PREFACE TO 1989-1992 SUPPLEMENT

The Judicial Council has requested the Committee on Criminal Jury Instructions to update PIK-Criminal 2d. The 1989-1992 supplement has been prepared and reflects statutory changes and significant appellate court decisions from the time of the 1987-1988 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 binder, it may be advisable to retain the old pages for a reasonable period of time until they are no longer needed.

The members of the committee for this supplement are: Judge David S. Knudson, Salina; Judge Robert L. Bishop, Winfield; Judge J. Patrick Brazil, Topeka; Judge Steven P. Flood, Hays; Justice David Prager (ret.), Topeka; Judge Kay Royse, Wichita; Judge Herbert W. Walton (ret.), Olathe; and Judge Fred Woleslagel (ret.), Lyons.

The committee is indebted to others who have made it possible to prepare the supplement. We are thankful for the support of the Kansas Judicial Council and most particularly, its Research Director, Randy M. Hearrell. We are grateful and appreciative of the correspondence and other communications received from members of the bench and bar.

Finally, the committee wishes to acknowledge one of its own. Herb Walton has retired from the bench. He has been a member of this committee from its inception. He has served as its chairperson since 1982. He was at the helm as this supplement was being prepared. Through Judge Walton's leadership the committee has always endeavored to produce quality pattern instructions. It is a fitting measure of his stewardship that the committee's pattern instructions are so highly accepted by the bench and the bar of Kansas.

David S. Knudson, *Chairperson*
Kansas Judicial Council Advisory
Committee on Criminal Jury
Instructions

1989-1992
SUPPLEMENTAL FOREWORD

The preparation and publication of this 1989-1992 supplement to Pattern Instructions for Kansas Criminal 2d has been accomplished through the efforts of the Kansas Judicial Council Pattern Instructions for Kansas Advisory Committee.

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, 1985-1986, and 1987-1988 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 1989-1992 supplement covers statutes through the 1992 legislative session; Supreme Court decisions through Vol. 250, No. 3., and Court of Appeals decisions through Vol. 17, No. 2. 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.

Kay McFarland, *Chair*
James D. Waugh, *Secretary*
Mary Beck Briscoe
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51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining if 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.

Comment

This instruction was approved in *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973), when the words "guilt or innocence" were in the instruction. The committee modifies that language to comport with recent appellate court decisions. For those decisions see PIK Criminal 2d 52.02.

51.11 CAMERAS IN THE COURTROOM

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

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

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

Comment

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

52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; 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.

Notes on Use

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

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

No separate instruction should be given relating to Presumption of Innocence and Reasonable Doubt. (See Committee recommendations under PIK 2d 52.03 and 52.04.)

Comment

This instruction has not been changed as to substance since first adopted. It was designed to eliminate verbose and meaningless instructions commonly given about "presumption of innocence" and about "reasonable doubt." The only issues that have arisen relate to the semantics of "innocent" as contrasted to "not guilty" and "should" as contrasted to "must."

The instruction complies with *State v. Keeler*, 238 Kan. 357, 710 P.2d 1279 (1985) and *State v. Maxwell*, 10 Kan. App.2d 62, 69, 691 P.2d 1316, rev. denied 236 Kan. 876 (1984). See also *State v. Dunn*, 249 Kan. 488, 492, 820 P.2d 412 (1991).

52.06 PROOF OF OTHER CRIME—LIMITED ADMISSIBILITY OF EVIDENCE

Evidence has been admitted tending to prove that the defendant committed (crimes) (a crime) other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's (motive) (opportunity) (intent) (preparation) (plan) (knowledge) (identity) (absence of mistake or accident).

Notes on Use

For authority, see K.S.A. 60-455.

Your attention is directed to K.S.A. 60-447(b), Character trait as proof of conduct, and K.S.A. 60-445, Discretion of judge to exclude admissible evidence.

In *State v. Hall*, 246 Kan. 728, 740, 793 P.2d 737 (1990), it was held that this instruction may be given by the trial court either contemporaneously with the testimony or at the close of the trial at the discretion of the trial court.

In *State v. Sanford*, 237 Kan. 312, 316, 699 P.2d 506 (1985), our Supreme Court observed that, "[W]e have never required a trial court to go beyond the express language of [this instruction]." In *State v. Bell*, 239 Kan. 229, 238, 718 P.2d 628 (1986), the instruction was held to "adequately and accurately [state] the relevant law."

Comment

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

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977); *State v. Cross*, 216 Kan. 511, 517, 532 P.2d 1357 (1975); *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). Although the same evidentiary question exists in civil actions, since the principal focus of most civil actions is not the plaintiff's or defendant's commission of, or propensity to commit, criminal acts, the inherently prejudical impact of the admission of the party's criminal acts is arguably lessened. For that reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and therefore committed the crime with which he has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin* 129-130 (Special Report, November 1961). While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that

may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted by the court in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

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

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

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

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

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

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

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

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

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

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

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

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

For example, where criminal intent is obviously proved by the mere doing of an act, the introduction of other crimes evidence has no probative value to prove intent—*i.e.* where an armed robber extracts money from a store owner at gunpoint, his intent is not genuinely in dispute. Likewise, where a defendant admits that he committed the act and his presence at the scene of the crime is not disputed, a trial court should not admit other crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly,* 215 Kan. at 176.

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

C. *Eight Specific Factors.* Since evidence of other crimes and civil wrongs

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

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

In *State v. Jordan*, 180, 190, ____ P.2d ____ (1992), "motive" is defined as the moving power that impels one to action for a definite result. Motive is that which incites or stimulates a person to do an action.

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

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

(3) *intent*. For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal; in that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

Where criminal intent is obviously proved by the mere doing of an act, the introduction of other crimes evidence has no real probative value to prove

intent and it was error to admit it. *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

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

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

(5) *plan.* Plan refers to an antecedent mental condition that points to the doing of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Strictly speaking, *the exception is limited to evidence which shows some causal connection between the two offenses*, so that proof of the prior offense could be said to evidence a preexisting design, plan, or scheme directed toward the doing of the offense charged. Something more than the doing of similar acts is required to have probative value in showing plan, because the object is not merely to negate an innocent intent or show identical offenses, but to prove the existence of a definite project directed toward the doing of the offense charged. *State v. Marquez*, 222 Kan. at 446-447; *State v. Gourley*, 224 Kan. 167, 170, 578 P.2d 713 (1978); *State v. McBarron*, 224 Kan. 710, 713, 585 P.2d 1041 (1978); *State v. Hall*, 246 Kan. 728, 740, 793 P.2d 737 (1990). The PIK Comment is cited in *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990); Slough articles, 20 Kan. L. Rev. at 419-420 and 26 Kan. L. Rev. at 163. In *State v. Fabian*, 204 Kan. 237, 461 P.2d 799 (1969), evidence of prior crimes was properly admitted to show a preconceived "creeping" plan to steal from a series of stores.

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

(7) *identity.* Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness *is* important when pondering the admission

of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); and *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

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

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

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

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. at 686; *State v. Marquez*, 222 Kan. at 447-448. The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. Reversal may also be required where no limiting instruction is given, even though not requested by the defendant. *State v. Roth*, 220 Kan. 677, 680, 438 P.2d 58 (1968). When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984).

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

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

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

the weight to be given to such evidence. *State v. Darling*, 197 Kan. 471, 419 P.2d 836 (1966).

* *acquittal as a collateral estoppel.* When an application is made to admit evidence of a prior offense of which the defendant has been acquitted, an additional consideration may present itself—the possibility of collateral estoppel. When an issue of ultimate fact has once been determined by a valid and final verdict or judgment, that issue cannot again be litigated between the same parties in any future lawsuit under the rule of collateral estoppel. See *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970). Thus, when a prior similar offense is offered as evidence on a particular issue of material fact and the defendant was previously tried and acquitted of the offense based on a determination of that issue, collateral estoppel nullifies the probative value of the evidence of the former offense. Then such evidence should not be admitted. *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981).

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

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

State v. Cross, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski,* 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also *State v. Carter,* 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley,* 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal,* 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson,* 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction); *State v. Fannan,* 167 Kan. 723, 207 P.2d 1176 (1949) (proper admission of 17-year-old conviction); *State v. Owen,* 162 Kan. 255, 176 P.2d 564 (1947) (28-year-old conviction excluded for lack of probative value).

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

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

° *sex offenses.* The court has apparently taken a more liberal view regarding admission of evidence in prosecutions for sex crimes. *See State v. Fisher,* 222 Kan. 76, 563 P.2d 1012 (1977); *State v. Gonzales,* 217 Kan. 159, 535 P.2d 988 (1975); *State v. Hampton,* 215 Kan. 907, 529 P.2d 127 (1974). For commentary, see Slough, *Other Vices, Other Crimes, Kansas Statutes Annotated Section 60-455 Revisited,* 26 Kan. L. Rev. at 175-176; Note, *Evidence of Other Crimes in Kansas,* 17 Washburn L. J. at 119.

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

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

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

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

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

rebuttal, *introduce evidence of prior convictions* and bad conduct relevant to the specific character trait or the issue of guilt.

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

(b) *character trait for care or skill.* Section 60-448 disallows the use of evidence of a character trait relating to care or skill to prove the degree of care or skill used by that person on a specified occasion.

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

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

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

(4) *relationship or continuing course of conduct between defendant and the victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455, if 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. *State v. Wood*, 230 Kan. 477, 638 P.2d 938 (1982), and *State v. Crossman*, 229 Kan. 384, 624 P.2d 461 (1981); and *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

(5) *other crime as element of crime charged.* Evidence of a prior conviction is admissible independent of 60-455 if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972). Where evidence of a prior conviction is admitted for this purpose, the trial court should give a limiting instruction as to its use by the jury. *Cf., State v. Gander*, 220 Kan. 88, 90-91, 551 P.2d 797 (1976); *State v. Martin*, 208 Kan. 950, 951-953, 495 P.2d 89 (1972). If the defendant is charged with several crimes, the trial court should instruct the jury regarding its specific application to the particular crime. Where evidence of a prior offense is relevant *solely* for the purpose of enhancing the length of the sentence imposed upon the defendant, the prior conviction should not be introduced as evidence during the trial, but should be reserved until the sentencing of the defendant. *See generally*, Note, *Evidence: Prior Convictions—The Duty to Provide Limiting Instrustions*, 12 Washburn L. J. 111 (1972).

(6) *admissible evidence of the crime charged which discloses other crimes.* Evidence tending directly to establish the crime charged is not rendered

52.08 AFFIRMATIVE DEFENSES—BURDEN OF PROOF

The defendant claims as a defense that (*here describe the defense claimed).* Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant. If the defense asserted causes you to have a reasonable doubt as to the defendant's guilt, you should find the defendant not guilty.

Notes on Use

This instruction should be given in connection with the instruction defining the applicable defense. See *e.g.*

54.03 Ignorance or Mistake of Fact
54.04 Ignorance or Mistake of Law-Reasonable Belief
54.11 Intoxication—Involuntary
54.13 Compulsion
54.14 Entrapment
54.17 Use of Force in Defense of a Person
54.18 Use of Force in Defense of a Dwelling
54.19 Use of Force in Defense of Property Other Than a Dwelling
55.04 Conspiracy—Withdraw as a Defense
55.10 Criminal Solicitation—Defense
56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
58.02 Affirmative Defenses to Bigamy
59.07 Worthless Check—Defense
59.33-B Unlawful Hunting—Defense
59.59 Piracy of Sound Recordings—Defenses
61.04 Compensation for Past Official Acts—Defense
62.02 Eavesdropping—Defense of Public Utility Employee
62.07 Criminal Defamation—Truth as a Defense
62.12 Unlawful Smoking—Defense of Smoking in Designated Smoking Area
64.04 Unlawful Use of Weapons—Affirmative Defense
64.11-B Unlawful Possession of Explosives—Defense
65.05 Promoting Obscenity—Affirmative Defenses
65.10-A Dealing in Gambling Devices—Defense
65.12-A Possession of a Gambling Device—Defense
65.16 Cruelty to Animals—Defense

52.09 CREDIBILITY OF WITNESSES

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.

Notes on Use

This instruction should be given in every criminal case. See K.S.A. 22-3415, Laws applicable to witnesses. See K.S.A. 60-417, Disqualification of witness; interpreters. See also K.S.A. 60-419, 420, 412 and 422 covering necessity of knowledge or experience on the part of a witness, evidence relating to credibility, limitation on evidence of conviction of crimes and other limitations on admissibility of evidence affecting credibility.

Expanding this instruction was not approved, but held not to be clearly erroneous when the expansion was not objected to in *State v. Clements*, 241 Kan. 77, 81-82, 734 P.2d 1096 (1987), and *State v. Bodtke*, 241 Kan. 96, 100, 734 P.2d 1109 (1987). Where objection to expanding the instruction was made in *State v. DeVries*, 13 Kan. App. 2d 609, 617-19, 780 P.2d 1118 (1989), the expansion was held to be reversible error. See also *State v. Hartfield*, 245 Kan. 431, 449, 781 P.2d 1050 (1980), where objection was made to expanding this instruction by adding the "false in one thing, false in all" concept. While such expansion was noted as less preferable than using the instruction we provide, it was held not to be reversible error because of the particular circumstances existing in the case.

Comment

This instruction was impliedly approved in *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976) and in *State v. Mack*, 228 Kan. 83, 89, 612 P.2d 158 (1980).

See also, *State v. Piolelli*, 246 Kan. 49, 58, 785 P.2d 963 (1990), and *State v. Land*, 14 Kan. App.2d 515, 519 P.2d (1990).

52.18 TESTIMONY OF AN ACCOMPLICE

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

Comment

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

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

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

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

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

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

52.18-A TESTIMONY OF AN INFORMANT—FOR BENEFITS

You should consider with caution the testimony of an informant who, in exchange for benefits from the state, acts as an agent for the state in obtaining evidence against a defendant, if that testimony is not supported by other evidence.

Notes on Use

In *State v. Fuller*, 15 Kan. App.2d 34, 41, 802 P.2d 599 (1990), it was held error to deny the defendant's request for a cautionary instruction where his conviction was "based solely on the testimony of a paid informant."

Whether or not a cautionary instruction on the reliability of the testimony of a paid informant is requested, the trial court should give such an instruction when the informant's testimony is substantially uncorroborated, substantial evidence contradicts the informant's testimony, or there is other evidence which casts a serious doubt on the informant's credibility. *State v. Novotny*, 17 Kan. App.2d 363, Syl. ¶ 3, ____ P.2d ____ (1992).

52.19 ALIBI

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

Notes on Use

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

Comment

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

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

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). This language from *Green,* however, may properly be refused as an additional instruction by the trial judge, since PIK 54.05 clearly informs the jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting. *State v. Hunter,* 241 Kan. 629, 639, 740 P.2d 559 (1987); *State v. Scott,* 250 Kan. 350, 361, 827 P.2d 733 (1992).

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."

In *State v. Edwards,* 250 Kan. 320, 331, 826 P.2d 1355 (1992), the Supreme Court examined the elements of aiding and abetting and solicitation and determined that, under the facts of that case, those offenses did not merge and were not multiplicitous.

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); *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987); and *State v. Gadelkarim*, 247 Kan. 505, 508, 802 P.2d 507 (1990).

"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. Shehan*, 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.

54.12-B DIMINISHED MENTAL CAPACITY

Diminished mental capacity [not amounting to insanity] may be considered in determining whether the defendant was capable of forming the necessary intent (set out specific element of the crime).

Notes on Use

This instruction may be used when there is some evidence of diminished mental capacity. The clause in brackets should be included when the defense of insanity has also been raised.

Comment

In *State v. Jackson*, 238 Kan. 793, 714 P.2d 1368 (1986), the Supreme Court expressly recognized the doctrine of diminished capacity. The Court cautioned that evidence of diminished capacity is "admissible only for the limited purpose of negating specific intent and is not a substitute for a plea of insanity." 238 Kan. at 798.

While a trial court is not required to instruct on diminished capacity, the "better practice" is to instruct on diminished capacity where necessary to inform the jury of the effect of defendant's diminished capacity on the specific intent required for the crime charged. *State v. Maas*, 242 Kan. 44, 52, 744 P.2d 1222 (1987). *State v. Pioletti*, 246 Kan. 49, 59, 785 P.2d 963 (1990) reiterated that the decision whether or not to give an instruction on diminished capacity is a matter of judicial discretion. See also *State v. Cady*, 248 Kan. 743, 748, 811 P.2d 1130 (1991).

The complete defense of insanity does not have to be asserted in order to claim diminished capacity. Moreover, mere personality characteristics, such as poor impulse control, a short temper, frustration, feelings of dependency, "snapping," lack of concern for the rights of other people, etc. do not constitute a mental disease or defect bringing the doctrine of diminished capacity into play. *State v. Wilburn*, 249 Kan. 678, 686, 822 P.2d 609 (1991).

Whether notice of a defense of diminished mental capacity is required under K.S.A. 22-3219 has not been determined in any published decision. As amended in 1989, that statute requires notice of intent to assert the defense of insanity "or other defense involving the presence of mental disease or defect."

54.13 COMPULSION

Compulsion is a defense if the defendant 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 committee is of the opinion that the same rationale the court applied in *Hundley* applies in compulsion cases.

In *State v. Hunter*, 241 Kan. 629, 642, 740 P.2d 559 (1987), the Court considered the statutory prohibition on use of the compulsion defense to charges of murder and manslaughter. The Court held that compulsion may be used as a defense to felony-murder when compulsion is a defense to the underlying felony.

A person charged with escape from lawful custody may not claim the defense of compulsion unless the following conditions exist: (1) The prisoner is faced with a threat of imminent infliction of death or great bodily harm; (2) there is no time for complaint to the authorities or there exists a history of futile complaints which makes any result from such complaints illusory; (3) there is not time or opportunity to resort to the courts; (4) there is no evidence of force or violence

used towards prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the imminent threat, *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992). The court noted that the fifth condition should refer to "imminent threat," rather than "immediate threat," to conform to the statutory language. 250 Kan. at 309.

The defense of compulsion is applicable to absolute liability traffic defenses. *State v. Riedl*, 15 Kan. App.2d 326, 329, 807 P.2d 697 (1991).

54.14 ENTRAPMENT

Entrapment is a defense if the defendant is (induced) (persuaded) to commit a crime which he had no previous (disposition) (intention) (plan) (purpose) to commit. It is not a defense if the defendant (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); *State v. Nelson*, 249 Kan. 689, 697, 822 P.2d 53 (1991).

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).

54.14-A 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 1990, the legislature eliminated this defense to certain charges involving controlled substances. See K.S.A. 65-4127a(d) and K.S.A. 65-4127b(f).

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) (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." 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).

In *State v. Scobee,* 242 Kan. 421, 428, 748 P.2d 862 (1988), the court held that Kansas does not impose a duty to retreat on a person acting in self-defense, under proper circumstances the instruction should be modified to so provide.

PIK 2nd 54.17 properly instructs the jury on both the subjective and objective standards by which to gauge the justification of use of force. *State v. Wiggins,* 248 Kan. 526, 808 P.2d 1383 (1991).

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

A person is not justified in using force in defense of (himself) (another) (his dwelling) if he is (attempting to commit) (committing) (escaping after the commission) of _____, a forcible felony.

Notes on Use

For authority, see K.S.A. 21-3214 (1). Insert in the blank space the particular forcible felony applicable to the particular case.

This instruction was cited with approval in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

Comment

In *State v. Sullivan and Sullivan*, 224 Kan. 111, 578 P.2d 1108 (1978), the Supreme Court held that, because a jury question remained as to whether the defendants committed the overt act required for an attempted burglary, the trial court erred in instructing the jury that the defendants could not claim self-defense.

54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

A person is not permitted to provoke an attack on (himself) (another person) with the specific intention to use such attack as a justification for inflicting bodily harm upon the person he provoked and then claim self-defense as a justification for inflicting bodily harm upon the person he provoked.

Notes on Use

For authority, see K.S.A. 21-3214 (2). The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 584, 552 P.2d 900 (1976), and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989). This instruction should not be confused with PIK 2d 54.22, Initial Aggressor's Use of Force. This instruction should be used with caution and limitations.

Comment

One who provokes an attack as an excuse to inflict bodily harm upon another cannot thereafter resist with force even though his own death or serious injury is imminent. *State v. Meyers*, 245 Kan. 471, 781 P.2d 700 (1989).

54.22 INITIAL AGGRESSOR'S USE OF FORCE

A person who initially provokes the use of force against (himself) (another) is not justified in the use of force to defend (himself) (another) unless:

1. He has reasonable ground to believe that he is in present danger of death or great bodily harm, and he has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person;
   or
2. He has in good faith withdrawn and indicates clearly to the other person that he desires to withdraw and stop the use of force, but the other person continues or resumes the use of force.

Notes on Use

For authority, see K.S.A. 21-3214 (3) (*a*) and (*b*).

Comment

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976), and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

54.23 LAW ENFORCEMENT OFFICER OR PRIVATE PERSON SUMMONED TO ASSIST—USE OF FORCE IN MAKING ARREST

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist him) need not retreat or desist from the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes [to be necessary to effect the arrest] [to be necessary to defend (himself) (another) from bodily harm while making the arrest.]

However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force:

(is necessary to prevent death or great bodily harm to [himself] [another person]).

(is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested has committed or attempted to commit _____, a felony that involves great bodily harm or [is attempting to escape by use of a deadly weapon] [otherwise indicates he will endanger human life or inflict great bodily harm unless arrested without delay]).

(A law enforcement officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.)

(A private person who is [summoned] [directed] by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the use of any force which he would be justified in using if the arrest were lawful.)

Notes on Use

For authority, see K.S.A. 21-3215.

The second paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The third paragraph should be used only where an invalid warrant is involved.

The fourth paragraph should be used only where an officer has requested assistance in making an arrest which proves to be unlawful. For authority see K.S.A. 21-3216(2).

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 to 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.

Murder in the first degree, murder in the second degree, and voluntary manslaughter require proof of an intent to kill. If a defendant did not entertain that particular mental state, he cannot be convicted of that crime, but may be guilty of a lesser crime not requiring that particular state of mind. *State v. Selke*, 221 Kan. 672, 678, 561 P.2d 869 (1977). *State v. Hill*, 242 Kan. 68, 81, 744 P.2d 1228 (1987). With the Supreme Court's acceptance of diminished capacity as admissible for the limited purpose of negating specific intent, the trial court needs to be concerned in the giving of instructions in this regard.

In *State v. Pioletti*, 246 Kan. 49, 59, 785 P.2d 963 (1990), the court stated:

> In *State v. Maas*, 242 Kan. 44, 744 P.2d 1222 (1987), we approved our prior holding in *Jackson* that the decision of whether or not to give an instruction on diminished capacity was a matter of judicial discretion, but stated:
>
> "However, a majority of the court is of the opinion that it would be better practice for the trial court to give an instruction on diminished capacity where such an instruction is reasonably necessary to inform the jury of the effect of a defendant's diminished capacity on the specific intent required for the crime charged." 242 Kan. at 52.

See Comment to PIK 2d 54.12-B, Diminished Mental Capacity.

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).

56.01-A MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—SENTENCING PROCEEDING

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of premeditated murder to determine whether the defendant shall be required to serve a mandatory minimum 40 year term of imprisonment. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

Notes on Use

For authority, see K.S.A. 21-4624 (1), (2), and (3).

At the time of arraignment the county or district attorney shall file written notice of an intention to request a separate sentencing proceeding to determine whether the defendant should be required to serve a mandatory minimum 40 year sentence. If the written notice is not filed, the sentencing proceeding is not permitted and the defendant shall be sentenced as otherwise provided by law.

The instruction should be preceded by the applicable introductory and cautionary instructions as contained in PIK 51.02, 51.04, 51.05, and 51.06.

56.01-B MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—AGGRAVATING CIRCUMSTANCES

The state of Kansas contends that the following aggravating circumstances are shown from the evidence:

[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.]
and/or
[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
and/or
[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
and/or
[That the defendant authorized or employed another person to commit the crime.]
and/or
[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]
and/or
[That the defendant committed the crime in an especially heinous, atrocious or cruel manner. The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.]
and/or
[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]
and/or
[That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]

Notes on Use

For authority, see K.S.A. 21-4625. This instruction should be included in all cases involving the mandatory minimum 40 year sentencing proceeding.

The applicable clauses in brackets should be selected as contained in the written notice and as supported by the evidence.

The definitions of the words contained in the sixth clause are taken from *Foster v. State*, 779 P.2d 591 (Okl.Cr. 1989).

Comment

In *Maynard v. Cartwright*, 108 S.Ct. 1853, 486 U.S. 356, 100 L.Ed.2d 372 (1988), an Oklahoma case, the United States Supreme Court held the terms "heinous", "atrocious" and "cruel" were unconstitutionally vague because they did not "on their face offer sufficient guidance to the jury to escape the strictures of [the courts] judgment in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)." However, a later decision by the Court of Criminal Appeals of Oklahoma in *Foster v. State*, 779 P.2d 591 (Okl.Cr. 1989) noted the unconstitutional vagueness problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others."

The definitions from *Foster*, 779 P.2d 591 have been included in the sixth clause of aggravated circumstances.

56.01-C MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—MITIGATING CIRCUMSTANCES

The defendant contends that mitigating circumstances include but are not limited to the following:

[The defendant has no significant history of prior criminal activity.]
and/or
[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]
and/or
[The victim was a participant in or consented to the defendant's conduct.]
and/or
[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]
and/or
[The defendant acted under extreme distress or under the substantial domination of another person.]
and/or
[The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]
and/or
[The age of the defendant at the time of the crime.]
and/or
[At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]
and/or
[Other _____.]

Notes on Use

For authority, see K.S.A. 21-4624 (3) and 21-4626. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the mandatory 40 year sentencing proceeding.

56.01-D MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—BURDEN OF PROOF

The State has the burden of proof to persuade you beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh any mitigating circumstances.

Notes on Use

For authority, see K.S.A. 21-4624 (5).

56.01-E MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—AGGRAVATING AND MITIGATING CIRCUMSTANCES—THEORY OF COMPARISON

In making the determination whether aggravating circumstances are outweighed by mitigating circumstances, you should keep in mind that your decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

Notes on Use

This instruction should be given in all mandatory minimum 40 year sentencing proceedings to provide guidance to the jury that their decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

56.01-F MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—REASONABLE DOUBT

If you find beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances, then you shall recommend a mandatory minimum term of 40 years. If you recommend that the defendant shall serve a mandatory minimum term of 40 years, you must designate upon the verdict form with particularity the aggravating circumstances which you found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, then it is your duty to return a verdict of life imprisonment with parole eligibility in 15 years.

Notes on Use

For authority, see K.S.A. 21-4624 (5).

56.01-G MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—SENTENCING RECOMMENDATION

At the conclusion of your deliberations you shall sign the verdict form upon which you agree.

The verdict forms provide the following alternative verdicts:

A. Life imprisonment with the defendant eligible for parole after 15 years; or

B. Life imprisonment with the defendant eligible for parole after 40 years.

Notes on Use

For authority, see K.S.A. 21-4624 (5).

56.02 MURDER IN THE FIRST DEGREE—FELONY MURDER

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

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

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

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

The killing of a child committed in the perpetration of abuse of a child under K.S.A. 21-3609 constitutes felony-murder under K.S.A. 21-3401, as amended in 1989.

In a felony-murder case, evidence of who the triggerman is is irrelevant and all participants are principals. *State v. Myrick & Nelms*, 228 Kan. 406, 416, 616 P.2d 1066 (1980).

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.

State v. Hartfield, 245 Kan. 431, 447, 781 P.2d 1050 (1989), recommends that the elements of each alternative be in separate instructions, but since the instruction refers to "either or both theories" in the conclusion, no error was found.

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

Second degree murder is a specific intent crime and requires proof of the intent to kill; hence, evidence of a diminished capacity is admissible for the limited purpose of negating specific intent. *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987). See comment to PIK 56.01, Murder in the First Degree.

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); *State v. Hill*, 242 Kan. 68, 82, 744 P.2d 1228 (1987).

(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 (1886) 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); *State v. Martinez*, 92 Kan. 443, 536, 575 P.2d 30 (1978); and *State v. Patterson*, 243 Kan. 262, 268, 755 P.2d 551 (1986), 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), and *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987).

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

56.05 VOLUNTARY MANSLAUGHTER

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

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

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

1. **That the defendant killed _____ (without justification);**
2. **That it was done intentionally;**
3. **That it was done (upon a sudden quarrel) (in the heat of passion); and**
4. **That this act occurred on or about the _____ day of _____, 19 ___, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3403. Voluntary manslaughter is a class C felony.

If the information charges voluntary manslaughter, omit paragraph B; but if the information charges a higher degree omit paragraph A. See PIK 2d 68.09 and 69.01, lead-in instructions on lesser included offenses. The term "without justification" should be added to the first element of the crime when the defense of self-defense is raised. See PIK 2d 56.04, Homicide Definitions, for definition of "heat of passion."

Comment

See Comment to PIK 2d 56.01, Murder in the First Degree, and *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977), on the duty of the trial judge to instruct on lesser included offenses in homicide cases.

The court, in *State v. Wilson*, 240 Kan. 606, 609-10, 731 P.2d 306 (1987), admonished trial judges to use the pattern jury instructions when appropriate unless there is some compelling and articulated reason not to do so.

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

Notes on Use

For authority, see K.S.A. 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.

In *State v. Woodman*, 12 Kan. App.2d 110, 735 P.2d 1102 (1987), the court held that failure to include in the elements instruction that "the death was the

proximate result of the operation of the vehicle" is reversible error. The prosecution must allege and prove that the death of the injured person occurred within one year and was the proximate result of the operation of the vehicle by the defendant in a manner proscribed by subsection (1) of K.S.A. 21-3405a. 12 Kan. App.2d at 113.

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).

56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of assault of a law enforcement officer. The defendant pleads not guilty.

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
4. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
5. That _____ was engaged in the performance of his duty; and
6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3409.

Assault of a law enforcement officer is a class A misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it PIK 2d 56.12, Assault, should be given.

Comment

See Comment PIK 2d 56.12, Assault.

56.14 AGGRAVATED ASSAULT

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

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

1. That the defendant intentionally (threatened) (attempted to do) bodily harm to _____;
2. That he had apparent ability to cause such bodily harm;
3. That defendant's conduct resulted in _____ being in immediate apprehension of bodily harm;
4. (a) That the defendant used a deadly weapon; or
   (b) That the defendant was disguised in any manner designed to conceal identity;
   or
   (c) That the defendant did so with intent to commit _____, a felony; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3410.

Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, instruction on assault should be included. See PIK 2d 56.12, Assault. Aggravated assault is a class D felony.

Under circumstances when the phrase "deadly weapon" should be defined, see PIK Chapter 53, Definitions and Explanations of Terms.

Comment

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

For application of the merger doctrine in felony-murder prosecution, see *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979) and Comment to PIK 2d 56.02, Murder in the First Degree—Felony Murder.

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.

Under circumstances when the phrase "deadly weapon" should be defined, see PIK Chapter 53, Definitions and Explanations of Terms.

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.

56.24 KIDNAPPING

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

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

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

Notes on Use

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

Comment

This instruction was approved in *State v. Glymph*, 222 Kan. 73, 75, 563 P.2d 422 (1977), *State v. Nelson*, 223 Kan. 572, 575 P.2d 547 (1978); and in *State v. McKessor*, 246 Kan. 1, 11, 785 P.2d 1332 (1990).

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

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

56.25 AGGRAVATED KIDNAPPING

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

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

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

Notes on Use

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

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

"Bodily harm" includes any act of physical violence even though no permanent injury results. Trivial or insignificant bruises or impressions resulting from the act itself should not be considered as "bodily harm". Unnecessary acts of violence upon the victim, and those occurring after the initial abduction would constitute "bodily harm". *State v. Sanders*, 225 Kan. 156, 587 P.2d 906 (1978); *State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975); *State v. Mason*, 250 Kan. 393, 396, 827 P.2d 748 (1992).

If there is a fact issue as to whether bodily harm is sustained by the victim or as to the extent of the harm, the above instruction should include the definition of "bodily harm", otherwise failure to define it does not constitute error. *State v. Royal*, 234 Kan. 218, 222, 670 P.2d 1337 (1983); *State v. Peltier*, 249 Kan. 415, 426, 819 P.2d 628 (1991).

56.26 INTERFERENCE WITH PARENTAL CUSTODY

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

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

1. That _____ is a child under 16 years of age;
2. That the child was in the custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to detain or conceal the child from _____; and
5. That this act occurred on or about ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3422. Interference with parental custody is a class A misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or the absence of a court order. Interference with parental custody in all other cases is a class E felony.

Comment

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

The 1986 legislature amended the age of the child from 14 years to 16 years under K.S.A. 21-3422(a).

It is not a defense to a prosecution under this section that the defendant is a parent entitled to joint custody. K.S.A. 21-3422(b).

56.26-A AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY PARENT'S HIRING ANOTHER

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

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

1. That _____ is a child under 16 years of age;
2. That the child was in the custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant _____, hired another person to (take) (carry away) (decoy or entice away) _____;
4. That _____ was (taken) (carried away) (decoyed or enticed away) by such other person;
5. That this was done with the intent to detain or conceal the child from _____; and
6. That this act occurred on or about ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3422a. Considering the various alternatives, the committee is of the opinion that separate instructions would be more feasible and clearer to juries than one instruction with all alternative elements. PIK 2d 56.26-A is applicable where the defendant is the non-custodial parent who hires another to interfere with parental custody. PIK 2d 56.26-B, Aggravated Interference with Parental Custody by Hiree, is applicable when the person hired to interfere with parental custody is the defendant, and PIK 2d 56.26-C, Aggravated Interference with Parental Custody—Other Circumstances, would apply to any person, parent or otherwise, provided one of the elements of paragraph 5 is present.

Comment

K.S.A. 21-3422, Interference with Parental Custody by a joint custody parent is a class A misdemeanor. Interference with parental custody in all other cases is a class E felony, thereby assuring extradition.

Note that the misdemeanor charge (PIK 2d 56.26, Interference with Parental Custody) includes the element of "intent to detain or conceal such child," whereas the language of the felony offense states "when done with the intent to deprive of custody. . ." The committee has retained the language of the respective

statutes, although it would appear that "intent to deprive" and "intent to detain or conceal" are synonymous as any intent to detain or conceal implies intent to deprive.

56.26-B AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIREE

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

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

1. That _____ is a child under 16 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed away) the child;
4. That the defendant was hired by another to (take) (carry away) (decoy or entice) the child;
5. That this was done with the intent to deprive _____ of the custody of the child; and
6. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Comment

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

56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY—OTHER CIRCUMSTANCES

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

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

1. That _____ is a child under 16 years of age;
2. That the child was in the custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to deprive _____ of the custody of the child;
5. That the defendant has previously been convicted of interference with parental custody;
   or
   That the defendant took the child outside the state without the consent of _____ (or the court);
   or
   That the defendant, after lawfully taking the child outside the state while exercising visitation or custody rights, refused to return the child at the expiration of these rights;
   or
   That the defendant (refused to return) (impeded the return) of the child at the expiration of visitation or custody rights outside the state;
   or
   That the defendant detained or concealed the child in a place unknown to _____, either inside or outside this state; and
6. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Comment

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

56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON

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

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

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

Notes on Use

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

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

Comment

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

56.30 ROBBERY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3426.
Robbery is a class C felony.

Comment

In *State v. Clingerman,* 213 Kan. 525, 516 P.2d 1022 (1973), the court, in granting a new trial, relied on the failure of the trial court to include felonious intent, "one of the necessary elements of robbery." In tracing the history of robbery, the court noted three ingredients as essential: the use of force and violence, the taking from a person of another money or other personal property, and an intent to rob or steal. (Modified in *State v. Lucas,* infra.)

In *State v. Rueckert,* 221 Kan. 727, 561 P.2d 850 (1977), the court stated that specific intent is not an element of the crime of aggravated robbery, (therefore) voluntary intoxication would not be a defense to a general intent crime, although it may be used to demonstrate the inability to form a particular state of mind necessary for a specific intent crime (State v. Rueckert at 732-733).

State v. McDaniel & Owens, 228 Kan. 172, 612 P.2d 1231 (1980), holds that aggravated robbery is not a specific intent crime; it requires only general criminal intent. See also *State v. Knoxsah,* 229 Kan. 36, 622 P.2d 140, (1981). The committee is of the opinion that alleging an "intention to take property" should suffice for establishing criminal intent under K.S.A. 21-3201.

In *State v. Lucas,* 221 Kan. 88, 557 P.2d 1296 (1976), the trial court failed to instruct on the intent requirement. In refusing to hold error, the court found that the defendant's use of a deadly weapon established clear proof of intent.

The ownership of property taken is not an element of robbery thus failure to allege ownership is not defective. The state is not required to allege that the property taken was not that of the defendant. Therefore, the committee has revised the above instruction to exclude "of another." See *State v. Lucas,* supra.

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

Theft is a lesser included crime of robbery as a "lesser degree of the same crime" under K.S.A. 21-3107(2). *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984).

56.31 AGGRAVATED ROBBERY

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

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

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

Notes on Use

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

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

Under circumstances when the phrase "deadly weapon" should be defined, see PIK Chapter 53, Definitions and Explanations of Terms.

Comment

See Comment to PIK 2d 56.30, Robbery.

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

56.32 BLACKMAIL

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

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

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

Notes on Use

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

CHAPTER 57.00

SEX OFFENSES

57.01 RAPE

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

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

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

Notes on Use

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

The statute provides four categories when the consent of the victim was not obtained. The appropriate category should be selected. In addition, 57.02, Sexual Intercourse—Definition, and PIK 54.01-A, General Criminal Intent, should be given.

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.

K.S.A. 21-3503 was amended by L. 1988, ch. 89, § 1 to provide:

"It shall be a defense to a prosecution of indecent liberties with a child that the child was married to the accused at the time of the offense." If the defense is raised the jury should be so instructed as provided in PIK 57.05-

B, Affirmative Defenses to Indecent Liberties with a Child, and PIK 52.08 Affirmative Defenses—Burden of Proof, should be given.

Comment

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

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.

In State v. Clements, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties.

57.05-A INDECENT LIBERTIES WITH A CHILD—SODOMY

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

57.05-B AFFIRMATIVE DEFENSES TO INDECENT LIBERTIES WITH A CHILD

It is a defense to the charge of indecent liberties with a child that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3503, *State v. Sedlack*, 246 Kan. 305, 787 P.2d 709 (1990) and *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989), hold that the common-law rule that males aged 14 and females aged 12 have the capacity to form a common-law marriage is the rule in Kansas. If the defense is raised, the court or jury may have to determine the existence of a valid common-law marriage. The elements of common-law marriage are set forth in *State v. Johnson*, 216 Kan. 445, 448, 532 P.2d 1325 (1975).

57.07 SODOMY

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

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

1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) (a consenting adult of the opposite sex);
   or
   That the defendant had (oral) (anal) copulation or sexual intercourse with an animal;
2. That there was (oral contact or oral penetration of the female genitalia) (oral contact of the male genitalia) (anal penetration, however slight, of a male or female by any body part or object); 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. 21-3505. The crime of sodomy is a class B misdemeanor. Sodomy between a husband and wife or between consenting adults of the opposite sex is not a crime.

For a definition of sodomy, see K.S.A. 1991 Supp. 21-3501(2). This 1991 legislative change is in response to *State v. Moppin*, 245 Kan. 639, 644, 783 P.2d 878 (1989), which held cunnilingus was not sodomy.

57.08 AGGRAVATED SODOMY

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

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

1. That the defendant had (oral) (anal) sexual relations with _____, who was not (his wife) (her husband) (a consenting adult of the opposite sex);
   or
   That the defendant had (oral) (anal) copulation or sexual intercourse with an animal;
2. That there was (oral contact or oral penetration of the female genitalia) (oral contact of the male genitalia) (anal penetration, however slight, of a male or female by any body part or object);
3. That _____ was a child who was not married to the defendant and who was under sixteen years of age;
4. That there was actual penetration; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

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

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

Notes on Use

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

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

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

The provisions of K.S.A. 21-4619(c) were amended in 1986 to provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 were amended to provide that a prosecution for the crime of aggravated criminal sodomy must

be commenced within five years after its commission if the victim is less than sixteen years of age.

In *State v. Wilson*, 247 Kan. 87-95, 795 P.2d 336 (1990), the court stated: "We approve of the use of PIK Crim.2d 57.08 in this case. We find no error in the use of the phrase anal sexual relations in place of the term anal copulation in the pattern instruction on aggravated criminal sodomy."

In *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989), the court held that oral-genital stimulation between the tongue of a male and the genital area of a female is not sodomy under K.S.A. 21-3501(2). The legislature amended the statute in L. 1990, ch. 149 (2), § 2. A new definition of sodomy has been included in PIK 57.18.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties.

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

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

(i) for pecuniary profit;

or

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

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

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

Notes on Use

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

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

Comment

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

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

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

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

These definitions apply to this instruction:

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

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

(i) for pecuniary profit;

or

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

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

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

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

(d) Sodomy. "Sodomy" means: (1) having oral or anal sexual relations between persons, including oral-genital stimulation between the tongue of a male and the genital area of a female; (2) having oral or anal sexual relations between a person and an animal; (3) having sexual intercourse with an animal; or (4) penetration of the anal opening by any body part or object. Any penetration, however slight, is sufficient to constitute sodomy. Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search conducted in accordance with law.

(e) Criminal sodomy. "Criminal sodomy" means sodomy between persons who are members of the same sex or between a person and an animal.

(f) Aggravated criminal sodomy. "Aggravated criminal sodomy" means: (1) sodomy with a child who is not married to the offender and who is under 16 years of age; (2) causing a child under 16 years of age to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease, which was known by the offender or was reasonably apparent to the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

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

(h) Sexual battery. "Sexual battery" is the unlawful and intentional touching of the person of another who is not the spouse of the offender and who does not consent to the touching, with the intent to arouse or satisfy the sexual desires of the offender or another.

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

Notes on Use

Authority for the definitions is contained in several statutes: Rape, K.S.A. 21-3502; Indencent liberties with a child, K.S.A. 21-3503; Aggravated indecent liberties with a child, K.S.A. 21-3504; Sodomy, K.S.A. 21-3501(2); Criminal sodomy, K.S.A. 21-3505; Aggravated criminal sodomy, K.S.A. 21-3506; and Lewd and lascivious behavior, K.S.A. 21-3508; Sexual battery, K.S.A. 21-3517; and Aggravated sexual battery, K.S.A. 21-3518.

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

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 battery) (aggravated sexual battery) (lewd fondling or touching) means: _____.

Notes on Use

For authority, see K.S.A. 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 (1977). 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.

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the Supreme Court compared the elements of aggravated incest and indecent liberties with a child. The court held that when a defendant is related to the victim as set forth in K.S.A. 21-3603(1), the State may charge the defendant with aggravated incest for engaging in the acts prohibited therein but not with indecent liberties with a child. 250 Kan. at 737. The *Williams* decision is concerned with what charges may be properly brought. *Williams* does not alter the fact that, under K.S.A. 21-3603, conduct described as indecent liberties with a child may form the basis for aggravated incest.

58.06 NONSUPPORT OF A CHILD

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

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

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

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

Notes on Use

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

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

Comment

Whether the legislature believed that there was a difference between "without lawful excuse" in the nonsupport of a child provision and "without just cause" in the nonsupport of a spouse provision, PIK 2d 58.07, Nonsupport of a Spouse, is not known. It is arguable that a juror might have no difficulty understanding what is meant by the term "without just cause," but would have some difficulty in understanding the term "without lawful excuse." Since the Committee does believe that "without just cause" is more understandable to jurors than "without lawful excuse," and since there are no statutory "lawful excuses," it has concluded "without just cause" should be used.

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

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

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

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

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

In *State v. Rupert*, 247 Kan. 512, 802 P.2d 511 (1990), the statutory provision for proof of parentage by a preponderance of the evidence was held unconstitutional; thus, it has been removed from this instruction.

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 MINOR

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

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

1. **That the defendant directly or indirectly (sold to) (bought for) (gave or furnished to) a minor any alcoholic liquor; and**
2. **That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3610. Furnishing 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 definitions of alcoholic liquor and minor. See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986).

58.12-A FURNISHING CEREAL MALT BEVERAGE TO A MINOR

The defendant is charged with the crime of furnishing cereal malt beverage to a minor 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; 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. 21-3610a(a). Furnishing cereal malt beverage to a minor 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) exempts 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.

58.12-C FURNISHING ALCOHOLIC LIQUOR TO A MINOR—DEFENSE

It is a defense to the charge of furnishing alcoholic liquor to a minor that the defendant was a licensed retailer, club, drinking establishment or caterer, or holds a temporary permit, or an employee thereof; that the defendant sold the alcoholic liquor to the person with reasonable cause to believe that the person was 21 or more years of age; and that to purchase the alcoholic liquor, the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 21 or more years of age.

Notes on Use

For authority, see K.S.A. 21-3610(4). If this instruction is given, PIK 52.08 Affirmative Defense—Burden of Proof, should be given.

58.12-D FURNISHING CEREAL MALT BEVERAGE TO A MINOR—DEFENSE

It is a defense to the charge of furnishing cereal malt beverage to a minor that the defendant was a licensed retailer or an employee thereof; that the defendant sold the cereal malt beverage to the person with reasonable cause to believe that such person was of legal age for consumption of cereal malt beverage; and that to purchase the cereal malt beverage, the person exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such person was of legal age for consumption of cereal malt beverage.

Notes on Use

For authority, see K.S.A. 21-3610a(d). If this instruction is given, PIK 52.08 Affirmative Defense—Burden of Proof, should be given.

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. 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:
   (a) (caused) (encouraged) _____ to become or remain a (traffic offender) (child in need of care) (juvenile offender);
   or
   (b) (caused) (encouraged) _____ not to attend school as required by law;
   or
   (c) (caused) (encouraged) _____ to commit an act which if committed by an adult would be a (felony) (misdemeanor);
   or
   (d) failed to reveal upon inquiry by a uniformed or properly identified law enforcement officer engaged in the performance of such officer's duty, information the defendant had regarding a runaway, with intent to aid the runaway in avoiding detection or apprehension;
   or
   (e) sheltered or concealed a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers; 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. 21-3612. Contributing to a child's misconduct or deprivation is a class A misdemeanor, except that causing or encouraging a child to commit an act which, if committed by an adult, would be a felony, and sheltering or concealing a runaway are classified as E felonies. For a definition

of Child in Need of Care, see K.S.A. 38-1502. For a definition of Juvenile Offender, see K.S.A. 38-1602. For a definition of Traffic Offender, see K.S.A. 38-1602(b)(1).

Comment

In 1987 the legislature deleted from K.S.A. 21-3612 the terms delinquent, miscreant, wayward and deprived child, which formerly appeared in this instruction.

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, and *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

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.

The asportation (carrying away) element of common-law larceny is included within the term "obtain or exert control" by statutory definition contained in K.S.A. 21-3110(12) and does not need to be separately set forth in a theft charge under K.S.A. 21-3701(a) alleging a defendant obtained or exerted unauthorized control over the property. *State v. Freitag*, 247 Kan. 499, 802 P.2d 502 (1990).

Neither theft nor conspiracy to commit theft were intended by the legislature to be a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

Sales tax is not part of the "value" of unsold retail merchandise stolen from a store. *State v. Alexander*, 12 Kan. App.2d 1, 732 P.2d 814, *rev. denied* 241 Kan. 839 (1987).

An information charging the defendant with felonious theft of 8,434 gallons of regular gasoline in violation of K.S.A. 1987 Supp. 21-3701, a class E felony, and which did not allege that the defendant had been convicted of theft two or more times in the last five years, when read in its entirety, construed according to

common sense, and interpreted to include facts necessarily implied, sufficiently informed the defendant that the value of the gasoline taken was $150 or more even though not specifically alleged. *State v. Crichton*, 13 Kan. App.2d 213, 766 P.2d 832, *rev. denied* 244 Kan. 739 (1988).

In *State v. Perry*, 16 Kan. App.2d 150, 823 P.2d 804 (1991), the court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

59.05 FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT

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

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

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

Notes on Use

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

59.06 WORTHLESS CHECK

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

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

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;
   or
   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;
3. That the defendant intended to defraud _____;
4. That the amount of the (check) (order) (draft) was ($50,000 or more) (at least $500 but less than $50,000) (less than $500); and
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3707. Giving a worthless check is a class D felony if the check, draft, or order is drawn for $50,000 or more. Giving a worthless check is a class E felony if the check, draft, or order is drawn for at least $500 but less than $50,000. Giving a worthless check is a class A misdemeanor if the check, draft, or order is drawn for less than $500.

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

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

Comment

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

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

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

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

K.S.A. 21-2711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of this case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged. *State v. Montgomery*, 14 Kan. App.2d 577, 796 P.2d 559 (1990).

59.07 WORTHLESS CHECK—DEFENSE

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

Notes on Use

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

59.08 HABITUALLY GIVING A WORTHLESS CHECK WITHIN TWO YEARS

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

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

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;
   or
   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for the payment in full of the (check) (order) (draft) on its presentation;
3. That the defendant had the intent to defraud _____;
4. That the (check) (order) (draft) was drawn for less than $500;
5. That the defendant had been convicted twice between the ___ day of _____, 19___, and the _____ day of _____, 19___ for giving a worthless check; and
6. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3708(1)(a).

Habitually giving a worthless check is a class E felony.

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

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

A complaint, information or indictment charging a violation of this section shall allege specifically that the defendant has been convicted twice for giving a worthless check and shall allege the dates and places of such convictions and that both of them occurred within a period of two years immediately preceding the date of the crime charged.

Comment

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

59.09 HABITUALLY GIVING WORTHLESS CHECKS—ON SAME DAY

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

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

1. That two or more (checks) (orders) (drafts) were (made) (drawn) (issued) (delivered) on the ____ day of _____, by the defendant to _____;
   or
   That two or more (checks) (orders) (drafts) were caused or directed to be (made) (drawn) (issued) (delivered) on the _____ day of _____, by the defendant to _____;
2. That the defendant knew that there were (no moneys or credits) (not sufficient funds) at the time of the (making) (drawing) (issuing) (delivering) of the (checks) (orders) (drafts) for the payment in full of the (checks) (orders) (drafts) on their presentation;
3. That the defendant intended to defraud _____;
4. That each of the checks was drawn for less than $500, but together they totalled $500 or more; and;
5. That these acts occurred on or about the _ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3708(1)(b).

Habitually giving worthless checks is a class E felony.

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

Worthless checks bearing the same date shall be presumed to have been given the same day. Any complaint, information, or indictment charging a violation of this section shall allege that the defendant feloniously committed the crime.

59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK

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

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

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

Notes on Use

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

Comment

See K.S.A. 21-3707.

59.11 FORGERY-MAKING OR ISSUING A FORGED INSTRUMENT

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

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

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

Notes on Use

For statutory authority, see K.S.A. 21-3710(1)(a), (b). Forgery is a class E felony. This section should not be used for K.S.A. 21-3710(1)(c).

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

Comment

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(1)(a) and (b) were held to be constitutional against a claim of being vague and indefinite.

In *State v. Hicks*, 11 Kan. App.2d 76, 714 P.2d 105 (1986), the court said that although the forgery instruction given was not clearly erroneous, it would have been preferable if the trial court had relied upon the substance of PIK 59.11 to define the elements of forgery.

In *State v. Perry*, 16 Kan. App.2d 150, 823 P.2d 804 (1991), the court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

59.12 FORGERY—POSSESSING A FORGED INSTRUMENT

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

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

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

Notes on Use

For statutory authority, see K.S.A. 21-3710(1)(c). Forgery is a class E felony. This section should not be used for K.S.A. 1984 Supp. 21-3710(1)(a), (b).

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

59.13 MAKING A FALSE WRITING

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

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

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

Notes on Use

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

Comment

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

In *State v. Montgomery*, 14 Kan. App.2d 577, 796 P.2d 559 (1990), the court held that K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of the case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged.

In a welfare fraud case, prosecution should be pursuant to the specific welfare fraud statute, K.S.A. 39-720, rather than the general statute for the crime of Making a false writing, K.S.A. 21-3711. *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). The implications of *Wilcox* were considered in *State v. Jones*, 246 Kan. 180, 787 P.2d 738 (1990), and the court held that K.S.A. 39-720 had no application to a situation involving theft (K.S.A. 21-3701) from a program or agency not administered by the Department of Social and Rehabilitation Services.

Making a false writing (K.S.A. 21-3711) as opposed to Forgery (K.S.A. 21-3710) involves a person making a false representation, or causing it to be made, while acting within his own identity. Forgery involves making an instrument which appears to have been made by another. *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

Intent to defraud, as set forth in K.S.A. 21-3711 and defined by K.S.A. 21-3110(9), requires that the maker of the false writing intended to deceive another person and to induce such person, in reliance upon the deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property. The making of an instrument to cover up a theft, which crime is unknown to the victim, does not come within the statutory definition of "intent to defraud." *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

59.16 POSSESSION OF FORGERY DEVICES

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

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

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

Notes on Use

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

Comment

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

59.17 BURGLARY

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

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

1. That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure); or

1. That the defendant knowingly (entered) (remained in) a (motor vehicle) (aircraft) (watercraft) (railroad car) (describe means of conveyance of persons or property);

2. That the defendant did so without authority;

3. That the defendant did so with the intent to commit (a theft) (_____, a felony,) therein; and

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

Notes on Use

For statutory authority, see K.S.A. 21-3715. Burglary as described in the first alternative paragraph 1 is a class D felony. Burglary as described in the second alternative paragraph 1 is a class E felony.

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

Comment

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

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

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

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

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

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

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

In a burglary prosecution, the elements of "intent to commit a felony or theft therein" and "without authority entering into or remaining within" are separate and distinct. The question of whether defendant had authority to enter the premises is to be resolved without reference to his intent at the time of entry. *State v. Harper*, 246 Kan. 14, 785 P.2d 1341 (1990).

59.18 AGGRAVATED BURGLARY

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

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

1. That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (describe means of conveyance of persons or property);
2. That the defendant did so without authority;
3. That the defendant did so with the intent to commit (a theft) (_____, a felony) therein;
4. That at the time there was a human being in (describe structure or conveyance); and
5. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

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

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

Comment

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

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

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

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

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

In *State v. Holcomb*, 240 Kan. 715, 732 P.2d 1272 (1987), the court held that it was not multiplicitous to charge the defendant with aggravated burglary and aggravated robbery arising from a single transaction because each offense requires proof of facts not required to prove the other. See *State v. Higgins*, 243 Kan. 48, 755 P.2d 12 (1988).

The aggravated burglary requirement under K.S.A. 21-3716 that a burglarized building be occupied should be broadly interpreted to include multi-unit structures in which there is a possibility of contact between the victim and the burglar. *State v. Dorsey*, 13 Kan. App.2d 286, 769 P.2d 38, *rev. denied* 244 Kan. 739 (1989).

59.19 POSSESSION OF BURGLARY TOOLS

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

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

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

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

Notes on Use

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

Comment

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

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

59.20 ARSON

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

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

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

Notes on Use

For authority, see K.S.A. 21-3718(1)(a). Arson is a class C felony. This instruction should not be used for crimes charged under K.S.A. 21-3718(1)(b).

Comment

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

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

In *State v. Johnson*, 12 Kan. App.2d 239, 738 P.2d 872 *rev. denied* 242 Kan. 905 (1987), the court held that "any interest" as used in K.S.A. 21-3718(1)(a) includes a leasehold interest in real property.

59.21 ARSON—DEFRAUD AN INSURER OR LIENHOLDER

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

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

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

Notes on Use

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

Comment

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

59.22 AGGRAVATED ARSON

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

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

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

Notes on Use

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

Comment

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

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

In *State v. Johnson*, 12 Kan. App.2d 239, 738 P.2d 872, *rev. denied* 242 Kan. 905 (1987), the court held that "any interest" in K.S.A. 21-3718(1)(a) includes a leasehold interest in real property.

59.23 CRIMINAL DAMAGE TO PROPERTY—WITHOUT CONSENT

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

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

1. **That _____ was (the owner of property described as _____) (had an interest as a _____ in property described as _____);**
2. **That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosive;**
3. **That the defendant did so without the consent of _____;**
4. **That the property was damaged to the extent of ($50,000 or more) (at least $500 but less than $50,000) (less than $500); and**
5. **That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For statutory authority, see K.S.A. 21-3720(1)(a). Criminal damage to property is a class D felony if the property is damaged to the extent of $50,000 or more. Criminal damage to property is a class E felony if the property is damaged to the extent of at least $500 but less than $50,000. Criminal damage to property is a class A misdemeanor if the property damaged is of the value of less than $500 or is of the value of $500 or more and is damaged to the extent of less than $500.

Where the extent of damage is in issue, PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue, should be used and modified accordingly.

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

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than $500, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue

as to whether the damage was more or less than $50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

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

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

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

The sole distinction between Criminal damage to property (K.S.A. 21-3720) and Arson (K.S.A. 21-3718), is that arson proscribes knowingly damaging another person's property by means of fire or explosive and criminal damage to property proscribes willfully damaging another person's property by means other than by fire or explosive. That the damages to property of another was brought about by means other than by fire or explosive is an essential element of Criminal damage to property (K.S.A. 21-3720). *Zapata v. State*, 14 Kan. App.2d 94, 782 P.2d 1251 (1989).

In *State v. Jones*, 247 Kan. 537, 802 P.2d 533 (1990), the criminal damage to property involved the breaking of windows in a 1977 Dodge car. The Supreme Court held that, for purposes of determining if the offense was a felony or misdemeanor, the value of damage was the cost of replacement plus installation, not to exceed the total value of the car. Since the State failed to present evidence to establish the value of the car, the Supreme Court reversed the felony convictions of criminal damage to property.

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

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

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

1. That the defendant intentionally (damaged) (defaced) _____ by means other than by fire or explosive;
2. That _____ was an insurer of the property; or
   That _____ had an interest in the property because he had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____;
4. That the property was damaged to the extent of ($50,000 or more) (at least $500 but less than $50,000) (less than $500); and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3720(1)(b). Criminal damage to property is a class D felony if the property is damaged to the extent of $50,000 or more. Criminal damage to property is a class E felony if the property is damaged to the extent of at least $500 but less than $50,000. Criminal damage to property is a class A misdemeanor if the property damaged is of the value of less than $500 or is of the value of $500 or more and is damaged to the extent of less than $500.

Where the extent of damage is in issue, PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue, should be used and modified accordingly.

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

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

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

intent of a defendant may be a proper issue in the case. *State v. McDaniel and Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than $500, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

59.25 CRIMINAL TRESPASS

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

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

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

Notes on Use

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

Comment

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

59.25-A CRIMINAL TRESPASS—HEALTH CARE FACILITY

The defendant is charged with criminal trespass involving a health care facility. The defendant pleads not guilty.

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

1. That defendant entered or remained (upon) (in) [identify the public or private land or structure involved] in a manner that interfered with access to or from a health care facility;
2. That defendant knew he was not (authorized) (privileged) to do so;
3. That defendant entered or remained (upon) (in) such (land) (structure) in definance of an order (not to enter) (to leave) the (land) (structure) personally communicated to defendant by (the owner of the health care facility) (an authorized person); and
4. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3721(a)(2). Criminal trespass involving a health care facility is a class B misdemeanor.

"Health care facility" means any licensed medical care facility, certificated health maintenance organization, licensed mental health center, or mental health clinic, licensed psychiatric hospital or other facility or office where services of a health care provider are provided directly to patients. K.S.A. 21-3721(b)(1).

"Health care provider" means any person: (A) licensed to practice a branch of the healing arts; (B) licensed to practice psychology; (C) licensed to practice professional or practical nursing; (D) licensed to practice dentistry; (E) licensed to practice optometry; (F) licensed to practice pharmacy; (G) registered to practice podiatry; (H) licensed as a social worker; or (I) registered to practice physical therapy. K.S.A. 21-3721(b)(2).

59.26 LITTERING—PUBLIC

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

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

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

Notes on Use

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

59.33-B UNLAWFUL HUNTING—DEFENSE

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

Notes on Use

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

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

59.34 UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER

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

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

1. That the defendant used a _____ financial card;
2. That the cardholder _____, had not consented to the use of the financial card by the defendant;
3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services other than telecommunication services);
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in the total amount of (($50,000 or more) (at least $500 but less than $50,000) (less than $500) between _____, 19___, and _____, 19___; and
6. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3729(1)(a). Unlawful use of a financial card is a class D felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of $50,000 or more. Unlawful use of a financial card is a class E felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of at least $500 but less than $50,000. Unlawful use of a financial card is a class A misdemeanor if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of less than $500.

If value is in issue use PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue.

For a definition of "financial card" and "cardholder", see K.S.A. 21-3729(2)(a) and (b), respectively.

Comment

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

59.35 UNLAWFUL USE OF FINANCIAL CARD—CANCELLED

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

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

1. That the defendant knowingly used _____, a financial card or number which had been revoked or cancelled;
2. That the defendant had received written notice that the financial card was revoked or cancelled;
3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services other than telecommunication services);
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in the total amount of ($50,000 or more) (at least $500 but less than $50,000) (less than $500) between _____, 19____, and _____, 19____; and
6. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3729(1)(b). Unlawful use of a financial card is a class D felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of $50,000 or more. Unlawful use of a financial card is a class E felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of at least $500 but less than $50,000. Unlawful use of a financial card is a class A misdemeanor if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of less than $500.

If value is in issue use PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue.

For a definition of "financial card" and "cardholder", see K.S.A. 21-3729(2)(a) and (b), respectively.

Comment

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

59.36 UNLAWFUL USE OF FINANCIAL CARD—ALTERED OR NONEXISTENT

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

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

1. That the defendant used a _____ financial card that had been (falsified) (multilated) (altered);
   or
   That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services other than telecommunication services);
3. That the defendant did so with the intent to defraud;
4. That the financial card was unlawfully used in the total amount of ($50,000 or more) (at least $500 but less than $50,000) (less than $500) between _____, 19____, and _____, 19____; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For statutory authority, see K.S.A. 21-3729(1)(c). Unlawful use of a financial card is a class D felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of $50,000 or more. Unlawful use of a financial card is a class E felony if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of at least $500 but less than $50,000. Unlawful use of a financial card is a class A misdemeanor if the money, goods, property, services, or communication services obtained *within a seven-day period* are of the value of less than $500.

If value is in issue use PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue.

For a definition of "financial card" and "cardholder", see K.S.A. 21-3729(2)(a) and (b), respectively.

59.39 POSSESSION OR TRANSPORTATION OF INCENDIARY OR EXPLOSIVE DEVICE

The defendant is charged with the crime of possession or transportation of an incendiary or explosive device. The defendant pleads not guilty.

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

1. That the defendant knowingly (had in his possession) (transported) a _____ filled with _____;
2. That _____ is an (incendiary) (explosive) device equipped with a fuse, wick, or other detonating device, commonly known as a "molotov cocktail"; 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. 21-3732. Possession or transportation of incendiary or explosive device is a class A misdemeanor.

Comment

A "torpedo," defined as a detonating shell placed on a rail to be exploded when crushed under the wheels of a railroad locomotive as a warning signal to the engineer, is not a device commonly known as a "molotov cocktail," (possession of which would be unlawful) under K.S.A. 21-3732. *In re D.W.A.*, 244 Kan. 114, 765 P.2d 704 (1988).

59.40 CRIMINAL USE OF NOXIOUS MATTER

The defendant is charged with the crime of criminal use of noxious matter. The defendant pleads not guilty.

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

1. That the defendant (had in his possession) (manufactured) (transported) _____ with the intent to use it for unlawful purposes;
   or
   That the defendant used or attempted to use _____ to injure either persons or property;
   or
   That the defendant placed or deposited _____ on or about the land of _____ without his consent;
2. That _____ may give off dangerous or disagreeable odors or cause distress to persons exposed 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. 21-3733. Criminal use of noxious matter is a class A misdemeanor.

59.41 IMPAIRING A SECURITY INTEREST—CONCEALMENT OR DESTRUCTION

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. **That the defendant (damaged) (destroyed) (concealed) _____;**
2. **That _____ was security for a debt owed to _____;**
3. **That the defendant did so with the intent to defraud the secured party;**
4. **That the property subject to the security interest (is of the value of fifty dollars or more and is subject to a security interest of fifty dollars or more) (is of the value of less than fifty dollars) (is of the value of fifty dollars or more but subject to a security interest of less than fifty dollars).**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

This section is concerned only with personal property.

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

In the prosecution for impairing a security interest by concealment or destruction it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

For a discussion of the history and purpose of K.S.A. 21-3734 see *State v. Ferguson*, 221 Kan. 103, 558 P.2d 1092 (1976).

59.42 IMPAIRING A SECURITY INTEREST—SALE OR EXCHANGE

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. That the defendant (sold) (exchanged) (disposed of) _____;
2. That defendant knew _____ was security for a debt owed to _____;
3. That the security agreement did not authorize (sale) (exchange) (disposal) of the _____;
4. That _____ did not consent in writing to the (sale) (exchange) (disposal) of the _____;
5. That the defendant (sold) (exchanged) (disposed of) the _____ with the intent to defraud (name of secured party);
6. That the property subject to the security interest (is of the value of $150 or more and is subject to a security interest of $150 or more) (is of the value of less than $150) (is of the value of $150 or more but subject to a security interest of less than $150); and
7. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(b). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of $150 or more. Impairment of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than $150, or of the value of fifty dollars or more but subject to a security interest of less than $150.

This section is concerned only with personal property.

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

In the prosecution for impairing a security interest by sale or exchange it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue, should be used and modified accordingly.

Comment

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

Also see comment under PIK 2d 59.41, Impairing a Security Interest—Concealment or Destruction.

Prior to its amendment July 1, 1987, K.S.A. 21-3734 did not require proof of an intent to defraud. In *State v. Jones*, 11 Kan. App.2d 612, 731 P.2d 881 (1987), the court held that absent an intent to defraud, the statute violated the prohibition against imprisonment for a debt under Section 16 of the Bill of Rights of the Kansas Constitution. The court also noted that this element was absent from the corresponding PIK instructions, PIK Crim. 2d 59.42 and 59.43. The Supreme Court reversed the Court of Appeals in *State v. Jones*, 242 Kan. 385, 748 P.2d 839 (1988). The Supreme Court held that an agreement which creates a security interest under the UCC does not create a debt within the prohibition of section 16 and that the creditor retains title to the property and in its proceeds until payment is made. The court then discussed the statutory distinction between general intent crimes and specific intent crimes. The court held that violations of K.S.A. 21-3734 are general intent crimes. The court concluded K.S.A. 21-3734 "does not punish for a *debt* in the form of a theft—it punishes for a *willful act to deprive a secured party of its property* and thus is not unconstitutional imprisonment for debt." 242 Kan. at 392. Notwithstanding the Supreme Court's analysis, the issue is now moot because the 1987 amendment requires an intent to defraud.

59.43 IMPAIRING A SECURITY INTEREST—FAILURE TO ACCOUNT

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. That _____ had a security interest in _____;
2. That the defendant (sold) (exchanged) (disposed of) the _____ and received _____;
3. That the security agreement required that in the event of the (sale) (exchange) (disposal) of the _____the proceeds were to be given to _____;
4. That the defendant intentionally failed to account for the [(proceeds) (collateral)] [(within a reasonable time) (as specified in the security agreement)];
5. That the defendant did so with the intent to defraud _____;
6. That the property subject to the security interest (is of the value of $150 or more and is subject to a security interest of $150 or more) (is of the value of less than $150) (is of the value of $150 or more but subject to a security interest of less than $150); and
7. That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(c). Impairing a security interest is a class E felony when the personal property subject to the security interest is of the value of $150 or more and is subject to a security interest of $150 or more. Impairing of a security interest is a class A misdemeanor when the property subject to the security interest is of the value of less than $150, or of the value of $150 or more but subject to a security interest of less than $150.

This section is concerned only with personal property.

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

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

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security

interest is in issue. PIK 2d 68.11, Verdict Form—Value in Issue and PIK 2d 59.70, Value in Issue should be used and modified accordingly.

Comment

See Comment to PIK 59.42.

59.44 FRAUDULENT RELEASE OF A SECURITY AGREEMENT

The defendant is charged with the crime of fraudulent release of a security agreement. The defendant pleads not guilty.

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

1. That the defendant was shown as the secured party in a security agreement;
2. That the defendant released the security agreement;
3. That the defendant at the time of the release was not the owner and holder of the debt secured by such security agreement;
4. That the defendant intended to defraud _____, who was the owner of the security agreement; 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. 21-3735: Fraudulent release of a security agreement is a class E felony.

The name of the owner and holder of the security agreement should be placed in the appropriate blank.

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 RECORDINGS

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

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

1. That _____ was the owner of recordings;
2. That the defendant knowingly (duplicated) (caused to be duplicated) sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded);
   or
   That the defendant knowingly (recorded) (caused to be recorded) any live performance;
3. That _____ did not consent to the defendant (duplicating) (causing to be duplicated) the recordings;
   or
   That _____ did not consent to the recording of the live performance;
4. That the defendant (duplicated) (caused to be duplicated) the recordings with the intent to (sell) (rent) (cause to be sold or rented) (give away as part of a promotion for any product or service) such duplicated sounds or any such recorded performance; 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 Recordings is a class E felony.

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

59.58-A DEALING IN PIRATED RECORDINGS

The defendant is charged with the crime of dealing in pirated recordings. The defendant pleads not guilty.

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

1. That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]), any sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded);

   or

   That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]) a recording of any live performance;
2. That the defendant knew or had reasonable grounds to know that such recording was produced in violation of law; 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. 21-3749. Dealing in pirated recordings is a class A misdemeanor if the offense involves less than 7 audio visual recordings or less than 100 sound recordings during a 180-day period or a class E felony if the offense involves 7 or more audio visual recordings or 100 or more sound recordings during a 180-day period.

59.59 PIRACY OF RECORDINGS—DEFENSES

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

or

It is a defense to the charge of piracy of recordings if the duplication is (of any sounds initially fixed in a tangible medium of expression after February 15, 1972) (of any computer program or any radio or visual recording that is part of any computer program).

Notes on Use

For authority, see K.S.A. 21-3748(3). If this instruction is used PIK 2d 52.08, Affirmative Defense—Burden of Proof, should be given.

59.60 NON-DISCLOSURE OF SOURCE OF RECORDINGS

The defendant is charged with the crime of non-disclosure of source of recordings. The defendant pleads not guilty.

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

1. That defendant knowingly (sold) (rented) (offered for sale or rental) ([possessed] [transported] [manufactured] for the purpose of [selling] [renting]) any (phonograph record) (audio or video disc) (wire) (audio or video tape) (film) (other article [known] [later developed]) on which (sounds) (images) (both sounds and images) are (recorded) (stored);
2. That the (outside cover) (box) (jacket) of the (insert type of recording) did not, clearly and conspicuously, disclose the name and address of the manufacturer of such article; 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. 21-3750.

Non-disclosure of source of recordings is a class A misdemeanor if the offense involves less than 7 audio visual recordings or less than 100 sound recordings during a 180-day period or a class E felony if the offense involves 7 or more audio visual recordings or 100 or more sound recordings during a 180-day period.

60.05 PERJURY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3805 as amended. Perjury is a class D felony if the false statement is made upon the trial of a felony. Under any other circumstances perjury is a class E felony. In 1989 the legislature amended 21-3805 to specifically include any declaration, verification, certificate or statement as provided under K.S.A. 53-601.

Comment

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

60.06 CORRUPTLY INFLUENCING A WITNESS

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

61.05 PRESENTING A FALSE CLAIM

The defendant is charged with the crime of presenting a false claim. The defendant pleads not guilty.

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

1. That _____ was a (public officer) (public body) authorized to allow or pay a claim;
2. That defendant knowingly presented to _____ a claim which was false in whole or in part;
3. That defendant did so with intent to defraud;
4. That the amount of the false claim presented was (fifty dollars or more) (less than fifty dollars); and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

As used in this instruction, "intent to defraud" means an intention to induce another by deception to assume, create, transfer, alter, or terminate a right or obligation with reference to property.

Notes on Use

For authority, see K.S.A. 21-3904. Presenting a false claim for $50 or more is a class E felony. Presenting a false claim for less than $50 is a class A misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim. For verdict form depending on values, see PIK 2d 68.11, Verdict Form—Value in Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

"Intend to defraud" is defined in K.S.A. 21-3110(9).

Comment

In *State v. Wilson*, 11 Kan. App.2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

61.06 PERMITTING A FALSE CLAIM

The defendant is charged with the crime of permitting a false claim. The defendant pleads not guilty.

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

1. **That defendant was a public (officer) (employee);**
2. **That the defendant (approved by audit) (allowed or paid) a claim made upon _____;**
3. **That defendant knew such claim was false or fraudulent in whole or in part;**
4. **That the amount of the false claim presented was (fifty dollars or more) (less than fifty dollars); 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. 21-3905. Permitting a false claim for fifty dollars or more is a class E felony. Permitting a false claim for less than fifty dollars is a class A misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim.

For verdict form depending on value see PIK 2d 68.11, Verdict Form—Value in Issue.

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

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

62.01 EAVESDROPPING

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

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

1. That the defendant knowingly and without lawful authority

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

or

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

or

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

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

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

Notes on Use

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

Comment

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

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

62.05 DENIAL OF CIVIL RIGHTS

The defendant is charged with the crime of denial of civil rights. The defendant pleads not guilty.

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

1. That the defendant intentionally denied to _____ on account of the (race) (color) (ancestry) (national origin) (religion) of _____
   (*a*) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any institution, department or agency of the (state) (any political subdivision of the state) (any municipality); and
   or
   (*b*) the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of (any establishment which provides lodging to transient guests for hire) (any establishment which is engaged in selling food or beverages to the public for consumption upon the premises) (any place of recreation, amusement, exhibition or entertainment which is open to the public); and
   or
   (*c*) the full and equal use and enjoyment of services, privileges and advantages of any facilities for the public transportation of persons or goods; and
   or
   (*d*) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any establishment which offers personal or professional services to members of the public; and
   or
   (*e*) the full and equal exercise of the right to vote in any election held pursuant to Kansas law; 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. 21-4003. Denial of civil rights is a class A misdemeanor.

Comment

For comment, see 1968 Judicial Council notes to K.S.A. 21-4003. See annotation, Participation of Student in Demonstration on or near Campus as Warranting Expulsion or Suspension from School or College, 32 A.L.R. 3d 864.

It was held in *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (1985), that the portion of the statute quoted in paragraph 1(d) of the instruction was not applicable under the facts to an ordained minister operating a wedding chapel who refused on grounds of his religious beliefs to perform a marriage ceremony for a black person and a white person.

62.10 HYPNOTIC EXHIBITION

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

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

1. That the defendant used or attempted to use a hypnotic exhibition, demonstration or performance for entertainment; and

   or

1. That the defendant permitted himself to be exhibited while in a state of hypnosis; and

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

As used in this instruction, "hypnosis" means a condition of altered attention brought about by an individual through the use of certain physical or psychological manipulations of one person by another.

Notes on Use

For authority, see K.S.A. 21-4007. Hypnotic exhibition is an unclassified misdemeanor punishable by fine not to exceed $50.00.

62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE

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

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

1. Defendant possessed a lighted (cigarette) (cigar) (pipe) ([other lighted smoking equipment]) other than in a designated smoking area in (a) (an) (restaurant) (retail store) (public means of transportation) (passenger elevator) (health care institution) (place where health care services are provided to the public) (educational facility) (library) (courtroom) ([state] [county] [municipal] building) (restroom) (grocery store) (school bus) (museum) (theater) (auditorium) (arena) (recreational facility) ([other enclosed indoor area] [open to the public] [used by the general public]);

   or

   Defendant possessed a lighted (cigarette) (cigar) (pipe) ([other lighted smoking equipment]) other than in a designated smoking area at a meeting open to the public; and
2. This act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. The prior statute, K.S.A. 21-4008, (repealed L. 1987, ch. 110, § 7, July 1), prohibited smoking tobacco. The definition of "smoking" in K.S.A. 21-4009 does not identify a particular substance. Smoking in a public place is an unclassified misdemeanor punishable by a fine of not more than $20.00 for each violation.

62.11-A FAILURE TO POST SMOKING PROHIBITED AND DESIGNATED SMOKING AREA SIGNS

The defendant is charged with the crime of failure (to post signs in a public place stating that smoking is prohibited by state law) (to post signs in a designated smoking area in a public place stating that smoking is permitted). The defendant pleads not guilty.

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

1. Defendant was the (proprietor) (person in charge) of (a) (an) (restaurant) (retail store) (public means of transportation) (passenger elevator) (health care institution) (place where health care services are provided to the public) (educational facility) (library) (courtroom) ([state] [county] [municipal] building) (restroom) (grocery store) (school bus) (museum) (theater) (auditorium) (arena) (recreational facility) ([other enclosed indoor area] [open to the public] [used by the general public]);
   or
2. Defendant failed to post or cause to be posted in a conspicuous place signs stating clearly that smoking is prohibited by state law;
   or
   Defendant failed to post or cause to be posted in a designated smoking area signs stating that smoking is permitted in such room or area; and
3. This act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. Failure to post signs stating smoking is prohibited by state law or to post signs stating smoking is permitted in a designated area is an unclassified misdemeanor punishable by a fine of not more than $50.

63.12 DESECRATING A CEMETERY

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

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

1. That the defendant knowingly and without authority of law:
   (a) (Destroyed) (Cut) (Mutilated) (Tore) (Removed) or (Damaged) any [(tomb) (monument) (memorial) (marker)] in a cemetery or any [(gate) (door) (fence) (wall) (post) (railing) (enclosure)] for the protection of cemetery property;
   or
   (b) obliterated any (grave) (vault) (niche) (crypt); and
   (c) (destroyed) (cut) (broke) (damaged) any (building) (statue) (ornament) (tree, shrub or plant);
2. That the property was damaged to the extent of (\$500 or more) (less than \$500); 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. 21-4115. Desecrating a cemetery is a class E felony if the damage is \$500 or more and a class A misdemeanor if less than \$500. Where the extent of damage is in issue, PIK 2d 68.11, Verdict Form—Value in Issue, and PIK 2d 59.70, Value in Issue, should be used and modified accordingly.

63.13 DESECRATING A DEAD BODY

The defendant is charged with the crime of desecrating a dead body. The defendant pleads not guilty.

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

1. That the defendant knowingly and without authorization of law
   (*a*) opened a grave or other place of interment with intent to remove the dead body or remains of a human being or any coffin, vestment or other article interred with such body; and
   or
   (*b*) removed the dead body or remains of a human being, or the coffin, vestment or other article interred with such body, from the grave or other place of interment; and
   or
   (*c*) received the dead body or remains of a human being, knowing the same to have been disinterred unlawfully; 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. 21-4112. Desecrating a dead body is a class B misdemeanor.

63.14-A HARASSMENT BY TELEFACSIMILE

The defendant is charged with the crime of harrassment by telefacsimile communication. The defendant pleads not guilty.

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

1. That the defendant knowingly used electronic equipment to transmit a copy of a document via a telephone line to a court in the state of Kansas for a use other than court business; 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. 21-3839. Harassment by telefacsimile communication is a class A misdemeanor.

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

64.01 UNLAWFUL USE OF WEAPONS—FELONY

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

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

1. That defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) [a shotgun with a barrel less than 18 inches in length] [a firearm (designed to discharge) (capable of discharging) automatically more than once by a single function of trigger];

   or

   That the defendant knowingly (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

Comment

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

In *State v. Kulper*, 12 Kan. App.2d 301, 744 P.2d 519 (1987), the court held evidence that the defendant possessed all the pieces of a disassembled shotgun is sufficient to support a conviction. PIK 64.01 is cited with approval.

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:

[A]

1. That the defendant intentionally 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

[B]

1. That the defendant intentionally discharged a firearm at an unoccupied dwelling; and

[C]

1. That the defendant intentionally discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (_____ [designate other means of conveyance of persons or property]);
2. That the person(s) therein (was) (were) not placed in immediate apprehension of bodily harm; and

[D]

1. That the defendant intentionally discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (_____ [designate other means of conveyance of persons or property]);
2. That this act resulted in bodily harm to a person; and

* * * * * * * * * *

[Insert correct number]. 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) and 21-4219. The latter statute was enacted to address so-called "drive by shootings" and presumably fill a perceived need not met under K.S.A. 21-3410 and 21-3414.

Under [A] unlawful discharge of a firearm is a class C misdemeanor. Under [B] it is class E felony. Under [C] it is a class D felony. Under [D] it a class C felony.

A felony offense charged under K.S.A. 21-4219 shall be considered a felony under subsection (a)(1) of K.S.A. 21-3401.

See PIK 64.04, Unlawful Use of Weapons—Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

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.

64.03 AGGRAVATED WEAPONS VIOLATION

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

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

1. That the defendant (allege any of the violations listed in 64.01 and 64.02);
2. That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) within five years prior to the commission of such act; 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. 21-4202.
Aggravated weapons violation is a class E felony.

Comment

In *State v. Lassley*, 218 Kan. 752, 545 P.2d 379 (1976), the court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

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

64.04 UNLAWFUL USE OF WEAPONS—AFFIRMATIVE DEFENSE

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

Notes on Use

For authority see K.S.A. 21-4201(2), (3), and (4) which lists persons exempt from the application of the act. There should be inserted in the blank space of the instruction a description of an exempt person under the statute. If this instruction is given PIK 2d 52.08, Affirmative Defenses—Burden of Proof, should be given.

Comment

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

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

In *State v. Hargis*, 5 Kan. App.2d 608, 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.

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 _____, who was under 18 years of age; and

   or

   That the defendant knowingly (sold) (gave) (transferred) a firearm to _____, who was both addicted to and an unlawful user of a controlled substance; and

   That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than twelve (12) inches long to _____, who was convicted of _____, a felony, (within the preceding five (5) years) (and released from imprisonment within the preceding five (5) years); and

   or

   That the defendant knowingly (sold) (gave) (transferred) a firearm to _____, a person who was convicted of a felony, (within the preceding ten (10) years) (and released from imprisonment within the preceding ten (10) 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. 21-4203. Unlawful disposal of firearms is a class A misdemeanor. The last alternative is applicable to disposal of any firearm provided the underlying felony is one of the crimes listed in the statute.

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 (12) inches long;
2. That the defendant within five (5) years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and

or

1. That the defendant knowingly had possession of a firearm;
2. That the defendant within ten (10) 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.

Notes on Use

For authority, see K.S.A. 21-4204(1)(b) or (1)(c). Alternate paragraphs 1 and 2 are applicable as to any firearm provided the underlying felony is one of the crimes specified in the statute.

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.

64.07 UNLAWFUL POSSESSION OF A FIREARM—MISDEMEANOR

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 was both addicted to and an unlawful user of a controlled substance;
2. That the defendant knowingly had possession of a firearm;

   or

   That the defendant knowingly had possession of a firearm in or on school property or grounds upon which a school building was located;

   or

   That the defendant refused to (surrender) (immediately remove) [from the school property or grounds] [at any regularly scheduled school sponsored activity or event] a firearm in his possession after being requested to do so by a duly authorized school employee or a law enforcement officer;

2. or 3. That this act occurred on or about the ____day of _____, 19____, in _____County, Kansas.

["School building" as used in this instruction means: any building or structure used by a unified school district or an accredited nonpublic school for student (instruction) (attendance) (extracurricular activities) of pupils enrolled in kindergarten or any of the grades 1 through 12. Use of any such building includes regularly scheduled school sponsored activities or events.]

Notes on Use

For authority, see K.S.A. 21-4204. Unlawful possession of a firearm under subsection (1)(a) is a class B misdemeanor and the first paragraphs numbered under subsection (1)(d) is a class B misdemeanor and the first alternate paragraph 1 would be applicable. Under subsection (1)(e) it is a class A misdemeanor and the second alternate paragraphs 1 and 2 would be used. Felony possession of a firearm is proscribed under subsection (1)(b) and (1)(c) of this statute and it is the subject of PIK Crim. 2d 64.06.

The bracketed portion of the instruction should be used if there is a factual issue whether the offense occurred in a school building.

See Comment to PIK 2d 64.06, Unlawful Possession of a Firearm-Felony.

As commonly defined, a person is addicted when he or she has a compulsive need for a habit forming drug and has lost the power of self control with reference to this addiction. Black's Law Dictionary 37 (6th Ed. 1990).

64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

The defendant is charged with the crime of defacing identification marks of a firearm. The defendant pleads not guilty.

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

1. **That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a 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. 21-4205. Defacing identification marks of a firearm is a class B misdemeanor.

Comment

It should be noted that under K.S.A. 21-4205(2) possession of any firearm upon which an identification mark shall have been intentionally altered is *prima facie* evidence that the possessor altered the same. This section does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence, hence an instruction covering this is not required.

64.16 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means. The defendant pleads not guilty.

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

1. That the defendant intentionally made, altered or signed a prescription order and the defendant was not a practitioner at the time of the commission of the act;

   or

   That the defendant delivered a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner;

   or

   That the defendant possessed a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner;

   or

   That the defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner;

   or

   That the defendant provided false information to a practitioner for the purpose of obtaining a prescription drug; and

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

"Pharmacist" means any natural person registered to practice pharmacy. "Practitioner" means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

"Prescription-only drug" means any drug required by the federal or state food, drug and cosmetic act to bear

on its label the legend "Caution: Federal law prohibits dispensing without prescription."

"Prescription order" means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. "Prescription order" does not mean a drug dispensed pursuant to such an order.

Notes on Use

For authority, see K.S.A. 21-4214. Obtaining a prescription-only drug by fraudulent means is a class A misdemeanor for the first offense and a class E felony for a second or subsequent offense.

Note that if a prosecution may be brought under the provisions of K.S.A. 65-4127a or 65-4127b, of the Uniform Controlled Substances Act, prosecutions may not be brought under this section.

64.18 SELLING BEVERAGE CONTAINERS WITH DETACHABLE TABS

The defendant is charged with selling beverage containers with detachable tabs. The defendant pleads not guilty.

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

1. That the defendant intentionally sold or offered for sale at retail in this State a metal beverage container designed and constructed so that a part of the container was detachable in opening the container; and
2. That this act occurred on or about the _____ day of _____, 19___, in _____ County, Kansas.

"Beverage container" means any sealed can containing beer, cereal malt beverages, mineral waters, soda water, and similar soft drinks intended for human consumption.

Notes on Use

For authority see K.S.A. 21-4216.

Selling beverage containers with detachable tabs is a class C misdemeanor.

64.19 UNLAWFULLY EXPOSING ANOTHER TO A COMMUNICABLE DISEASE

The defendant is charged with the crime of unlawfully exposing another to a communicable disease. The defendant pleads not guilty.

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

1. That the defendant knew he was infected with _____, a life threatening communicable disease;
2. That the defendant:
   engaged in sexual intercourse or sodomy with another individual;
   or
   sold or donated defendant's blood, blood products, semen, tissue, organs, or other body fluids;
   or
   shared with another individual a hypodermic needle or syringe for the introduction of drugs or other substance into the other individual's body;
   or
   shared with another individual a hypodermic needle, syringe, or both, for the withdrawal of blood or body fluids from the other individual's body;
3. That the defendant intended to expose (that individual) (the recipient) (another person) to a life threatening communicable disease; 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. 21-3435. Unlawfully exposing another to a communicable disease is a class A misdemeanor. The statute provides that neither sexual intercourse nor sodomy include penetration by any object other than the male penis.

See K.A.R. 28-1-1 for a definition of "communicable disease." This definition would need to be supplemented as the crime requires the disease to be life threatening.

65.12 POSSESSION OF A GAMBLING DEVICE

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

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

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

Notes on Use

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

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

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

65.12-A POSSESSION OF A GAMBLING DEVICE—DEFENSE

It is a defense to this charge that:

(1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950;

or

(2) The gambling device or sub-assembly or essential part thereof was manufactured, transferred or possessed by a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171, et seq.) or a transporter under contract with such manufacturer with intent to transfer for use:

(a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;

(b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;

(c) In a state other than the State of Kansas.

Notes on Use

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

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 AND CERTAIN STIMULANTS

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) (stimulant) 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) (possessed with the intent to sell) (offered for sale with the intention to sell) (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a (narcotic drug) (stimulant) known as _____;
2. That the defendant did so intentionally; and

[3. That the defendant did so in, or within 1,000 feet of school property upon which was located a school;

4. That the defendant was over 18 years of age;] and

[3.] or [5.] That the defendant did so on or about the ___ day of _____, 19___, in _____ County, Kansas.

[As used in this instruction, "school" means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4127a. The statute specifically relates to "any opiates, opium, or narcotic drugs, or any stimulant designated in subsection (d) (1), (d) (3) or (f) (1) of K.S.A. 65-4107 and amendments thereto." Such stimulants are amphetamine, methamphetamine and their immediate precursors.

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*), and "person" in paragraph (*s*).

If a definition of "possession" is necessary, see chapter 53 or the instruction defining possession approved in *State v. Galloway*, 16 Kan. App.2d 54, 63, 817 P.2d 1124 (1991).

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.

Generally, 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. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

Under K.S.A. 65-4127a(c), a first offense is a class B felony if the defendant was over 18 years of age and the substances involved were possessed with intent to sell, sold or offered for sale within 1,000 feet of school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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 K.S.A. 65-4127e.

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).

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App.2d 364, 657 P.2d 1136 (1983).

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App.2d 167, ____ P.2d ____ (1992).

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 OR ANABOLIC STEROIDS 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) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as _____. The defendant pleads not guilty.

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

1. That the defendant possessed (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as _____;
2. That the defendant did so with the intent to sell it;

[3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was over 18 years of age;] and

[3.] or [5.] That the defendant did so on or about the ___ day of _____, 19 ___, in _____ County, Kansas.

[As used in this instruction, "school" means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

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, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(*d*) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among others. K.S.A. 65-4127b(b) (4) covers substances designated in 65-4105(g) and 65-4111(c), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and element 1 of the instruction.

Generally, a violation of K.S.A. 65-4127b(*b*) is a class C felony. If the defendant was over 18 years of age and the substances involved were possessed with intent to sell within 1,000 feet of school property upon which was located a school

structure, the violation is a class B felony. K.S.A. 65-4127b(e). If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

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). Possession with intent to sell would appear to be a lesser included offense of possession with intent to sell within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App.2d 167, ____ P.2d ____ (1992).

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, CULTIVATING, OR DISPENSING CONTROLLED STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) 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 with the intent to sell] [cultivated] [prescribed] [administered] [delivered] [distributed] [dispensed] [compounded] (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) known as _____;
2. That the defendant did so intentionally;

[3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was over 18 years of age;] and

[3.] or [5.] That the defendant did so on or about the ___ day of _____, 19 ___, in _____ County, Kansas.

[As used in this instruction, "school" means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

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, hallucinogenic drugs, anabolic steroids and other controlled substances that are involved. For example, it refers to K.S.A. 65-4105(*d*) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others. K.S.A. 65-4127b(b) (4) covers substances designated in 65-4105(g) and 65-4111(c), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. When the vio-

lation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and element 1 of the instruction.

Generally, a violation of K.S.A. 65-4127b(*b*) is a class C felony. If the defendant was over 18 years of age and the substances involved were sold or offered for sale within 1,000 feet of school property upon which was located a school structure, the violation is a class B felony. K.S.A. 65-4127b(e). If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

See Notes on Use to PIK 67.13, Narcotic Drugs and Certain Stimulants.

A presumption that the defendant be sentenced to imprisonment arises if the substance involved, regardless of amount, 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 K.S.A. 65-4127e.

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), "person" in paragraph (s) and "cultivate" in paragraph (aa). When appropriate, definitions should be given.

Comment

See 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).

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App.2d 364, 657 P.2d 1136 (1983).

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App.2d 167, ____ P.2d ____ (1992).

67.16 POSSESSION OF CONTROLLED STIMULANTS, DEPRESSANTS, HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the state of Kansas as it pertains to (a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) 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) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid) 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, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marihuana, mescaline, and peyote, among many others. K.S.A. 65-4127b(a) (4) covers substances designated in 65-4105(g) and 65-4111(c), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and element 1 of the instruction.

A violation of K.S.A. 65-4127b(a) is a class A misdemeanor except if a person has a prior conviction under 65-4127b or a conviction for a substantially similar offense from another jurisdiction, the person is guilty of a class D felony. "Prior conviction of possession of narcotics is not an *element* of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and thus to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." Syl. ¶ 1, *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1975).

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

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.' "

A presumption that the defendant be sentenced to imprisonment arises if the amount of the substance involved is equal to or greater than the amounts specified in K.S.A. 65-4127e.

Comment

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).

67.22 UNLAWFUL USE OF COMMUNICATION FACILITY TO FACILITATE FELONY DRUG TRANSACTION

The defendant is charged with the crime of unlawful use of a communication facility (in a conspiracy to commit) (in the solicitation of) (to facilitate) the felony of _____. The defendant pleads not guilty.

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

1. That the defendant intentionally used a _____ (in a conspiracy to commit) (in the solicitation of) (to facilitate) the felony of _____; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

(As used in this instruction, a "conspiracy" is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.)

(As used in this instruction, "solicitation" is commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.)

(As used in this instruction, "facilitate" means to aid, assist, or make easier fulfillment of a goal.)

Notes on Use

For authority, see K.S.A. 65-4141. A violation of K.S.A. 65-4141 is a class D felony.

The particular communication facility used should be inserted in the first blank of element one. K.S.A. 65-4141(b) defines "communication facility" to mean any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers and all other means of communication. The appropriate felony violation of K.S.A. 65-4127a or 65-4127b should be inserted in the second blank of element one.

67.23 SELLING, OFFERING TO SELL, POSSESSING WITH INTENT TO SELL OR DISPENSING CONTROLLED SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113 TO PERSON UNDER 18 YEARS OF AGE

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 (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as _____. The defendant pleads not guilty.

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

1. That the defendant intentionally (prescribed) (administered) (delivered) (distributed) (dispensed) (sold) a (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as _____ (for) (to) _____; or
   That the defendant (offered for sale) (possessed) a (material) (compound) (mixture) (preparation) containing a (narcotic drug) (stimulant) known as _____ with the intent to sell it to _____;
2. That _____ was a person under 18 years of age; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4127b(c). The subsection covers unlawful acts relating to medicinals with a lower potential for abuse designated in K.S.A. 65-4113.

A violation of K.S.A. 65-4127b(c) is a class D felony if the substance is prescribed, administered, delivered, distributed, dispensed, sold, offered for sale or possessed with intent to sell to a child under 18 years of age. A violation of the subsection is a class A misdemeanor if it involves simple possession or if the recipient of the substance is 18 or more years of age. The instruction covers felony violations of the subsection.

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 amount specified in K.S.A. 65-4127e.

K.S.A. 21-3202(2) states, "Proof of criminal intent does not require proof that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which he is charged."

Comment

K.S.A. 65-4127b(c) qualifies the acts specified as unlawful with the premise, "except as authorized by the Uniform Controlled Substances Act." See Comment to PIK 67.13 or 67.14 in regard to this qualification.

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App.2d 364, 657 P.2d 1136 (1983).

67.24 POSSESSION BY DEALER—NO TAX STAMP AFFIXED

The defendant is charged with the crime of possession of _____, (a controlled substance) (marijuana), without Kansas tax stamps affixed. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed more than _____ (grams) (dosage units) of _____, a controlled substance without affixing official Kansas tax stamps or other labels showing that the tax has been paid; 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. 79-5201 et seq. Upon conviction the defendant may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

68.06 NOT GUILTY BECAUSE OF INSANITY

We, the jury, find defendant not guilty because of insanity.

Presiding Juror

Notes on Use

See K.S.A. 1982 Supp. 22-3428 in regard to acquittal on the ground of insanity at the time of the commission of the alleged crime, and commitment of defendant to the state security hospital.

See K.S.A. 1982 Supp. 22-3302 concerning proceedings to determine competency to stand trial. See also, PIK 2d 54.10, Insanity—Mental Illness or Defect and PIK 2d 54.10-A, Insanity—Commitment.

Comment

Mental competency at the time of the commission of an offense—if raised—is to be determined by the trier of facts upon a trial. Mental competency to stand trial—if raised—is another matter and is to be determined by the Court under K.S.A. 1982 Supp. 22-3302. *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970).

68.07 MULTIPLE COUNTS—VERDICT INSTRUCTION

Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the presiding juror.

Notes on Use

This instruction should be given when separate offenses are charged in more than one count and defendant can be convicted of any one or all.

See PIK 2d 68.08, Multiple Counts—Verdict Forms.

Cited with approval in *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).

Comment

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405, 406, 769 P.2d 621 (1989). However, the failure was not reversible error under the circumstances of the case because it did not prejudicially affect the substantial rights of the defendant.

In *Macomber*, the Court stated that "[a] trial court does not have the time to give the thought and do the research which has been put into the preparation of the Pattern Criminal Jury Instructions by the Advisory Committee on Criminal Jury Instructions to the Kansas Judicial Council. Therefore, where 'pattern jury instructions are appropriate, a trial court should use them unless there is some compelling and articulable reason not to do so.' " *State v. Macomber*, 244 Kan. at 405. See also *State v. Wilson*, 240 Kan. 606, 610, 731 P.2d 306 (1987).

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.)
27. **Theft by Deception**—Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry,* 16 Kan. App.2d 150, 823 P.2d 804 (1991).

68.14 MURDER IN THE FIRST DEGREE—MANDATORY 40 YEAR SENTENCE—VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS.

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS be imposed by the court.

_____

Presiding Juror

_____, 19____.

Notes on Use

For authority see K.S.A. 21-4624(5).

68.14-A MURDER IN THE FIRST DEGREE—MANDATORY 40 YEAR SENTENCE—VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS.

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist: [The Jury shall set forth here in legible print each such aggravating circumstance.]

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

and so therefore unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS be imposed by the Court.

_____

Presiding Juror

_____, 19____.

Notes on Use

For authority see K.S.A. 21-4624(5) and 21-4628.

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