. 141, 143, 708 P.2d 524 (1985).

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

56.02-A MURDER IN THE FIRST DEGREE AND FELONY MURDER—ALTERNATIVES

In this case the state has charged the defendant with one offense of murder in the first degree and has introduced evidence on two alternate theories of proving this crime.

The state may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed _____ and that such killing was done while (in the commission of) (attemting to commit) _____, a felony or in the alternative by proving beyond a reasonable doubt that the defendant killed _____ maliciously and with deliberation and premeditation, as fully set out in these instructions.

Where evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict.

In instruction _____ the court has set out for your consideration the essential claims which must be proved by the state before you may find the defendant guilty of felony murder, that is the killing of a person (in the commission of) (in an attempt to commit) a felony crime.

In instruction _____ the court has set out for your consideration the essential claims which must be proved by the state before you may find the defendant guilty of premeditated murder.

If you do not have a reasonable doubt from all the evidence that the state has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree on either theory, then you must enter a verdict of not guilty.]

or

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree, then you must consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter)].

Notes on Use

For authority see K.S.A. 21-3401. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence includes both felony-murder and deliberate and premeditated murder, this instruction must be given in addition to PIK 56.01, Murder in the First Degree, and PIK 56.02, Murder in the First Degree—Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. (See PIK 69.01, Murder in the First Degree With Lesser Included Offenses.)

Comment

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of deliberation and premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the state may proceed on both theories. The defendant is entitled to notice that the state is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978). *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The state is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

56.03 MURDER IN THE SECOND DEGREE

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

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

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

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

Notes on Use

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

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 2d 68.01 and 69.01, lead-in instructions on lesser included offenses. For a definition of "maliciously" see PIK 2d 56.04, Homicide Definitions.

Comment

The Committee has inserted the word "intentionally" in paragraph one of the elements. In *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980), the court held that the trial court's failure to instruct on the intent to kill as an element of a lesser included offense of murder in the second degree was not error where a definition of "maliciously" was given as ". . . willfully doing a wrongful act without just cause or excuse," (PIK 2d 56.04, Homicide Definitions) and which was followed by a definition of "willfully" meaning "conduct that is purposeful and intentional, and not accidental."

By adding that the killing was intentional, which is a necessary intent requirement of proof, and defining "maliciously," it would appear to be sufficient and avoid additional definitions as the jury would understand the term "intentional."

See comment PIK 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

56.04 HOMICIDE DEFINITIONS

(a) Maliciously

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

For collection of cases dealing with definition of this term, see *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). See also, *State v. Wilson*, 215 Kan. 437, 524 P.2d 224 (1974); *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977); *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980).

(b) Deliberately and with premeditation

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

For authority, see *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560 (1887) in which it is said: Premeditation means "that there was a design or intent before the act; that is, that the accused planned, contrived and schemed beforehand to kill Sherman." See also, *State v. Johnson*, 92 Kan. 443, 143 Pac. 389 (1914), and *State v. Martinez*, 223 Kan. 536, 575 P.2d 30 (1978), for approval of this instruction.

(c) Willfully

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

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

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

(d) Intentionally

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

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

(e) Heat of passion

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

For authority, see *State v. McDermott*, 202 Kan.

56.06 INVOLUNTARY MANSLAUGHTER

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

B. (If you cannot agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)

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

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

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

Notes on Use

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

Comment

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

See Comment PIK 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

56.07 VEHICULAR HOMICIDE

The defendant is charged with the crime of vehicular homicide.

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

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

Notes on Use

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

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

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

Comment

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

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

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defend-

ant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Cordon*, supra.

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

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

56.07-A AGGRAVATED VEHICULAR HOMICIDE

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

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

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

Notes on Use

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

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

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

Aggravated vehicular homicide is a class E felony.

Comment

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

Vehicular battery may be a lesser included offense of aggravated vehicular homicide, a class E felony, particularly if there is dispute as to whether the death of the victim was the direct result of the injury by the defendant, or if death did not ensue until after one year of the incident.

56.07-B VEHICULAR BATTERY

The defendant is charged with the crime of vehicular battery.

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

1. That defendant unintentionally caused bodily harm to _____ by the operation of an (automobile) (airplane) (motorboat) (other motor vehicle);
2. That this act was committed while defendant (engaged in reckless driving) (drove under the influence of alcohol or drugs) (attempted to elude a police officer); and
3. That this act occurred on or about the ____ day of _____, 19 __, in _____ County, Kansas.

The term "bodily harm", as used here, means great bodily harm, disfigurement or dismemberment.

Notes on Use

For authority, see K.S.A. 21-3405b.

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

This instruction must be accompanied by a definition of the proscribed act. For a definition of "reckless driving" see PIK 70.04, Reckless Driving. For a definition of "driving under the influence of alcohol or drugs" see PIK 70.01, Traffic Offense-Driving Under the Influence of Alcohol or Drugs. For a definition of "attempt to elude a police officer" see K.S.A. 8-1568 and *State v. Russell*, 229 Kan. 124, 126, 622 P2d 658 (1981).

Vehicular battery is a class A misdemeanor.

This instruction may be applicable as a lesser included offense of aggravated vehicular homicide (PIK 56.07-A), a class E felony, particularly if there is dispute as to whether the death of the victim was the direct result of the injury by the defendant, or if death did not ensue until after one year of the incident.

Comment

In *Smith v. Marshall*, 225 Kan. 70, 587 P.2d 320 (1978), the term "permanent disfigurement" was discussed and defined in determining a threshhold criterion for an action under K.S.A. 40-3117 (no-fault insurance).

56.08 ASSISTING SUICIDE

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

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

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

Notes on Use

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

Comment

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

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

56.18 AGGRAVATED BATTERY

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

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

1. That the defendant intentionally touched or applied force to the person of _____;
2. That it was done with intent to injure _____ (or another) and
3. That it inflicted great bodily harm upon _____;

   or

   that it caused a (disfigurement to) (dismemberment of) his person;

   or

   that it was done with a deadly weapon;

   or

   that it was done in a manner whereby (great bodily harm) (disfigurement) (dismemberment) or (death) could have been inflicted; 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. 21-3414.

Aggravated battery is a class C felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it PIK 2d 56.16, Battery, should be given.

Comment

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). This instruction was approved in *State v. Stringfield*, 4 Kan. App.2d 559, 608 P.2d 1041 (1980).

In *State v. Bowers*, 239 Kan. 417, 721 P.2d 268 (1986), the court was faced with the issue of determining whether a Doberman pinscher constitutes a "deadly weapon" for purposes of proving aggravated battery under K.S.A. 21-3414. Relying on *State v. Hanks*, 236 Kan. 524, 537, 694 P.2d 407 (1985), the court held that a deadly weapon is an instrument which, "from the manner in which it is used," is calculated or likely to produce death or serious bodily injury. Even though dogs, including this breed, may not be deadly weapons per se, if "used"

in a deadly manner it would constitute a deadly weapon within the meaning of the statute.

The term "in any manner," used in the statute is not vague. The ordinary meaning of "manner" is a mode, a method, the way of effecting a result (239 Kan. at 246).

56.18A CRIMINAL INJURY TO PERSON

Comment

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

57.05 INDECENT LIBERTIES WITH A CHILD

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

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

1. That the defendant had sexual intercourse with _____;

   or

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

   or

   That the defendant fondled or touched the person of _____ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either or both;

   or

   That the defendant solicited _____ to engage in lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of _____, the defendant or another;
2. That _____ was then a child under the age of 16 years and not married to the defendant; and
3. That this act occurred on or about the _____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

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

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

Comments

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

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

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

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

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

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

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

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

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

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

The authority statute was further amended in 1987 to enlarge the crime to include solicitation of a child to engage in any lewd fondling or touching of another person.

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).

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 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) (aggravated 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) (16) 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 criminal sodomy) (lewd and lascivious behavior) (sexual bat-

tery) (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.

An element of the crime of aggravated incest is that the victim be under eighteen years of age. By definition the unlawful sex acts of indecent liberties with a child (K.S.A. 21-3503), aggravated indecent liberties with a child (K.S.A. 21-3504), aggravated criminal sodomy (K.S.A. 21-3506), and aggravated sexual battery (K.S.A. 21-3518) can only be committed with persons under sixteen years of age. The committee has no explanation for this inconsistency. In our opinion "under *16* years of age" should be used in paragraph two when these unlawful sex acts are involved.

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 ALCOHOLIC LIQUOR TO A PERSON UNDER 21

The defendant is charged with the crime of furnishing alcoholic liquor 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 alcohol 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 alcoholic liquor to a person under 21 is a class B misdemeanor for which the minimum fine is $200.

Comment

K.S.A. 41-102 may be referred to for a definition of alcoholic 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.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986).

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 of 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 which the minimum fine is $200. 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.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986).

58.12-B FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR ILLICIT PURPOSES

The defendant is charged with the crime of furnishing alcoholic beverages to a minor for illicit purposes. The defendant pleads not guilty.

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

1. That the defendant [(directly) (indirectly)] [(bought for) (sold to) (gave to) (furnished to)] _____, a child under 18 years of age, (a cereal malt beverage) (an intoxicating liquor);
2. That the defendant did so with the intent (to commit against such child) (to [encourage] [induce] such child to [commit] [participate in]) the crime of (set out the crime as defined in Article 35 of Chapter 21 of Kansas Statutes Annotated or in K.S.A. 21-3602 or 21-3603 and amendments thereto); 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. 21-3610b. Furnishing alcoholic beverages to a minor for illicit purposes is a class E felony.

For a definition of "cereal malt beverage" see K.S.A. 41-2701 and amendments thereto.

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.

CHAPTER 59.00

CRIMES AGAINST PROPERTY

59.01 THEFT

The defendant is charged with the crime of theft of property of the value of (fifty thousand dollars or more) (at least five hundred dollars but less than fifty thousand dollars) (less than five hundred dollars). The defendant pleads not guilty.

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

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

   or

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

   or

   That the defendant obtained by threat control over property,

   or

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

Notes on Use

For authority see K.S.A. 21-3701. Theft of property of the value of fifty thousand dollars or more is a class D felony. Theft of property of the value of at least five hundred dollars but less than fifty thousand dollars is a class E felony. Theft of property of the value of less than five hundred dollars is a class A misdemeanor, except that theft of property of the value of less than five

hundred dollars is a class E felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of theft two or more times.

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

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 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 the type of theft to charge under K.S.A. 21-3701, it is permissible to charge in the alternative. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

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.

Comment

PIK 59.01 is approved in *State v. Nesmith*, 220 Kan. 146, 551 P.2d 986 (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.

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."

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. xxii (July 16, 1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

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).

59.01-B THEFT—WELFARE FRAUD

The defendant is charged with the crime of theft of social welfare assistance of the value of (fifty thousand dollars or more) (at least five hundred dollars but less than fifty thousand dollars) (less than five hundred dollars). The defendant pleads not guilty.

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

1. That defendant (obtained) (attempted to obtain) (aided or abetted [name of applicant or client] to obtain) assistance in the form of [describe applicable assistance as defined in K.S.A. 39-702(d)] to which (defendant) or (name of other applicant or client) was not entitled;
2. That defendant did so by (means of a wilfully false statement or representation) (impersonation) (collusion) (fraudulent device);
3. That the value of the assistance was (fifty thousand dollars or more) (at least five hundred dollars but less than fifty thousand dollars) (less than five hundred dollars); and
4. That this act occurred on or about the _____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 39-720, 39-702(d) and 21-3701. Theft of assistance of the value of fifty thousand dollars or more is a class D felony. Theft of assistance of the value of at least five hundred dollars but less than fifty thousand dollars is a class E felony. Theft of assistance of the value of less than five hundred dollars is a class A misdemeanor, except that theft of assistance of the value of less than five hundred dollars is a class E felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of theft two or more times.

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

Comment

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. xxii (July 16, 1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

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 of the value of (fifty thousand dollars or more) (at least five hundred dollars but less than fifty thousand dollars) (less than five hundred dollars). The defendant pleads not guilty.

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

1. That the defendant intentionally obtained services in the form of _____ 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) (tampering by [describe the form of tampering]) (use of a false token or device);
3. That the value of the services obtained was (fifty thousand dollars or more) (at least five hundred dollars but less than fifty thousand dollars) (less than five hundred dollars); and
4. That this act occurred on or about the ____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3704. Theft of services of the value of fifty thousand dollars or more is a class D felony. Theft of services of the value of at least five hundred dollars but less than fifty thousand dollars is a class E felony. Theft of services of the value of less than five hundred dollars is a class A misdemeanor.

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

Forms of tampering are described in K.S.A. 21-3704(3).

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.

59.57 THEFT OF CABLE TELEVISION SERVICES

(K.S.A. 21-3752 was repealed effective July 1, 1988. See L. 1988, Ch. 113, Sec. 3.) For an instruction on the current statute see PIK 59.03, Theft of Service.

59.58 PIRACY OF SOUND RECORDINGS

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

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

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

Notes on Use

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

Defenses to the charge of piracy of sound recordings are set forth in PIK 2d 59.59, Piracy of Sound Recordings—Defenses.

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

59.63-B ADDING DOCKAGE OR FOREIGN MATERIAL TO GRAIN

The defendant is charged with adding dockage or foreign material to grain. Defendant pleads not guilty.

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

1. That the defendant knowingly added (insert description of type of dockage) or (insert description of foreign material) to (type of grain); and

   or

   That the defendant knowingly recombined (insert description of type of dockage) or (insert description of foreign material) once removed from grain with (type of grain); and
2. That the defendant intended the grain to be marketed; 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. 21-3756. Adding dockage or foreign material is a class E felony.

The court must determine, as a matter of law, from the regulations promulgated by the United States Secretary of Agriculture whether the material added constitutes dockage or foreign material. Dockage means that definition given to it by the United States Secretary of Agriculture as of July 1, 1987, under the federal grain quality improvement act of 1986. K.S.A. 21-3156 defines "foreign material" as dirt, rock, sand, sticks, or manure, or any combination of such material defined as foreign material by the United States Secretary of Agriculture, as of July 1, 1987, under the federal grain quality improvement act of 1986.

The secretary has provided a definition for dockage or foreign material for each of several types of grain. See 7 C.F.R. § 810 *et seq.* Official United States Standards for Grain (1988).

Subpart B barley	dockage	7 C.F.R. § 810.202(e)
	foreign material	7 C.F.R. § 810.202(f)
Subpart C corn	dockage	none
	foreign material	7 C.F.R. § 810.402(e)
Subpart D flaxseed	dockage	7 C.F.R. § 810.602(b)
	foreign material	none
Subpart F oats	dockage	none
	foreign material	7 C.F.R. 810.1002(b)

PATTERN INSTRUCTIONS FOR KANSAS

Subpart G rye	dockage	7 C.F.R. 810.1202(b)
	foreign material	7 C.F.R. 810.1202(c)
Subpart H sorghum	dockage	7 C.F.R. 810.1402(e)
	foreign material	7 C.F.R. 810.1402(f)
Subpart I soybeans	dockage	none
	foreign material	7 C.F.R. 810-1602(c)
Subpart J sunflower seed	dockage	none
	foreign material	7 C.F.R. 810.1802(d)
Subpart K triticale	dockage	7 C.F.R. 810.2002(c)
	foreign material	7 C.F.R. 810.2002(d)
Subpart L wheat	dockage	7 C.F.R. 810.2202(e)
	foreign material	7 C.F.R. 810.2202(f)

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.

59.65-A VIOLATION OF THE KANSAS ODOMETER ACT—TAMPERING, ETC.

The defendant is charged with the crime of violation of the Kansas Act relating to odometers. The defendant pleads not guilty.

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

1. That the defendant knowingly (tampered with) (adjusted) (altered) (changed) (set back) (disconnected) (failed to connect) the odometer of a motor vehicle so as to reflect a lower mileage than the true mileage the motor vehicle had been driven; and

   or

   The the defendant knowingly caused the odometer of a motor vehicle to (be tampered with) (be adjusted) (be altered) (be changed) (be set back) (be disconnected) (remain disconnected) by another so as to reflect a lower mileage than the true mileage driven by the motor vehicle; 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. 21-3757(b). Violation of the Act is a class E felony.

59.65-B VIOLATION OF THE KANSAS ODOMETER ACT—CONSPIRING

The defendant is charged with the crime of conspiring to violate the Kansas Odometer Act. The defendant pleads not guilty.

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

1. That the defendant agreed with (another person) (others) to (commit) (assist in the commission of) the crime of violation of the Kansas Odometer Act by (describe the specific violation of the Act to which the defendant conspired);
2. That the defendant did so agree with the intent that a violation of the Kansas Odometer Act be committed;
3. That the defendant or any party to the agreement acted in furtherance of the agreement by (describe the overt act); 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. 21-3757(c). Violation of the Act is a class E felony.

59.65-C VIOLATION OF THE KANSAS ODOMETER ACT—OPERATING A VEHICLE

The defendant is charged with the crime of violation of the Kansas Act relating to odometers. The defendant pleads not guilty.

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

1. That the defendant operated a motor vehicle on a (street) (highway) knowing that the odometer was (disconnected) (nonfunctional);
2. That defendant did so with the intent to defraud; and
3. That this act occurred on or about the _____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3757(d). Violation of the Act is a class E felony.

59.65-D VIOLATION OF THE KANSAS ODOMETER ACT—UNLAWFUL DEVICE

The defendant is charged with the crime of violation of the Kansas Act relating to odometers. The defendant pleads not guilty.

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

1. That the defendant (advertised for sale) (sold) (used) (installed on a motor vehicle) (installed on an odometer in a motor vehicle) a device which causes the odometer to register mileage other than the true mileage; 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. 21-3757(e). Violation of the Act is a class E felony.

59.65-E VIOLATION OF THE KANSAS ODOMETER ACT—UNLAWFUL SALE

The defendant is charged with the crime of violation of the Kansas Act relating to odometers. The defendant pleads not guilty.

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

1. That the defendant (sold) (offered to sell) a motor vehicle knowing that the odometer on the motor vehicle (was tampered with) (was adjusted) (was altered) (was changed) (was set back) (was disconnected) (had not been connected) so as to reflect a lower mileage than the true mileage of the motor vehicle;
2. That the defendant did so with the intent to defraud; and
3. That this act occurred on or about the _____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3757(f). Violation of the Act is a class E felony.

59.65-F VIOLATION OF THE KANSAS ODOMETER ACT—UNLAWFUL SERVICE, REPAIR OR REPLACEMENT

The defendant is charged with the crime of violation of the Kansas Act relating to odometers. The defendant pleads not guilty.

The Kansas Odometer Act provides that if in the service, repair, or replacement of an odometer the odometer is (made) (found) incapable of registering the same mileage as before the service, repair, or replacement of the odometer, it shall be adjusted to read zero and a notice shall be attached permanently to the left door frame of the vehicle specifying the mileage prior to repair or replacement of the odometer, the date on which it was repaired or replaced, and the vehicle identification number.

To establish the crime for which the defendant is charged each of the following claims must be proved:

1. That the defendant failed to (adjust) (affix a notice regarding the adjustment of) the odometer of a motor vehicle; and

   or

   That the defendant (removed) (altered) the notice affixed to a motor vehicle as required by the Kansas Odometer Act; 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. 21-3757(g). Violation of the Act is a class E felony.

59.66—59.69 Reserved for future use.

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).

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

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 _____, 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 correction 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 or parole violation to be reported and prosecuted and assisting in its prosecution.

   or

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

   or

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

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

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.

Notes on Use

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

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

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

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

60.06-C UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS

The defendant is charged with unlawful disclosure of authorized interception of (wire) (oral) (electronic) communications. The defendant pleads not guilty.

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

1. **The defendant communicated to a person or made public in any way the existence of an application or order for the interception of (wire) (oral) (electronic) communications;**
2. **The act was done with the intent to obstruct, impede or prevent an authorized interception; and,**
3. **That this act occurred on or about the __ day of _____, 19__, in _____ County, Kansas.**

For purposes of this instruction, intercept means the hearing or otherwise learning of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.

Notes on Use

For authority see K.S.A. 21-3838. Unlawful disclosure of an authorized interception of communications is a Class E felony.

Definitions of wire communication, oral communication and electronic communication are found in K.S.A. 22-2514.

60.07 COMPOUNDING A CRIME

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

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

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

Notes on Use

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

60.10 ESCAPE FROM CUSTODY

The defendant is charged with 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) (following defendant's conviction 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 temporary leave lawfully granted) (following a court order authorizing 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, parole, or a community correctional services program) (here 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) (following conviction 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 (temporary leave authorized by law) (temporary leave granted by a court);

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) (following conviction 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 or imposed as a specific condition of probation, parole, or a community correctional services program) (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 60.10.

60.12 AIDING ESCAPE

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

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

A. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime);

2. That the defendant intentionally assisted _____ in escape from custody; and

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

or

B. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime);

2. That the defendant supplied to _____, an object suitable for _____'s use in escaping custody;

3. That the defendant did so with intent to assist _____ in escaping custody; and

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

or

C. 1. That _____ was confined in an institution (charged with a crime) (after conviction of a crime);

2. That the defendant (brought) (introduced) into the institution an object suitable for _____'s use in escaping the institution;

3. That the defendant did so with intent to assist _____ in escaping the institution; and

4. 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 de-

portation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (any other detention for law enforcement purposes).

Notes on Use

For authority see K.S.A. 21-3811 and K.S.A. 21-3809.

Aiding escape is a class E felony.

"Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. Lawful custody is initially a question of law for the court to determine.

Comment

The instruction requires that the objects provided be "suitable," this term includes both "adapted" and "designed."

60.15 FAILURE TO APPEAR OR AGGRAVATED FAILURE TO APPEAR

The defendant has been charged with the crime of (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

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

1. That the defendant had been charged with a (misdemeanor) (felony) and released on an appearance bond to appear before a court;
2. That the defendant willfully failed to appear before the court at the time requested;
3. That the defendant's appearance bond was forfeited;
4. That the defendant willfully (failed to surrender within 30 days following the forfeiture of appearance bond) (failed to surrender within 30 days after conviction of a [misdemeanor] [felony] had become final); 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. 21-3813 and K.S.A. 21-3814.

Failure to appear is a class B misdemeanor.

Aggravated failure to appear is a class E felony.

The provisions of K.S.A. 21-3813(1) do not apply to any person who forfeits a cash bond supplied pursuant to law upon an arrest for a traffic offense.

For venue see K.S.A. 22-2615.

The 30 day period following forfeiture is a question of law.

It is the opinion of the Committee that all the elements essential to an instruction for K.S.A. 21-3813, Failure to appear, and K.S.A. 21-3814, Aggravated failure to appear, are contained in this instruction.

Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself

within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers,* 225 Kan. 242, 245, 589 P.2d 981 (1979).

Failure to appear is "aggravated" only if the charge involved is a felony. When applicable this element should be included in the trial court's instruction. See *State v. DeAtley,* 11 Kan. App 2d 605, 731 P2d 318 (1987).

60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER

The defendant is charged with the crime of attempting to influence a judicial officer. The defendant pleads not guilty.

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

1. **That _____ was a judicial officer;**
2. **That the defendant knew _____ was a judicial officer;**
3. **That the defendant communicated with _____ relative to a matter which (was before) (might have been brought before) _____;**
4. **That such act was done by the defendant with the intent to improperly influence _____; 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. 21-3815.
Attempting to influence a judicial officer is a class E felony.
Judicial officer is defined in K.S.A. 21-3110(19)(c).

Comment

In *State v. Torline,* 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the court stated, "The phrase, with intent improperly to influence a judicial officer, as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above cited case, the court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.

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) (sandclub) (metal knuckles) (throwing star) (switchblade knife); and

   or

   That the defendant knowingly (carried concealed on defendant's 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 defendant's 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 defendant's person when not on defendant's 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(1)(a) through (f). The instruction presents several alternative situations and only the appropriate one should be used.

If the weapon is a switchblade knife the definition given in subsection (1)(a) of the statute should be inserted after the numbered paragraphs of the instruction.

Likewise under subsection (1)(b) an ordinary pocket knife with no blade more than four (4) inches in length shall not be construed to be a dangerous knife, weapon or instrument. If applicable, this exclusionary definition should be included after the numbered paragraphs of the instruction.

It should also be noted under this statute, possession of a shotgun with a barrel less than 18 inches in length is a felony. See PIK 64.01, Unlawful Use of Weapons—Felony.

See also PIK 64.04, Unlawful Use of Weapons—Affirmative Defense, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

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 722, 648 P.2d 262 (1982) the constitutionality of subsection (1)(d) was upheld as not an unreasonable exercise of police power or overbroad.

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 each of the following claims must be proved:

1. That the defendant discharged a firearm;
2. That the act occurred upon land of another or from any public road or railroad right-of-way that adjoins land of another;
3. That the defendant did not have permission of the owner or person in possession of such land to discharge a firearm; 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. 21-4217(a). Unlawful Discharge of a Firearm is a class C misdemeanor.

See also PIK 64.04, Unlawful Use of Weapons—Affirmative Defense, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

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.

64.05 UNLAWFUL DISPOSAL OF FIREARMS

The defendant is charged with the crime of unlawful disposal of firearms. The defendant pleads not guilty.

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

1. **That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than twelve (12) inches long to _____;**
2. **That _____ was a person under eighteen (18) years of age; and**

or

1. **That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;**
2. **That _____ was (an habitual drunkard) (a narcotic addict); and**

or

1. **That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than twelve (12) inches long to _____;**
2. **That _____ was a person convicted of _____, a felony, (within five years after his release from the penitentiary) (within five years after his conviction of _____, a felony); and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 21-4203. The appropriate alternative situation should be used. Unlawful disposal of firearms is a class A misdemeanor.

64.06 UNLAWFUL POSSESSION OF A FIREARM—FELONY

The defendant is charged with the crime of unlawful possession of a firearm. The defendant pleads not guilty.

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

1. **That the defendant knowingly had possession of a firearm with a barrel less than twelve inches long;**
2. **That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Possession means having custody of a firearm with the intent to control its management and use.

Notes on Use

For authority see K.S.A. 21-4204. Unlawful possession of a firearm under these circumstances is a class D felony.

Comment

K.S.A. 21-4204 makes "possession" of a firearm by a convicted felon an offense. The word "knowingly" is not used in the statute. The Committee in preparing this instruction has added the requirement that the possession of the firearm be "knowingly." This construction of the word "possession" is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself. For example, see *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920), and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). In reaching this conclusion the committee considered K.S.A. 21-3201 which provides that a criminal intent is an essential element of every crime defined by the code. Willful conduct is conduct that is purposeful and intentional and not accidental. An exception is made in K.S.A. 21-3204 which provides for an absolute criminal liability without criminal intent 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. In view of the case law set forth above and the statutes just cited, it seems clear that in order to establish the offense of unlawful possession of a firearm, it must be proved that the possession was knowing and intentional.

K.S.A. 21-2611, which was superseded in K.S.A. 21-4204, was held to be constitutional under the attack that it was a denial of equal protection of the laws. *State v. Weathers*, 205 Kan. 329, 469 P.2d 292 1970.

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

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

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).

In *State v. Kulper*, 12 Kan. App.2d 301, 744 P.2d 519 (1987) the court held it was not error to define "possession" as stated in PIK 53.00 rather than as defined in PIK 64.06. This decision does not suggest any deficiency in the 64.06 definition which was drafted as consistent with the Supreme Court's definition of possession in *State v. Farris*, supra.

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) (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.

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 instructions are defined as follows:

"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.

"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. As used in this definition, a lottery does not include a lottery operated by the state pursuant to the Kansas Lottery Act.

"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 consideraton.

"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.

"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), (d), (e), and (f) set forth what a bet does not include. A bet does not include: bonafide 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; a lottery operated by the state pursuant to the Kansas lottery act; and any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas parimutuel racing act.

K.S.A. 21-4302(2) states a lottery does not include a lottery operated by the State pursuant to the Kansas lottery act.

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; sums of money paid by or for participants in any lottery operated by the state pursuant to the Kansas lottery act; and sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas parimutuel racing act. Where such excluded transactions are involved in the particular case, they usually raise pure questons 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.

K.S.A. 21-4302(5) provides that evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places is admissible on the issue of whether it is a gambling place.

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).

65.21 to 65.29 Reserved for future use.

65.30 CONFLICTS OF INTEREST—COMMISSION MEMBER OR EMPLOYEE

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

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

1. That the defendant was (the executive director) (a member of the commission) (an employee) (a person residing in the household of [the executive director], [a member of the commission] [an employee]) of the Kansas Lottery;
2. That the defendant had either directly or indirectly an interest in a business knowing that such business contracts with the Kansas Lottery for a major procurement, whether such interest is as (a natural person) (partner) (member of an association) (a stockholder or director or officer of the corporation);

   or

   That the defendant (accepted) (agreed to accept) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of $20.00 or more in any calendar year from a person knowing that such person contracts or seeks to contract with the state to supply (gaming equipment) (materials) (tickets) (consulting services) for use in the lottery or is a lottery retailer or an applicant for lottery retailer;
3. That this act occurred on the ____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 74-8716(a)
Conflicts of interest is a class A misdemeanor.

Comment

In addition to the provisions of K.S.A. 74-8716(a) all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas Lottery. K.S.A. 74-8716(e).

65.31 CONFLICTS OF INTEREST—RETAILER OR CONTRACTOR

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

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

1. That the defendant is (a lottery retailer) (an applicant for lottery retailer) (a person who contracts or seeks to contract with the state to supply [gaming equipment] [materials] [tickets] [consulting services] for use in the lottery);
2. That the defendant (offered) (paid) (gave) (made) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of $20.00 or more in any calendar year to a person knowing such person is (the executive director) (a member of the commission) (an employee) of the Kansas Lottery (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery;
3. That this act occurred on the ____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 74-8716(b).
Conflicts of interest is a class A misdemeanor.

Comment

In addition to the provisions of K.S.A. 74-8716(b) all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas Lottery. K.S.A. 74-8716(e).

65.32 FORGERY OF A LOTTERY TICKET

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

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

1. That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a lottery ticket issued or purported to have been issued by the Kansas Lottery

   or

   That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a share or receipt for the purchase of a lottery ticket issued or purported to have been issued by the Kansas Lottery.
2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on the ____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 74-8717.
Forgery of a lottery ticket is a class D felony.

65.33 UNLAWFUL SALE OF A LOTTERY TICKET

The defendant is charged with the crime of unlawful sale of a lottery ticket. The defendant pleads not guilty.

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

1. That the defendant sold a lottery ticket or share at a price other than the price fixed by the rules and regulations adopted pursuant to the Kansas Lottery act;

   or

   That the defendant (sold) (resold) a lottery ticket or share and was not a lottery retailer as authorized by the Kansas Lottery Act;

   or

   That the defendant sold a lottery ticket or share to _____ knowing that _____ was a person under 18 years of age; and
2. That this act occurred on the ____ day of _____, 19__, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 74-8718.

Unlawful sale of a lottery ticket is a class A misdemeanor upon conviction of the first offense and a class D felony upon conviction of a second or subsequent offense.

65.34 UNLAWFUL PURCHASE OF A LOTTERY TICKET

The defendant is charged with the crime of unlawful purchase of a lottery ticket. The defendant pleads not guilty.

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

1. That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was the (executive director) (a member of the commission) (an employee) of the Kansas Lottery;

   or

   That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was an (officer) (employee) of a business which was currently engaged in supplying equipment, supplies or services used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act.

   or

   That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was a (spouse) (child) (stepchild) (brother) (stepbrother) (sister) (stepsister) (parent or stepparent) of (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; (an officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or services) used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act;

   or

   That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was a person who resided in the same household of (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; (an officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or service) used directly in the op-

erations of any lottery conducted pursuant to the Kansas Lottery Act; and

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

Notes on Use

For authority see K.S.A. 74-8719.

Unlawful purchase of a lottery ticket is a class A misdemeanor upon conviction of the first offense and a class D felony upon conviction of a second or subsequent offense.

For applicable definitions see PIK 65.35, Lottery Definitions.

Comment

K.S.A. 74-8719(f) states that each person who purchases a lottery ticket or share thereby agrees to be bound by the rules and regulations adopted by the commission and the provisions of the Kansas Lottery Act.

It is a defense to a charge of unlawful purchase of a lottery ticket that the executive director of the Kansas Lottery authorized, in writing, any employee of the Kansas Lottery and any employee of the lottery vendor to purchase a lottery ticket.

65.35 LOTTERY DEFINITIONS

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

"Commission" means the Kansas Lottery Commission.

"Executive Director" means the executive director of the Kansas Lottery.

"Gaming Equipment" means any electric, electronic or mechanical device or other equipment unique to the Kansas lottery used directly in the operation of any lottery and in the determination of winners pursuant to this act.

"Kansas Lottery" means the state agency created by the Kansas Lottery Act to operate a lottery or lotteries pursuant to this act.

"Lottery Retailer" means any person with whom the Kansas Lottery has contracted to sell lottery tickets or shares, or both, to the public.

"Lottery" or "State Lottery" means the lottery or lotteries operated pursuant to the Kansas Lottery Act.

"Major Procurement" means any gaming product or service including but not limited to facilities, advertising and promotional services, annuity contracts, prize payment agreements, consulting services, equipment, tickets and other products and services unique to the Kansas Lottery, but not including materials, supplies, equipment and services common to the ordinary operations of state agencies.

"Person" means any natural person, association, corporation or partnership.

"Prize" means any prize paid directly by the Kansas lottery pursuant to its rules and regulations.

"Share" means any intangible manifestation authorized by the Kansas Lottery to prove participation in a lottery game.

"Ticket" means any tangible evidence issued by the Kansas Lottery to prove participation in a lottery game.

"Vendor" means any person who has entered into a major procurement contract with the Kansas Lottery.

Notes on Use

For Authority see K.S.A. 74-8702.

65.36-65.50 Reserved for future use.

65.51 VIOLATION OF THE KANSAS PARIMUTUEL RACING ACT

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

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

1. That the defendant (status of the defendant, if applicable);

1. or 2. That the defendant (describe the prohibited act);

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

Notes on Use

For authority see K.S.A. 74-8810 which covers a multitude of prohibited acts involving persons having varying status under the provisions of the Kansas Parimutuel Racing Act.

K.S.A. 74-8810(a) applies to members of the racing commission, certain directors and members of an organization licensee. Violation of 74-8810(a) is a class A misdemeanor.

K.S.A. 74-8810(b) applies to any member, employee or appointee of the racing commission, including stewards and racing judges. Violation of 74-8810(b) is a class A misdemeanor.

K.S.A. 74-8810(c) applies to any members, employees or appointees of the racing commission, and certain of their relatives. Violation of 74-8810(c) is a class A misdemeanor.

K.S.A. 74-8810(d) applies to any officers, directors and members of organizational licensees. Violation of 74-8810(d) is a class A misdemeanor.

K.S.A. 74-8810(e) applies to facility owners or manager licensees. Violation of 74-8810(e) is a class A misdemeanor.

K.S.A. 74-8810(f), (g) or (h) applies to any person. Violation of 74-8810(f) is a class B misdemeanor. Violation of 74-8810(g) is a class A misdemeanor. Violation of 74-8810(h) is a class E felony.

K.S.A. 74-8810(i) applies to any person less than 18 years of age. Violation of 74-8810(i) makes the person subject to adjudication as a juvenile offender pursuant to the Kansas Juvenile Offenders Code.

The suggested pattern instruction should be completed to show the status of the defendant, if applicable, and the particular act which is prohibited by the statute as set forth in the complaint or information. Allegation #1 is not applicable and need not be used when the prohibited act can be committed by any person under subsections (f), (g) and (h) of K.S.A. 74-8810.

The following is a sample instruction which assumes a member of the racing commission is charged with placing a wager on an entry in a horse race conducted by an organization licensee:

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

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

1. That the defendant was a member of the Kansas Racing Commission;
2. That the defendant knowingly placed a wager on an entry in a horse race conducted by an organizational licensee; and,
3. That this act occurred on the _____ day of _____, 19 ___, in _____ County, Kansas.

For applicable definitions, see PIK 65.52, Parimutuel Racing Act-Definitions.

65.52 PARIMUTUEL RACING ACT—DEFINITIONS

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

"Breakage" means the odd cents by which the amount payable on each dollar wagered in a parimutuel pool exceeds a multiple of $.10.

"Commission" means the Kansas Racing Commission created by this act.

"Concessionaire licensee" means a person, partnership, corporation or association licensed by the commission to utilize a space or privilege within a racetrack facility to sell goods.

"Dual racetrack facility" means a racetrack facility for the racing of both horses and greyhounds or two immediately adjacent racetrack facilities, owned by the same licensee, one for racing horses and one for racing greyhounds.

"Executive Director" means the executive director of the commission.

"Facility manager licensee" means a person, partnership, corporation or association licensed by the commission and having a contract with an organization licensee to manage a racetrack facility.

"Facility owner licensee" means a person, partnership, corporation or association, or the State of Kansas or any political subdivision thereof, licensed by the commission to construct or own a racetrack facility but does not mean an organization licensee which owns the racetrack facility in which it conducts horse or greyhound racing.

"Financial interest" means an interest that could result directly or indirectly in receiving a pecuniary gain or sustaining a pecuniary loss as a result of ownership or interest in a business entity or activity or as a result of a salary, gratuity or other compensation or remuneration from any person.

"Greyhound" means any greyhound breed of dog properly registered with the national greyhound association of Abilene, Kansas.

"Kansas-bred horse" means any horse dropped by a

mare in Kansas and domiciled in Kansas for the first six months of its life.

"Kansas-whelped greyhound" means a greyhound whelped and raised in Kansas for the first six months of its life.

"Minus pool" means a parimutuel pool in which, after deducting the takeout, not enough money remains in the pool to pay the legally prescribed minimum return to those placing winning wagers, and in which the organization licensee would be required to pay the remaining amount due.

"Nonprofit organization" means:
(1) A corporation which is incorporated in Kansas as a not-for-profit corporation pursuant to the Kansas general corporation code and the net earnings of which do not inure to the benefit of any shareholder, individual member of person; or (2) a county fair association organized pursuant to K.S.A. 2-125 *et seq.*, and amendments thereto.

"Occupation licensee" means a person licensed by the commission to perform an occupation or provide services which the commission has identified as requiring a license pursuant to this act.

"Organization licensee" means a nonprofit organization licensed by the commission to conduct races pursuant to this act and, if the license so provides, to construct or own a racetrack facility.

"Parimutuel pool" means the total money wagered by individuals on one or more horses or greyhounds in a particular horse or greyhound race to win, place or show, or combinations thereof, as established by the commission, and held by the organization licensee pursuant to the parimutuel system of wagering. There is a separate parimutuel pool for win, for place, for show and for each of the other forms of betting provided for by the rules and regulations of the commission.

"Parimutuel wagering" means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denomination on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are

paid prizes from such pool in amounts proportional to the total receipts in the pool.

"Race meeting" means the entire period of time for which an organization licensee has been approved by the commission to hold horse or greyhound races at which parimutuel wagering is conducted or to hold horse races at which parimutuel wagering is not conducted.

"Racetrack facility" means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials and such additional areas as designated by the commission.

"Takeout" means the total amount of money withheld from each parimutuel pool for the payment of purses, taxes and the share to be kept by the organization licensee. Takeout does not include the breakage. The balance of each pool less the breakage is distributed to the holders of winning parimutuel tickets.

Notes on Use

For authority, see K.S.A. 74-8802.

CHAPTER 67.00

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 this 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) (offered for sale) (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(*q*) presents a detailed definition of "opiate." The committee believes that for convenience a court should refer to the substance in question under the generic term "narcotic drug" and insert the name of the specific drug in the appropriate blank. There will 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. 286, 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.

A presumption that the defendant be sentenced to imprisonment arises if the substance involved, regardless of amount, is possessed with intent to sell, is offered for sale, or is sold to a child under 18 years of age *or* is equal to or greater than the amounts specified in section 3 of the statute. K.S.A. 65-4127a.

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. Flinchpaugh,* 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).

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

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

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

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

Notes on Use

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

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

A presumption that the defendant be sentenced to imprisonment arises if the substance involved, regardless of amount, is possessed with intent to sell, is offered for sale, or is sold to a child under 18 years of age *or* is equal to or greater than the amounts specified in section (d)(3) of the statute. K.S.A. 65-4127b.

Comment

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

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

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

The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-410[*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.

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

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

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

67.15 SELLING, OFFERING TO SELL, MANUFACTURING, OR DISPENSING 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] [manufactured] [prescribed] [administered] [delivered] [distributed] [dispensed] [compounded] (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. 65-4127b(*b*). The section refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, and hallucinogenic drugs that are involved. For example, it refers to K.S.A. 65-4105(*d*) relative to the hallucinogenic drugs involved, which subsection includes such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others.

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

See Notes on Use to PIK 67.13, Narcotic Drugs.

A presumption that the defendant be sentenced to imprisonment arises if the substance involved, regardless of amount, is possessed with intent to sell, is offered for sale, or is sold to a child under 18 years of age *or* is equal to or greater than the amounts specified in section 3 of the statute. K.S.A. 65-4127a.

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

See the comment to PIK 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 POSSESSION 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 [possessed] [had under his or her control] (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 many others.

A violation of K.S.A. 65-4127b(a) is a class A misdemeanor, "except that such person shall be guilty of a class D felony upon conviction for a second or subsequent offense." "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. 286, 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.' "

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. Flinchpaugh*, 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.

67.18 POSSESSION OR MANUFACTURE OF CONTROLLED SUBSTANCE OR DRUG PARAPHERNALIA

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

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

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

Notes on Use

For authority see K.S.A. 65-4153.

A violation of K.S.A. 65-4153 is a class A misdemeanor, except that "any person who violates this section by delivering or causing to be delivered within this state drug paraphernalia or a simulated controlled substance to a person under 18 years of age is guilty of a class E felony." K.S.A. 65-4153(c).

An instruction defining "drug paraphernalia" should be given. K.S.A. 65-4150(c). Only those objects in evidence that might be classified by K.S.A. 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. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

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

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

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 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. 65-4156.

When defendant fails to present substantive evidence concerning reasonable legitimate uses for items of drug paraphernalia, an inference is raised that defendant is aware items will be used for illegal purposes and intends to sell them for such purposes. *State v. Dunn*, 233 Kan. 411, 430-431, 662 P.2d 1286 (1983).

67.20 REPRESENTATION THAT A NONCONTROLLED SUBSTANCE IS A CONTROLLED SUBSTANCE

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

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

1. That the defendant knowingly delivered or caused to be delivered in Kansas a substance which was not (name the controlled substance); and
2. (a) that the defendant made an express representation that the substance delivered was (name the controlled substance); and

   or

   (b) that the substance delivered was of such nature or appearance that the recipient would be able to distribute it as (name the controlled substance); and

   or

   (c) that the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

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

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 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. 65-4156.

A conviction for violation of K.S.A. 65-4155(a)(2) "requires proof of knowing delivery, but does not require proof of knowledge the delivered substance was not a controlled substance or proof of specific intent to deliver a noncontrolled substance." *State v. Marsh*, 9 Kan. App. 2d 608, 613, 684 P.2d 459 (1984).

The *Marsh* court also found that 65-4155 was not unconstitutionally vague and that the jury must be instructed that K.S.A. 65-4155(b)(3) does not shift the burden of proof to the defendant.

Comment

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

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

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

K.S.A. 21-3107(3) requires the trial court to instruct on a lesser offense which may be a "lesser degree of the same crime" when there is evidence introduced to reasonably support a conviction of the lesser offense. *State v. Long*, 234 Kan. 580 675 P.2d 832 (1984).

The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).

In *State v Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107. The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the indictment, complaint, or information as well as the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an "included crime" under the definition in 21-3107(2)(d).

The court held in *Fike* that under the statutory elements test, aggravated sexual battery is not a lesser included offense of indecent liberties with a child. Neither is it a lesser included offense under the second test even though the charging document alleges a lack of actual consent, as proof of actual consent would not be required in any event to prove the greater offense of indecent liberties with a child. 243 Kan. at 367 and 373.

The *Fike* court agreed with the reasoning in *State v. Fulcher*, 12 Kan. App. 2d 169, 170, 737 P.2d 61 (1987), which held that aggravated sexual battery cannot be a lesser included offense of indecent liberties with a child because it requires additional proof of an absence of consent. The Supreme Court in *Fike* overruled *State v. Hutchcraft*, 242 Kan. 55, 744 P.2d 849 (1987), to the extent that it is inconsistent with *Fike*. 243 Kan. at 373.

Aggravated incest is not a lesser included offense of rape because each crime requires proof of elements not present in the other. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987).

Under K.S.A. 21-3107(2)(d), the offense of driving under the influence of alcohol is a lesser included offense of involuntary manslaughter when (1) the

underlying misdemeanor to the involuntary manslaughter complaint is the driving under the influence of alcohol, and (2) all of the elements of the DUI are required to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987).

The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 76, 78, 744 P.2d 1228 (1987).

The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 864 (1987).

It was not reversible error where the trial court failed to instruct the jury that when there is reasonable doubt as to which two or more offenses the defendant is guilty, he may be convicted of the lesser included offense only. *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987).

Examples of lesser included offenses are:

1. **First Degree Murder**—The court's duty to instruct on the lesser offenses of second degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second degree murder is included where the issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses.
2. **Voluntary Manslaughter**—Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
3. **Involuntary Manslaughter**—If the operation of a motor vehicle is unintentional, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987).
4. **Felony Murder**—Ordinarily there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied*, 411 U.S. 951 (1973); but where there is an issue as to the felony itself, then an instruction on second degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 204, 718 P.2d 613 (1986).
5. **Aggravated Kidnapping**—Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978).
   Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975).
   Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).
6. **Kidnapping**—Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 130 (1982).

Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982).

Assault is not a lesser included offense. *State v. Schirner*, 215 Kan. 86, 523 P.2d 703 (1974).

7. **Aggravated Robbery**—Robbery is a lesser included offense only where there is in issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976).

   Aggravated battery or battery are not lesser included offenses. *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982).
8. **Robbery**—Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985).
9. **Aggravated Assault**—Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976). See *State v. Cameron*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
10. **Aggravated Battery**—Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976).

    Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).
11. **Aggra ated assault on law enforcement officer**—Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1972).
12. **Aggravated battery on law enforcement officer**—Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
13. **Aggravated burglary**—Burglary is a lesser included offense only where there is an issue whether another person was within the building. *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976).
14. **Burglary**—Criminal trespass is not a lesser included offense. *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976).

    Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).
15. **Theft**—Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), *reversing State v. Burnett*, 4 Kan. App. 2d 412.
16. **Sale of Narcotics**—"Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976).

    "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilkens*, 224 Kan. 66, 579, P.2d 132 (1978): *State v. Collins, infra.*
17. **Possession with intent to sell**—"Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
18. **Rape**—Indecent liberties with a minor is a lesser included offense. *State v. Coverly*, 233 Kan. 100, 661 P.2d 383 (1983).

    Aggravated sexual battery. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).

Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987).

19. **Indecent liberties with a child**—Aggravated sexual battery is not a lesser included offense. *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988).
20. **Attempted Rape**—Battery is not a lesser included offense. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).
21. **Aggravated Sodomy**—Lewd and lascivious behavior is not a lesser included offense. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).
22. **Attempted Murder**—Aggravated battery is not a lesser included offense. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977).
23. **Unlawful possession of firearm**—Carrying a concealed weapon and aggravated weapons violation are not lesser included offenses. *State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1974).
24. **DUI**—Reckless driving is not a lesser included offense. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983).
25. **Conspiracy**—Generally conspiracy is not a lesser included offense of any substantive, principal crime, (e.g. burglary) because conspiracy to commit (burglary) requires an agreement between two or more persons while burglary does not. *State v. Antwine*, 4 Kan. App. 2d 389, 397-98, 608 P.2d 519 (1980); 21-3302.
26. **Attempt**—Generally an attempt to commit the substantive, principal crime (e.g. murder) may be a lesser included crime where there is in issue whether the substantive crime was ever consummated. 21-3301, 21-3107(2).

(From *Kansas Criminal Law Handbook* with permission of Kansas Bar Association.)

68.10 LESSER INCLUDED OFFENSES—VERDICT FORMS

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

_____

Presiding Juror

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

_____

Presiding Juror

We, the jury, find defendant not guilty.

_____

Presiding Juror

Notes on Use

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

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

Comment

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

68.11 VERDICT FORM—VALUE IN ISSUE

We, the jury, find the defendant guilty of _____ and find the [value of] [damage to] [amount of] the [property] [services] [money or its equivalent] [communication services] [check(s)] [order(s)] [draft(s)] (which the defendant [obtained] [damaged] [impaired] [gave]) (over which the defendant [obtained] [exerted] unauthorized control) to be:

_____ dollars ($_____) or more ☐

Less than _____ dollars ($_____) ☐

(Place an X in the appropriate square.)

_____

Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 2d 68.03, Not Guilty Verdict—General Form, must be used with this form.

See Comments and Notes on Use PIK 2d 59.70, Value in Issue.

68.12 DEADLOCKED JURY

This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

Also, there is no reason to believe that the case would ever be submitted to twelve people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

These matters are mentioned now because some of them may not have been in your thoughts.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.

The giving of this instruction at this time in no way means it is more important than any other instruction. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.

You may now retire and continue your deliberations in such manner as may be determined by your good judgment as reasonable people.

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

Your agreement upon a verdict must be unanimous.

_____
District Judge

_____, 19____.

VERDICT FORMS

We, the jury, find defendant guilty of first degree murder.

_____
Presiding Juror

We, the jury, find defendant guilty of second degree murder.

_____
Presiding Juror

We, the jury, find defendant guilty of voluntary manslaughter.

_____
Presiding Juror

We, the jury, find defendant guilty of involuntary manslaughter.

_____
Presiding Juror

We, the jury, find defendant not guilty.

_____
Presiding Juror

(PIK 2d 68.10)

69.02 THEFT WITH TWO PARTICIPANTS

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 5, 1988, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1.	PIK 2d 51.02, Consideration and Binding Application of Instructions. PIK 2d 51.05, Rulings of the Court. PIK 2d 51.06, Statements and Arguments of Counsel. PIK 2d 52.09, Credibility of Witnesses.
Instruction 2.	PIK 2d 59.01, Theft.
Instruction 3.	PIK 2d 59.70, Value in Issue.

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

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1

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

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

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

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

Instruction No. 2

The defendant is charged with the crime of theft of property of the value of at least five hundred dollars but less than fifty thousand dollars. The defendant pleads not guilty.

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

1. That Acme Department Store was the owner of the property;
2. That the defendant exerted unauthorized control over the property;
3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;
4. That the value of the property was at least five hundred dollars but less than fifty thousand dollars; and
5. That this act occurred on or about the 5th day of July, 1988, in Sedgwick County, Kansas.

(PIK 2d 59.01)

Instruction No. 3

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

The State claims that the value of the property involved herein was in the amount of at least five hundred dollars but less than fifty thousand dollars.

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

(PIK 2d 59.70)

Instruction No. 4

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

(PIK 2d 54.05)

Instruction No. 5

The 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.

(PIK 2d 52.02)

Instruction No. 6

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

(PIK 2d 54.01)

Instruction No. 7

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

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, 19____.

(PIK 2d 68.01)

VERDICT FORMS

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

Five hundred dollars ($500) or more ☐
Less than Five hundred dollars ($500) ☐
(Place an × in the appropriate square.)

_____
Presiding Juror

(PIK 2d 68.11)

We, the jury find the defendant not guilty of _____.

_____
Presiding Juror

(PIK 2d 68.03)

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).

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 202, 737 P.2d 880 (1987).

Under K.S.A. 8-1567(a)(1), "the fact of driving with an alcohol concentration of .10 or above is now a crime, even in a case . . . where the state cannot prove the driver was under the influence of alcohol to the extent he or she is incapable of driving safely." *State v. Larson*, 12 Kan. App. 2d 198, 200, 737 P.2d 880 (1987); *State v. Zido*, 11 Kan. App. 2d 432, 434, 724 P.2d 149 (1986).

In *City of Wichita v. Hull*, 11 Kan. App.2d 441, 445, 724 P.2d 699 (1986), it was held that by omission of the element of intent in 8-1567, the legislature intended driving while under the influence of alcohol or drugs to be an absolute liability *malum prohibitum* offense.

Driving while under the influence of alcohol is a lesser included offense of aggravated vehicular homicide. *State v. Woodman*, 12 Kan. App. 2d 110, 119, 735 P.2d 1102 (1987).

Driving while under the influence of alcohol under certain circumstances is a lesser included offense of involuntary manslaughter where: (1) driving under the influence is alleged as the underlying misdemeanor in the information/complaint; and (2) all of the elements of driving under the influence are alleged in the information/complaint and are necessarily proved to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, Syl. ¶ 2, 744 P.2d 833 (1987).

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.

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. xiii (4-10-87).

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) cert denied 449 U.S. 844 (1980).

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 to fine and/or imprisonment, the court may, and in some cases must, enter an order placing conditions on the defendant's driving privileges. K.S.A. 41-804(f).

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

Comment

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

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

70.04 RECKLESS DRIVING

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

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

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

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

Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than ninety days, or by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than ten days nor more than six months, or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment.

Comment

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

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

"The offense of reckless driving is not a lesser included offense of driving under the influence of alcohol or drugs." *State v. Mourning*, 233 Kan. 678, 682-683, 664 P.2d 857 (1983); see also *State v. Brueninger*, 238 Kan. 429, 434-435, 710 P.2d 1325 (1985).

Conviction of a law enforcement officer for reckless driving while on duty affirmed. Conduct not privileged under K.S.A. 8-1506. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

70.05 VIOLATION OF CITY ORDINANCE

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

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

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

Notes on Use

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

PIK CRIMINAL INDEX