Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

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FOREWORD

The preparation and publication of *Pattern Instructions for Kansas-Criminal 3d (PIK 3d)* has been accomplished through the efforts of the Kansas Judicial Council's Advisory Committee on Criminal Jury Instructions. The Council directed its preparation because of two major pieces of legislation: sentencing guidelines (1992 S.B. 479) and recodification of the criminal code (1992 S.B. 358). Finishing touches had to await 1993 legislation to reconcile those two bills. Not until the veto session was the reconciliation bill (1993 S.B. 423) enacted. Further complicating the Committee's task have been asundry revisions based upon other 1993 legislation and ongoing case law. Nonetheless, the Committee has finished its assigned task on schedule.

PIK 3d covers statutes enacted through the 1993 legislative session, Kansas Supreme Court decisions through Vol. 252, No. 4 and Kansas Court of Appeals decisions through Vol. 18, No. 2.

The format of *PIK 3d* is comparable to that of its predecessors. The Committee did decide to use a slightly larger three-ring notebook to facilitate use.

Long hours, illuminating debate, and lots of elbow grease have produced these pattern instructions with appropriate notes and comments. The members of the Committee are: Professor Christine Arguello, Lawrence; Hon. Michael A. Barbara, Topeka; Hon. Robert L. Bishop, Winfield; Hon. J. Patrick Brazil, Topeka; Hon. David M. Kennedy, Wichita; Hon. David Prager, Topeka; Hon. M. Kay Royse, Topeka; Hon. Philip C. Vieux, Garden City; Hon. Herbert W. Walton, Olathe; Hon. John W. White, Iola; Hon. Frederick Woleslagel, Lyons. Each of these individuals has served upon the Committee because of a belief in the Kansas judiciary and a desire that the men and women serving on the bench be provided with a quality product. Hopefully, we have succeeded and *PIK 3d* will take its place along side *PIK* (1971) and *PIK 2d* (1982) as a trusted and valued publication that stands the test of time.

The Committee is indebted to many others who have made it possible to prepare this publication. We are appreciative of those judges and lawyers who have made suggestions for revisions, many

of which we have adopted. We gratefully acknowledge the consistent support of the Kansas Judicial Council. To the staff of the Council that gave unflinchingly of their time and energies to insure a quality product, our special thanks. Its Research Director, Randy M. Hearrell, and Research Associate, Matthew B. Lynch, provided Committee members with not only technical assistance but valuable substantive contributions. Many long hours were spent getting the manuscript into final, publishable form by Janelle Williams and Lisa R. North.

With that, we rest our case.

David S. Knudson, Chair
Kansas Judicial Council Advisory
Committee on Criminal Jury Instructions
July, 1993

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

Comment

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

In addition to the above instructions, some courts may desire to give PIK 3d 51.05, Rulings of the Court. It should not be objectionable to do this, but it is believed most judges would consider such an instruction out of place as an introductory instruction and, consequently, it is not included.

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

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

Although the instruction was neither approved nor disapproved, *Williams* could be considered as an approval of it simply because it was reproduced. We do not consider that to be so, and we adhere to the brevity of PIK 3d 51.01. If specific factors were appropriate for inclusion, it would seem they would be those not mentioned but related to the serology tests: methodology, quality control, condition of blood, etc. (State's contention, 234 Kan. at 237) All of which simply points out one of the negative aspects of attempts to expand PIK 3d 51.01.

51.02 CONSIDERATION AND BINDING APPLICATION OF INSTRUCTIONS

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

Notes on Use

For authority, see K.S.A. 22-3403(3).

Comment

The implication of *State v. McClanahan*, 212 Kan. 208, 510 P.2d 153 (1973) is that this instruction complies with the statutory directive and the law of Kansas relative to the province of a jury.

See *State v. Pennington*, 254 Kan. 757, 764, 869 P.2d 624 (1994) relative to using the word "must" in this instruction.

51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

You must consider this case without favoritism or sympathy for or against either party. Neither sympathy nor prejudice should influence you.

Notes on Use

The Committee recommends that unless there are very unusual circumstances the above instruction should not be given. Ordinarily, PIK 3d 52.09, Credibility of Witnesses, should be a sufficient guide for the jury. Additionally, the above instruction is objectionable in that it tells the jury what not to do rather than what to do.

Comment

In *State v. Sully*, 219 Kan. 222, 547 P.2d 344 (1976), the Supreme Court approved not giving this precautionary instruction unless there are very unusual circumstances as being "the better practice." To give this instruction, however, "would not constitute error."

If a precautionary instruction of this type is to be given, it appears that one "in substantial accord" with this instruction will be approved. *State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976).

In *State v. Reser*, 244 Kan. 306, 317, 767 P.2d 1277 (1989), the Court found no unusual circumstances existed which would support a claim of error for refusal to give this instruction.

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

51.08 FORM OF PRONOUN - SINGULAR AND PLURAL

The instruction which originally appeared as PIK 51.08 is deleted because the Committee believes the proper practice is for a judge to tailor his or her instructions to the parties by generally using their names. Where a pronoun is used, it should express both the sex and the number to which the pronoun refers.

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)(she) is not guilty. You must presume that (he)(she) is not guilty until you are convinced from the evidence that (he)(she) 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 element instructions 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 706 (1983); *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's recommendations under PIK 3d 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. 356, 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).

See also, *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994) relative to using the word "must" in this instruction.

52.03 PRESUMPTION OF INNOCENCE

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

Notes on Use

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to presumption of innocence.

Comment

Failure to give a detailed instruction was approved in *State v. Taylor*, 212 Kan. 780, 784, 512 P.2d 449 (1973). See Comment to PIK 3d 52.02.

52.04 REASONABLE DOUBT

The Committee recommends that there be no separate instruction given defining reasonable doubt.

Notes on Use

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to reasonable doubt. See Notes on Use thereto.

Comment

The Committee believes that the words "reasonable doubt" are so clear in their meaning that no explanation is necessary.

The Kansas Supreme Court approved this principle in *State v. Bridges*, 29 Kan. 138, 141 (1882), by stating: "It has often been said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves."

State v. Davis, 48 Kan. 1, 10, 28 Pac. 1092 (1892), states: "It is to be presumed that the jury understood what the words 'reasonable doubt' meant. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language."

The position of the Committee opposing any separate instruction on reasonable doubt was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980); *State v. Dunn*, 249 Kan. 488, Syl. ¶ 4, 820 P.2d 412 (1991); and *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994).

52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

The defendant claims as a defense that (here describe the defense claimed). Evidence in support of this defense 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 must 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 - Withdrawal as a Defense
55.10 Criminal Solicitation - Defense
56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
56.38 Affirmative Defense to Mistreatment of a Dependent Adult
57.01-A Rape - Defense of Marriage
57.05-B Affirmative Defense to Indecent Liberties With a Child
57.06-A Affirmative Defense to Aggravated Indecent Liberties With a Child
57.07-A Affirmative Defense to Criminal Sodomy
57.08-C Affirmative Defense to Aggravated Criminal Sodomy
58.02 Affirmative Defense to Bigamy
58.10-A Affirmative Defense to Endangering a Child
58.12-C Furnishing Alcoholic Liquor to a Minor - Defense
58.12-D Furnishing Cereal Malt Beverage to a Minor - Defense
59.07 Worthless Check - Defense
59.33-B Criminal Hunting - Defense
59.59 Piracy of Recordings - Defenses
59.64-A Computer Crime - Defense

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
64.02-B Criminal Discharge of a Firearm - Affirmative Defense
64.04 Criminal Use of Weapons - Affirmative Defense
64.07-C Criminal Possession of a Firearm by a Juvenile - Affirmative Defenses
64.11-B Criminal Possession of Explosives - Defense
65.05 Promoting Obscenity - Affirmative Defenses
65.05-A Promoting Obscenity to a Minor - 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

State v. Wilson, 240 Kan. 607, 610, 731 P.2d 306 (1987), held it was error to delete from this instruction the sentence, "The State's burden of proof does not shift to the defendant." See also, *State v. Kershner*, 15 Kan. App. 2d 17, 18, 801 P.2d 68 (1990).

52.13 DEFENDANT'S FAILURE TO TESTIFY

You must not consider the fact that the defendant did not testify in arriving at your verdict.

Notes on Use

For authority, see K.S.A. 60-439. This instruction should not be given unless there is a specific request by the defendant.

Comment

This instruction was held to be adequate in *State v. Quinn*, 219 Kan. 831, 549 P.2d 1000 (1976).

In *State v. Perry*, 223 Kan. 230, 573 P.2d 989 (1977), the Court held it was to be preferred that a trial court not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error.

The United States Supreme Court held the giving of the following instruction over the defendant's objections is constitutionally permissible:

> Under the laws in this State, a defendant has the option to take the stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant and this must not be considered by you in determining the question of guilt or innocence. *Lakeside v. Oregon*, 435 U.S. 333, 55 L.Ed. 2d 319, 98 S.Ct. 1091 (1978).

The holding in *Perry* is in accordance with *Lakeside*. That does not, however, in any way alter the recommendation of the Committee: Do not give one unless requested by the defendant.

52.14 EXPERT WITNESS

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

Comment

See PIK 2d 2.50, Expert Witness, Notes on Use. The Committee believes that an expert should be considered as any other witness as set forth in PIK 3d 52.09, Credibility of Witnesses.

See also, Comment to PIK 3d 52.10, Defendant as a Witness.

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

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

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

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

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

Accessory: See PIK 3d 54.05, Responsibility for Crimes of Another. The term "accessory" is not used in the Criminal Code.

Accost: To approach and speak to.

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

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

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

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

Attempt: See K.S.A. 21-3301; PIK 3d 55.01, Attempt.

Believes: See Reasonable Belief.

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

Breach of Peace: A disturbance which alarms, angers or disturbs the peace and quiet of others. See *State v. Cleveland*, 205 Kan. 426, 469 P.2d 251 (1970) for discussion of this concept. See PIK 3d 63.01, Disorderly Conduct.

Charge: A written statement presented to a court accusing a person of the commission of a crime and includes a complaint, information or indictment. K.S.A. 22-2202 (7); *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973).

Child Abuse: K.S.A. 21-3609; K.S.A. 38-1502 (b); PIK 3d 58.11, Abuse of a Child.

Child Neglect: K.S.A. 21-3604 and 3605; K.S.A. 38-1502 (b); PIK 3d 58.06, Nonsupport of a Child.

Compulsion: K.S.A. 21-3209; PIK 3d 54.13, Compulsion; *State v. Dunn*, 243 Kan. 414, 421, 758 P.2d 718 (1988). See *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993) for discussion of defense of compulsion and necessity.

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

Conduct, Intentional: K.S.A. 21-3201 (b).

Conduct, Reckless: K.S.A. 21-3201 (c).

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

Conspiracy: K.S.A. 21-3302; PIK 3d 55.05, Conspiracy - Defined.

Contraband: K.S.A. 21-3826 pertaining to contraband in a correctional institution. PIK 3d 60.27, Traffic in Contraband in a Correctional Institution.

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

Copulation: See *State v. Switzer*, 244 Kan. 449, 769 P.2d 645 (1989).

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

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

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

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

Criminal Solicitation: K.S.A. 21-3303; PIK 3d 55.09, Criminal Solicitation.

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

Deadly Weapon: *State v. Bowers*, 239 Kan. 417, 721 P.2d 268 (1986); *State v. Manzanares*, 19 Kan. App. 2d 214, 866 P.2d 1083 (1994), objective test in aggravated battery cases. Subjective test in aggravated robbery cases, *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989).

Death: K.S.A. 77-205.

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

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

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

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

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

Escape: K.S.A. 21-3809(b)(2); PIK 3d 60.10, Escape From Custody.

Feloniously: The doing of the act with a deliberate intent to commit a crime which crime is of the grade or quality of a felony. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973). See *State v. Busse*, 252 Kan. 695, 847 P.2d 1304 (1993), felonious act of a juvenile.

Felony: K.S.A. 21-3105 (1). See also, *State v. Kershner*, 15 Kan. App. 2d 17, 801 P.2d 68 (1990).

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

Gambling: K.S.A. 21-4303.

Gambling Device: K.S.A. 21-4302 (d)(1); PIK 3d 65.07, Gambling - Definitions.

Gambling Place: K.S.A. 21-4302 (e); PIK 3d 65.07, Gambling - Definitions; *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

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

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

Heat of Passion: Any intense or vehement emotional excitement which was spontaneously provoked from the circumstances. *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); PIK 3d 56.04 (e), Homicide Definitions; *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979). Such emotional state of mind must be of such a degree as would cause an ordinary person to act on impulse without reflection. *State v. Guebara*, 236 Kan. 791, 696 P.2d 381 (1985).

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

Inherently Dangerous Felony: K.S.A. 21-3436.

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

Intentional Conduct: K.S.A. 21-3201(b).

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

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

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

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

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

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

Lottery: K.S.A. 21-4302 (b). *State ex rel. Stephen v. Finney*, 254 Kan. 632, 867 P.2d 1034 (1994).

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

Merchandise: K.S.A. 21-4403 (b) (1) (for deceptive commercial practice).

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

Obscene Material: K.S.A. 21-4301 (c); K.S.A. 21-4301a(a); PIK 3d 65.03, Promoting Obscenity - Definitions.

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

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

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

Overt Act: An act which constitutes a substantial step toward the completion of the crime. *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924). See also, *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); *State v. Zimmerman*, 251 Kan. 54, 833 P.2d 925 (1992); PIK 3d 55.01, Attempt.

Owner: K.S.A. 21-3110 (13); *State v. Parsons*, 11 Kan. App. 2d 220, 720 P.2d 671 (1986).

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

Passenger Vehicle: K.S.A. 21-3744; K.S.A. 8-126(x).

Peace Officer: See *Law Enforcement Officer*, above.

Penal Institution: A penitentiary, state farm, reformatory, prison, jail, house of correction, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses. *State, ex rel., v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966). See also, K.S.A. 21-3826 (traffic in contraband in a correctional institution).

Performance: K.S.A. 21-4301(c)(4) (for obscenity).

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

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

Possession: Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). Definition approved in *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977) (citing earlier approval in *State v. Neal*, 215 Kan. 737, 529 P.2d 114 [1974]). See also, *State v. Flinchpaugh*, 232 Kan. 831, 833, 659 P.2d 208 (1983). See Comment to PIK 3d 64.06, Criminal Possession of a Firearm - Felony.

Premeditation: See PIK 3d 56.04, Homicide Definitions.

Presumption, Evidentiary: An assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. K.S.A. 60-413. But see *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983). (The jury must be clearly instructed as to the nature and extent of presumptions and that such does not shift the burden of proof to the defendant.)

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

Probable Cause: Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the matter being sought to be proved. *State v. Starks*, 249 Kan. 516, 820 P.2d 1243 (1991).

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

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

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

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

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

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

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

Reasonable Doubt: See PIK 3d 52.04, Reasonable Doubt.

Reckless Conduct: K.S.A. 21-3201 (c).

Retailer: See K.S.A. 21-4404(b)(1) pertaining to tie-in magazine sales.

Sale: K.S.A. 21-4403 (b) (3), as it relates to deceptive commercial practices. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

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

Security Agreement: K.S.A. 84-9-105 (l).

Security Interest: K.S.A. 84-1-201(37).

Sell: K.S.A. 21-4404 (b) (3) for tie-in magazine sales. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

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

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

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

Sports Contest, Participant and Official: K.S.A. 21-4406.

State: K.S.A. 21-3110 (22).

Stolen Property: K.S.A. 21-3110 (23).

Temporarily Deprive: To take from the owner the possession, use, or benefit of his or her property with intent to deprive the owner of the temporary use thereof. See PIK 3d 59.04, Criminal Deprivation of Property.

Terror and Terrorize: The word "terror" means an extreme fear or fear that agitates body and mind; and "terrorize" means to reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

Threat: K.S.A. 21-3110 (24).

Unlawful Sexual Act: K.S.A. 21-3501 (4).

Wanton or Wantonness: K.S.A. 21-3201 (c).

Wanton Negligence: K.S.A. 21-3201 (c).

Wholesaler: K.S.A. 21-4404 (b)(2) for tie-in magazine sales.

Willful or Willfully: K.S.A. 21-3201 (b).

Written Instrument: K.S.A. 21-3110 (25).

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CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

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 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended.

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 3d 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 willfully and knowingly associate himself with the unlawful venture and willfully 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.

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

Regardless of whether the State included an aiding and abetting theory in the charging document, an instruction on aiding and abetting is appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of the crime. *State v. Pennington*, 254 Kan. 757, 869 P.2d 624 (1994).

54.12 VOLUNTARY INTOXICATION - GENERAL INTENT CRIME

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

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

Notes on Use

For authority, see K.S.A. 21-3208(2). The second paragraph should be included if there is an issue of fact as to whether a defendant may have acted only as an aider or abettor. PIK 3d 54.05, Responsibility for Crimes of Another, or PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended, should also be given in such circumstances.

Comment

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

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

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

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

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

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

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

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, _____ P.2d _____ (1994).

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)(she) 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); *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.*

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, _____ P.2d _____ (1994).

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54.12-A-1 VOLUNTARY INTOXICATION - PARTICULAR STATE OF MIND

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

Notes on Use

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

Comment

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, _____ P.2d _____ (1994).

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."

CHAPTER 55.00

ANTICIPATORY CRIMES

55.01 ATTEMPT

A. (The defendant is charged with the crime of an attempt to commit _____. The defendant pleads not guilty.)

OR

B. (If you find the defendant is not guilty of _____, you shall consider if [he] [she] is guilty of an attempt to commit the crime of _____.)

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

1. **That the defendant performed an act toward the commission of the crime of _____;**
2. **That the defendant did so with the intent to commit the crime of _____;**
3. **That the defendant failed to complete commission of the crime of _____; and**
4. **That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).

Notes on Use

For authority, see K.S.A. 21-3301. K.S.A. 21-3301(c) provides that an attempt to commit an off-grid felony (murder in the first degree, treason) is a nondrug severity level 1 crime. An attempt to commit any other nondrug felony is ranked at two crime severity levels below the severity level for the completed crime. The lowest level for an attempt to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3301(d) provides that conviction for an attempt to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months. Violations of attempting to unlawfully manufacture a controlled substance are excepted from the provisions of K.S.A. 21-3301(d) as provided in K.S.A. 65-4159(c).

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 21-3301(e), (f).

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

If the attempted crime is submitted as a lesser offense, PIK 3d 68.09, Lesser Included Offenses, should be given.

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

Comment

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

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. On the one hand, mere acts of preparation are insufficient while, on the other, if the accused has performed the final act necessary for the completion of the crime, he or she could be prosecuted for the crime intended and not for an attempt. The overt act lies somewhere between these two extremes and each case must depend upon its own particular facts. For cases involving this subject, see *State v. Carr*, 230 Kan. 322, 327, 634 P.2d 1104 (1981); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 305, 624 P.2d 964 (1981); *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); *State v. Gobin*, 216 Kan. at 280-281; *State v. Awad*, 214 Kan. 499, 520 P.2d 1281 (1974); *State v. Cory*, 211 Kan. at 532; *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959); *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954).

The trial court has a duty to instruct on lesser included offenses established by the evidence, even though the instructions have not been requested. Such an instruction must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant. The duty to so instruct exists only where the defendant might reasonably be convicted of the lesser offense. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

For purposes of K.S.A. 21-3107(2), the offenses of attempted second-degree murder and attempted voluntary manslaughter are included crimes of a lesser degree of attempted first-degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

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

The general principles for determining whether charges are multiplicitous were reviewed in *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992); and *State v. Garnes*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). For cases involving the subject of duplicitous charges, see *State v. Turbeville*, 235 Kan. 993, 686 P.2d 138 (1984); *State v. Cathey*, 241 Kan. 715, 741 P.2d 738 (1987); *State v. Knowles*, 209 Kan. 676, 498 P.2d 40 (1972); *State v. Cory*, supra; *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973); *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978).

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

Attempted indecent liberties is not a lesser included offense of attempted rape where there is no issue raised by defendant that victim consented to act. *State v. Cahill*, 252 Kan. 309, 845 P.2d 624 (1993).

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

K.S.A. 21-4618 as amended by L. 1992, ch. 239, § 246 does not apply to crimes committed on or after July 1, 1993.

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

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

55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

K.S.A. 21-3301(b) provides that it shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible. The Committee believes that PIK 3d 55.01, Attempt, is sufficient without the injection of impossibility of committing the offense into the case. For a discussion of factual impossibility, see *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

Comment

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

55.03 CONSPIRACY

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

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

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

The definition of _____, the crime charged to be the subject of the conspiracy, is as (follows:_____) (set forth in Instruction No. _____).

Notes on Use

For authority, see K.S.A. 21-3302. K.S.A. 21-3302(c) provides that conspiracy to commit an off-grid felony (murder in the first degree, treason) is a severity level 2 crime. A conspiracy to commit any other nondrug felony offense is ranked two crime severity levels below the severity level for the completed crime. The lowest level for a conspiracy to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3302(d) provides that conviction for conspiracy to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months.

A conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 21-3302(*e*).

This instruction should be given in all crimes of conspiracy along with PIK 3d 55.05, Conspiracy - Defined, and PIK 3d 55.06, Conspiracy - Overt Act

Defined. When the evidence warrants its submission, PIK 3d 55.04, Conspiracy - Withdrawal as a Defense, should be given.

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

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

In the trial of a conspiracy case, a court may become involved with the conspiracy evidence rule. Under this rule, statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception to the hearsay rule. In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

The conspiracy evidence rule is based on the concept that a party to an agreement to commit a crime is an agent or a partner of the other.

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

In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the Court stated that a specific intent is essential to the crime of conspiracy. The Court divided the concept of intent into two elements: (1) the intent to agree or conspire, and (2) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure* § 85, the Court recognized the obvious difficulty of proving the dual

intent and concluded generally that no distinction should be made between the two specific intents. The Court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases.

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

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

Conspiracy is not a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

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

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

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

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d, 182, 205, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii (1978).

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

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

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. at 762-763.

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

55.04 CONSPIRACY - WITHDRAWAL AS A DEFENSE

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

Notes on Use

For authority, see K.S.A. 21-3302(b). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

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

55.05 CONSPIRACY - DEFINED

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 of the facts and circumstances.

Notes on Use

For authority, see K.S.A. 21-3302(a) and the Judicial Council comment to K.S.A. 21-3302. *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); *State v. Small*, 5 Kan. App. 2d 760, 625 P.2d 1 (1981); 16 Am. Jur. 2d, Conspiracy, §§ 1, 7, and 11. This instruction should be given in all cases involving the crime of conspiracy.

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daughtery*, 221 Kan. 612, 562 P.2d 42 (1977).

In *Campbell*, the Supreme Court of Kansas emphasized that the essence of a conspiracy is the agreement to commit a crime, not simply to commit a particular act. The Court further held that the provisions of K.S.A. 21-3302 were not unconstitutionally vague and indefinite. 217 Kan. at 770.

The agreement may be expressed or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

The agreement requires a "meeting of the minds" of at least two persons. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

55.06 CONSPIRACY - OVERT ACT DEFINED

A person may be convicted of a conspiracy only if some act in furtherance of the agreement is proved to have been committed. An act in furtherance of the agreement is any act knowingly committed by a member of the conspiracy in an effort to effect or accomplish an object or purpose of the conspiracy. The act itself need not be criminal in nature. It must, however, be an act which follows and tends towards the accomplishment of the object of the conspiracy. The act may be committed by a conspirator alone and it is not necessary that the other conspirator be present at the time the act is committed. Proof of only one act is sufficient.

Notes on Use

For authority, see K.S.A. 21-3302(a). *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); 16 Am. Jur. 2d, Conspiracy §§ 7, 10, 11 and 14.

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State V. Daughtery*, 221 Kan. 612, 562 P.2d 42 (1977).

In *Campbell*, the Court observed that membership in a conspiracy could be proved only by willful, knowing and intentional conduct of the accused. In other words, a person cannot unintentionally or accidentally become a member of a conspiracy.

The State is not obligated to prove that the accused has a "stake" in the outcome of the conspiracy. All that is required is that the accused not be indifferent to its outcome. *State v. Daugherty*, 221 Kan. 612, 620, 562 P.2d 42 (1977).

A conspiracy to commit a crime is not established by mere association or knowledge of acts of other parties. There must be some intentional participation in the conspiracy with a view to the furtherance of the common design and purpose. See *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978).

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978).

55.07 CONSPIRACY - DECLARATIONS

Declarations of one conspirator, made in furtherance of the conspiracy, may be considered by you as evidence against all co-conspirators. However, declarations of a conspirator, not in furtherance of the conspiracy, can be considered by you only as to the declarant to prove (his)(her) participation in the conspiracy.

Notes On Use

For authority, see *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 225 Kan. 846 (1978). This instruction should be given when there is an issue of fact as to whether or not the declarations of one conspirator were made in furtherance of the conspiracy.

Comment

The Court of Appeals has recognized the general rule that declarations of one conspirator, made in furtherance of the conspiracy, may be used against all co-conspirators on the theory that the declarant is an agent of the other conspirators. However, declarations not in furtherance of the conspiracy are admissible only as to the declarant to prove his participation in the conspiracy. *State v. Marshall & Brown-Sidorowicz* at 198-199. See also, *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981); *State v. Roberts*, 223 Kan. 49, 574 P.2d 164 (1977).

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55.08 CONSPIRACY - SUBSEQUENT ENTRY

All of the conspirators need not enter into the agreement at the same time. If a person later joins an already formed conspiracy with knowledge of its unlawful purpose, that person may be found guilty as a conspirator.

Notes on Use

For authority, see *State v. Becknell*, 5 Kan. App. 2d 269, 272, 615 P.2d 795 (1980); and 16 Am. Jur. 2d, Conspiracy § 10.

55.09 CRIMINAL SOLICITATION

The defendant is charged with the crime of solicitation to commit _____, a felony. The defendant pleads not guilty.

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

1. **That the defendant intentionally (commanded) (encouraged) (requested) _____ (to commit) (attempt to commit) the crime of _____, a felony;**

   or

   That the defendant intentionally (commanded) (encouraged) (requested) _____ to aid and abet in the (commission) (attempted commission) of the crime of _____, a felony, for the purpose of promoting or facilitating the felony; and

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

The definition of _____, the felony charged to be the subject of the solicitation, is as (follows: _____)(setforth in Instruction No. _____).

Notes on Use

For authority, see K.S.A. 21-3303. K.S.A. 21-3303(d) provides that soliciting another to commit an off-grid felony (murder in the first degree, treason) is a severity level 3 crime. Soliciting another to commit any other nondrug felony offense is ranked three crime severity levels below the appropriate level for the completed crime. The lowest severity level for soliciting another to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3303(e) provides that conviction for solicitation of a drug felony reduces the prison term prescribed in the sentencing grid for the underlying or completed crime by six months.

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

Comment

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation; whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905); and 21 Am. Jur. 2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act.

It should be noted that subsection (b) provides that it is immaterial ". . . that the actor fails to communicate with the person solicited to commit a felony if the person's conduct was designed to effect a communication." Apparently, this subsection covers the unusual situation where one might place an offer in a newspaper or use some other form of communication or utilize the concepts of an agency to carry out the prohibited solicitation. In the event the provision becomes material, an appropriate paraphrase of the statute should be presented.

In a "loan scam" case, the defendants' convictions of criminal solicitation and aiding and abetting were held neither to have merged nor to have been multiplicitous. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

55.10 CRIMINAL SOLICITATION - DEFENSE

It is a defense to a charge of criminal solicitation that the defendant, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances demonstrating a complete and voluntary abandonment of the defendant's criminal plan.

Notes on Use

For authority, see K.S.A. 21-3303(c). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

CHAPTER 56.00
CRIMES AGAINST PERSONS

56.00-A CAPITAL MURDER

The defendant is charged with the crime of capital murder. 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 with premeditation.
3. (a) That such killing was done in the commission of a (kidnapping) (aggravated kidnapping) when the (kidnapping) (aggravated kidnapping) was committed with the intent to hold _____ for ransom;

   or

   (b) That such killing was done pursuant to a contract or agreement to kill _____;

   or

   (c) That the defendant was an inmate or prisoner (confined in a state correctional institution) (confined in a community correctional institution) (confined in a jail) (in the custody of an officer or employee of a [state correctional institution] [community correctional institution] [jail]);

   or

   (d) That _____ was a victim of (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy), and such killing was done in the commission of or subsequent to such (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy);

   or

   (e) That _____ was a law enforcement officer;

   [Law enforcement officer means any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for

crimes, whether that duty extends to all crimes or is limited to specific crimes, or any officer of the Kansas Department of Corrections.]

or

(f) That the premeditated and intentional killing of _____ and (_other victim[s]_) was (a part of the same act or transaction) (two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct);

or

(g) That _____ was a child under the age of 14 years and such killing was done in the commission of (kidnapping) (aggravated kidnapping) when such (kidnapping) (aggravated kidnapping) was done with intent to commit a sex offense upon or with _____ or with intent that _____ commit or submit to a sex offense;

[Sex offense means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution, or sexual exploitation of a child.]

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

Notes on Use

For authority, see K.S.A. 21-3439, effective July 1, 1994. Capital murder is an off-grid person felony subject to a possible sentence of death. For first degree murder, see PIK 3d 56.01, Murder in the First Degree. For felony murder, see PIK 3d 56.02, Murder in the First Degree - Felony Murder.

Instructions on definitions of terms should be given as defined in PIK 3d 56.04, Homicide Definitions.

When defendant is charged with a capital murder done in the commission of or subsequent to another offense, the elements of the other offense should be set out in a separate instruction.

In the case of murder for hire, any party to the contract or agreement is guilty of capital murder. Modifications to this instruction will be necessary in those cases where the defendant was not the person who performed the killing.

56.00-B CAPITAL MURDER - DEATH SENTENCE - SENTENCING PROCEEDING

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. 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(a), (b), and (c).

Not later than five days after 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 sentenced to death. 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 3d 51.02, 51.04, 51.05, and 51.06.

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

56.00-C CAPITAL MURDER - DEATH SENTENCE - AGGRAVATING CIRCUMSTANCES

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

1. [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
2. [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
   and/or
3. [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
4. [That the defendant authorized or employed another person to commit the crime.]
   and/or
5. [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]
   and/or
6. [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; and "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

   A crime is committed in an especially heinous, atrocious, or cruel manner where the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her

ultimate fate.]
and/or

7. [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]
and/or

8. [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 death sentence 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*, 486 U.S. 356, 108 S.Ct. 1853, 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 court's] judgement in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (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; and '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.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

In *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993), the Supreme Court held the third aggravating circumstance, murder for the purpose of receiving money or any other thing of monetary value, is not limited to cases involving murder for hire.

In *State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), the Supreme Court returned to the problem of definitions in the sixth clause. The Court noted that the definitions referenced in *Bailey* did not include the complete instruction from *Foster* and directed that the sixth clause be revised. The language approved in *Willis* is now included in the sixth clause.

Bailey, *Kingsley*, *Cromwell*, and *Willis* examined the aggravating factors in the context of a "Hard 40" sentencing proceeding. Care should be exercised in applying these opinions in a death sentence case. The Supreme Court has expressed the view that death is a penalty different from all other sanctions and therefore death penalty cases are of limited precedential value in resolving "Hard 40" cases. See *Bailey*, 251 Kan. at 171; *Cromwell*, 253 Kan. at 513. Presumably, the reverse is also true.

56.00-D CAPITAL MURDER - DEATH SENTENCE - MITIGATING CIRCUMSTANCES

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

1. **[The defendant has no significant history of prior criminal activity.]**
   and/or
2. **[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]**
   and/or
3. **[The victim was a participant in or consented to the defendant's conduct.]**
   and/or
4. **[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]**
   and/or
5. **[The defendant acted under extreme distress or under the substantial domination of another person.]**
   and/or
6. **[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
7. **[The age of the defendant at the time of the crime.]**
   and/or
8. **[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
9. **[Other_____.]**

Notes on Use

For authority, see K.S.A. 21-4624(c) and 21-4626. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the death sentence proceeding

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

56.00-E CAPITAL MURDER - DEATH 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 are not outweighed by any mitigating circumstances.

Notes on Use

For authority, see K.S.A. 21-4625.

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

56.00-F CAPITAL MURDER - DEATH SENTENCE - AGGRAVATING AND MITIGATING CIRCUMSTANCES - THEORY OF COMPARISON

In making the determination whether aggravating circumstances exist that are not outweighed by any 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 death sentence 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.

Comment

In *State v. Phillips*, 252 Kan. 937, 850 P.2d 877 (1993), a "Hard-40" case, the Supreme Court held the statutes provide for certain aggravating and mitigating circumstances to be considered by the jury. The statutes do not impose a balancing test based upon the number of aggravating circumstances as opposed to the number of mitigating circumstances. One aggravating circumstance can be so compelling as to outweigh several mitigating circumstances.

56.00-G CAPITAL MURDER - DEATH SENTENCE - REASONABLE DOUBT

If you find beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall impose a sentence of death. If you sentence the defendant to death, 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 are not outweighed by any mitigating circumstances, then you should so indicate on your verdict form, and defendant will not be sentenced to death but will be sentenced by the court as provided by law.

Notes on Use

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

In *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) (No. 92-9059), the United States Supreme Court held that, when a defendant's future dangerousness is at issue in a death penalty proceeding, and state law prohibits his or her release on parole, due process requires that the sentencing jury be informed the defendant is parole ineligible. The Court commented, however, that in a case where a defendant is eligible for parole, the State may reasonably conclude that information about parole eligibility should be kept from the jury.

Although *Simmons* does not seem to require it, the Committee believes it is appropriate to inform the jury that the judge will sentence a defendant who is not sentenced to death. The statement is phrased in general terms because the trial judge will have several options in sentencing such a defendant.

56.00-H CAPITAL MURDER - DEATH 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. Finding beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, and sentencing the defendant to death;

OR

B. Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances.

Notes on Use

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

56.01 MURDER IN THE FIRST DEGREE

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

B. (If you do not agree that the defendant is guilty of capital murder, you should then consider the lesser included offense of murder in the first 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 with premeditation; 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. 21-3401. Murder in the first degree is an off-grid person felony. For capital murder, see PIK 3d 56.00-A. For felony murder, see PIK 3d 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 3d 56.02, for authority to instruct on both theories.

If the information charges murder in the first degree, omit paragraph B; but if the information charges capital murder, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and PIK 3d 69.01, Murder in the First Degree With Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Instructions on definitions of terms should be given as defined in PIK 3d 56.04, Homicide Definitions.

The elements of this crime were modified, effective July 1, 1993. For instructions under prior law, see PIK 2d 56.01.

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 (1968).

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 aforethought and called manslaughter." Effective July 1, 1993, however, the Legislature has deleted "malice" from the statutory definition of murder in the first degree.

The term "premeditation" is not defined in the code, but is to be given the meaning established by the decisions of the Supreme Court of Kansas.

The definition of "death" as set out in K.S.A. 77-202 (Repealed L. 1984, ch. 345, § 4) 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).

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(a), (b), and (c).

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 3d 51.02, 51.04, 51.05, and 51.06.

Effective July 1, 1994, a "Hard 40" sentence may be imposed if the defendant is convicted of capital murder but sentence of death is not imposed or if the defendant is convicted of first degree premeditated murder. The decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

Comment

For an instruction discussion of the "Hard 40" statute, see Malone, *The Kansas "Hard-Forty" Law*, 32 Washburn Law Journal 147 (1993).

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:

1. [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
2. [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
   and/or
3. [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
4. [That the defendant authorized or employed another person to commit the crime.]
   and/or
5. [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]
   and/or
6. [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; and "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

   A crime is committed in an especially heinous, atrocious, or cruel manner when the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish

includes a victim's uncertainty as to his or her ultimate fate.]

and/or

7. [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]

and/or

8. [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).

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

Comment

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 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 court's] judgement in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (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; and '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.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

In *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993), the Supreme Court held the third aggravating circumstance, murder for the purpose of receiving money or any other thing of monetary value, is not limited to cases involving murder for hire.

In *State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), the Supreme Court returned to the problem of definitions in the sixth clause. The Court noted that the definitions referenced in *Bailey* did not include the complete instruction from *Foster* and directed that the sixth clause be revised. The language approved in *Willis* is now included in the sixth clause.

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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:

1. **[The defendant has no significant history of prior criminal activity.]**
   and/or
2. **[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]**
   and/or
3. **[The victim was a participant in or consented to the defendant's conduct.]**
   and/or
4. **[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]**
   and/or
5. **[The defendant acted under extreme distress or under the substantial domination of another person.]**
   and/or
6. **[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
7. **[The age of the defendant at the time of the crime.]**
   and/or
8. **[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
9. **[Other_____.]**

Notes on Use

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

In *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993), the Court examined instructions given during the sentencing proceeding of a "Hard 40" case. The Court held that the trial court created confusion by instructing the jury that "neither sympathy nor prejudice should influence you," and at the same time telling the jury that it may consider all mitigating circumstances which, "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

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 are not outweighed by any mitigating circumstances.

Notes on Use

For authority, see K.S.A. 21-4625.

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

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 exist that are not outweighed by mitigating circumstances, you should keep in mind that your decision should not be determined solely by the number of aggravating or any 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.

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

Comment

In *State v. Phillips*, 252 Kan. 937, 850 P.2d 877 (1993), a "Hard 40" case, the Supreme Court held the statutes provide for certain aggravating and mitigating circumstances to be considered by the jury. The statutes do not impose a balancing test based upon the number of aggravating circumstances as opposed to the number of mitigating circumstances. One aggravating circumstance can be so compelling as to outweigh several mitigating circumstances.

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 are not outweighed by any 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 are not outweighed by any 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).

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes prior to 1994.

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).

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. L. 1994, ch. 341. This instruction is retained for crimes committed prior to 1994.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilty based on proof of premeditation while other arrive at a verdict of guilty by reason of the killer's malignant purpose." To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

Before the mandatory minimum 40 year sentence is imposed, however, the jury must have unanimously found that premeditated murder occurred. In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Court upheld the use of this instruction in a "Hard 40" case where separate verdict forms for premeditated murder and felony murder were used.

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 do not 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 _____; and

[2. That it was not done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and]

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

Notes on Use

For authority, see K.S.A. 21-3402. Murder in the second degree is a severity level 1, person felony, if intentional. If unintentional, see PIK 3d 56.03-A, Murder in the Second Degree - Unintentional.

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 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

Bracketed element 2 should be added where there is evidence which requires an instruction on voluntary manslaughter.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.03.

Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

56.03-A MURDER IN THE SECOND DEGREE - UNINTENTIONAL

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

B. (If you do not 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 killed _____ unintentionally but recklessly under circumstances showing extreme indifference to the value of human 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. 21-3402. Murder in the second degree is a severity level 2, person felony, if unintentional but reckless.

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 3d 68.01, Concluding Instruction, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.03.

Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

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

For a collection of cases dealing with the 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); and *State v. Hill*, 242 Kan. 68, 82, 744 P.2d 1228 (1987).

Effective July 1, 1993, "malice" is no longer a statutory element of murder in the first degree or murder in the second degree.

(b) Deliberately and with premeditation.

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

For authority, see *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560 (1887), in which it is said: Premeditation means "that there was a design or intent before the act; that is, that the accused planned, contrived and schemed beforehand to kill Sherman." See also, *State v. Johnson*, 92 Kan. 441, 140 Pac. 839 (1914); *State v. Martinez*, 223 Kan. 536, 575 P.2d 30 (1978); and *State v. Patterson*, 243 Kan. 262, 268, 755 P.2d 551 (1988), for approval of this instruction.

Effective July 1, 1993, "deliberately" is no longer included in the statutory definition of murder in the first degree.

(c) Willfully.

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

For authority, see K.S.A. 21-3201(b). See also, *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973); *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987).

(d) Intentionally.

Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing", "willful", "purposeful" and "on purpose."

For authority, see K.S.A. 21-3201(b). 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. Such emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection.

For authority, see *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959); *State v. Ritchey*, 223 Kan. 99, 573 P.2d 973 (1977); and *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

(f) Reckless.

Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence", "culpable negligence", "wanton negligence" and "wantonness" are included within "reckless".

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

56.05 VOLUNTARY MANSLAUGHTER

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

B. (In considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. If there is a reasonable doubt as to which of these two offenses the defendant is guilty, the defendant may be convicted of voluntary manslaughter only.)

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

1. That the defendant intentionally killed _____;

2. That it was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); 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. 21-3403. Voluntary manslaughter is a severity level 3, person felony.

If the information charges voluntary manslaughter, omit paragraph B; but if the information charges a higher degree, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses. See PIK 3d 56.04, Homicide Definitions, for definition of "heat of passion".

Comment

See Comment to PIK 3d 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.

An intentional homicide is reduced from murder to voluntary manslaughter if it is committed upon a sudden quarrel or in the heat of passion or upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213. Where the homicide is intentional and committed under the mitigating circumstances contained in K.S.A. 21-3403, the voluntary manslaughter statute is concurrent with and controls the statute on intentional murder in the second degree, K.S.A. 21-3402(a).

In *State v. Wilson*, 240 Kan. 606, 609, 610, 731 P.2d 306 (1987), the trial judge used a modified version of this instruction. The Supreme Court admonished trial judges to use the pattern jury instructions when appropriate unless there is some compelling and articulated reason not to do so.

"Heat of passion" is subject to an objective test. It requires an emotional state of mind of such degree as to cause an ordinary person to act on impulse without reflection. Moreover, the emotional state must arise from circumstances constituting "sufficient provocation." "Sufficient provocation" is also subject to an objective test. The provocation must be sufficient to cause an ordinary person to lose control of actions and reason. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

56.12 ASSAULT

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

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

1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm; and

2. 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. 21-3408. Assault is a class C person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

Comment

Apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

The statute does not impose any requirement of proof that the assault be established by some physical, overt act by the accused. A conviction based upon threatening words alone is proper especially in light of the definition of "threat" in K.S.A. 21-3110(24), meaning ". . . a communicated intent to inflict physical or other harm. . ." *In re Geisler*, 4 Kan. App. 2d 684, 610 P.2d 640 (1980).

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 placed _____ in reasonable apprehension of immediate bodily harm;**
2. **That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;**
3. **That _____ was engaged in the performance of (his)(her) duty; and**
4. **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, person misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, PIK 3d 56.12, Assault, should be given.

The elements of this crime were modified, effective July 1, 1993.

Comment

See Comment to PIK 3d 56.12, Assault.

56.15 AGGRAVATED ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of aggravated 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 placed _____ in reasonable apprehension of immediate bodily harm;**
2. **That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;**
3. **That _____ was engaged in the performance of (his)(her) duty;**
4. **(a) That the defendant used a deadly weapon;**
   or
   (b) That the defendant was disguised in a 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.

[The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).]

Notes on Use

For authority, see K.S.A. 21-3411. Aggravated assault of a law enforcement officer is a severity level 6, person felony.

Assault of a law enforcement officer, as defined by K.S.A. 21-3409, and Assault, as defined by K.S.A. 21-3408, are lesser included offenses and where the evidence warrants it, PIK 3d 56.13, Assault of a Law Enforcement Officer and

PIK 3d 56.12, Assault, should be given.

If there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty at the time, PIK 3d 56.14, Aggravated Assault, should be considered as a lesser included offense. See *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

Where element 4(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

The elements of this crime were modified, effective July 1, 1993.

Comment

Proof of actual knowledge that the person assaulted was a law enforcement officer is not necessary where it is undisputed that the officer was in uniform or properly identified as an officer. *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975). This is distinguishable where the officer is not in uniform and the question of knowledge was raised in deciding what was required to establish that the officer had properly identified himself. *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

See Comment to PIK 3d 56.14, Aggravated Assault.

56.16 BATTERY

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

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

1. **That the defendant (intentionally) (recklessly) caused bodily harm to another person;**
   or
   That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner; 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. 21-3412. Battery is a class B, person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of battery against 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) (recklessly) caused bodily harm to _____;**
   or
   That the defendant intentionally caused physical contact with _____ in a rude, insulting or angry manner; and
2. **That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;**
   or
   That _____ was a correctional officer or employee and defendant was a person in the custody of the Secretary of Corrections;
   or
   That _____ was a state youth center officer or employee and defendant was a person confined in such youth center;
   or
   That _____ was a juvenile detention facility officer or employee and defendant was a person confined in such juvenile detention facility; and
3. **That _____ was engaged in the performance of (his)(her) duty; 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. 21-3413. Battery against a state, county or city law enforcement officer is a class A, person misdemeanor. Battery against a correctional officer or employee, a state youth center officer or employee, or a juvenile detention officer or employee is a severity level 7, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The statute defines "correctional officer or employee" as "any officer or employee of the Kansas Department of Corrections, or any independent contractor, or any employee of such contractor, working at a correctional institution." "State youth center officer or employee" means any officer or employee of the Kansas Department of Social and Rehabilitation Services or any independent contractor, or any employee of such contractor, working at a state youth center. "Juvenile detention facility officer or employee" means any officer or employee of a juvenile detention facility.

The elements of this crime were modified, effective July 1, 1993.

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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. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;

or

(b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);

or

(c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);

or

(d) That the defendant recklessly caused (great bodily harm to) (disfigurement of) another person;

or

(e) That the defendant recklessly caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted); 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. 21-3414. Aggravated battery as described in 1(a) is a severity level 4, person felony; as described in 1(b) or 1(c), a severity level 7, person felony; as described in 1(d), a severity level 5, person felony; and as

described in 1(e), a severity level 8, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The elements of this crime were modified, effective July 1, 1993.

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).

In *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989), the Court held the definition of "deadly weapon" for purposes of the aggravated battery statute is an instrument which, from the manner it is used, is calculated or likely to produce death or serious bodily injury. The determination of whether the object was a deadly weapon is made on an objective basis rather than subjectively from the victim's point of view. Ordinarily, whether a gun used as a club is a deadly weapon for purposes of the aggravated battery statute is a jury question. Thus, in *Colbert*, it was error to instruct the jury that "a firearm is a deadly weapon as a matter of law" in connection with a charge of aggravated battery.

56.18-A CRIMINAL INJURY TO PERSON

Comment

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

56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;

or

(b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);

or

(c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);

2. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;

3. That _____ was engaged in the performance of (his)(her) duty; 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. 21-3415. Battery against a law enforcement officer, as defined by K.S.A. 21-3413, and Battery, as defined by K.S.A. 21-3412, are lesser included offenses and where the evidence warrants it, PIK 3d 56.17, Battery Against A Law Enforcement Officer, and PIK 3d 56.16, Battery, should be given.

Also, if there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty at the time, PIK 3d 56.18, Aggravated Battery, should be considered as a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

Aggravated battery against a law enforcement officer as described in 1(a) is a severity level 3, person felony; and as described in 1(b) or (c), a severity level 6, person felony.

The elements of this crime were modified, effective July 1, 1993.

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).

56.20 UNLAWFUL INTERFERENCE WITH A FIREFIGHTER

The defendant is charged with the crime of unlawful interference with a firefighter. The defendant pleads not guilty.

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

1. **That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;**
   or
   That the defendant knowingly and intentionally interfered with _____;
   or
   That the defendant knowingly and intentionally (obstructed) (interfered with) (impeded) the efforts of _____ to reach the location of a fire;
2. **That _____ was a firefighter engaged in the performance of (his)(her) duties; 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. 21-3416. Unlawful interference with a firefighter is a class B, person misdemeanor.

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.**

[An object can be a dangerous weapon if intended by the user to convince the victim that it is a dangerous weapon and which the victim reasonably believed to be a dangerous weapon.]

Notes on Use

For authority, see K.S.A. 21-3427. Aggravated robbery is a severity level 3, person felony. When there is an issue as to whether the defendant was "armed with a dangerous weapon" the bracketed definition may be used. Robbery as defined by K.S.A. 21-3426 is a lesser included offense and where the evidence warrants it PIK 3d 56.30, Robbery, should be given.

Comment

See Comment to PIK 3d 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."

See also, *State v. Davis*, 227 Kan. 174, 605 P.2d 572 (1980).

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 threatened to communicate (accusations) (statements) about _____ that would subject _____ to public (ridicule) (contempt) (degradation);**
2. **That the defendant did so to ([gain] [attempt to gain] something of value from _____) (compel _____ to act against [his][her] will); 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. 21-3428. Blackmail is a severity level 7, nonperson felony.

The elements of this crime were modified effective July 1, 1993.

56.37 MISTREATMENT OF A DEPENDENT ADULT

The defendant is charged with the crime of mistreatment of a dependent adult. The defendant pleads not guilty.

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

1. That the defendant knowingly and intentionally inflicted (physical injury) (unreasonable confinement) (cruel punishment) upon _____;
   or
   That the defendant knowingly and intentionally took unfair advantage of _____'s (physical) (financial) resources for another individual's (personal) (financial) advantage by the use of (undue influence) (coercion) (harassment) (duress) (deception) (false pretense);
   or
   That the defendant knowingly and intentionally (omitted) (deprived) _____ of (treatment) (goods) (services) necessary to maintain the (physical) (mental) health of _____;
2. That _____ was a dependent adult; and
3. That this act occurred on or about the _____ day of _____ 19____, in _____ County, Kansas.

Dependent adult means an individual 18 years of age or older who is unable to protect (his)(her) own interest.

Notes on Use

For authority, see K.S.A. 21-3437. Mistreatment of a dependent adult as defined in subsection (a)(1) is a severity level 6, person felony. Mistreatment of a dependent adult as defined in subsections (a)(2) and (a)(3) is a class A, person misdemeanor. K.S.A. 21-3437(c) sets forth several factual situations where an individual shall be considered a "dependent adult".

56.38 AFFIRMATIVE DEFENSE TO MISTREATMENT OF A DEPENDENT ADULT

It is a defense to the charge of mistreatment of a dependent adult if you find the sole reason for the mistreatment is that (insert name of dependent adult) relied upon or was furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which such dependent adult is a member or adherent.

Notes on Use

For authority, see K.S.A. 21-3437(b).

If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

The Committee takes no position on what is or is not a recognized church or religious denomination.

56.39 STALKING

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

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

1. **That the defendant (followed) (engaged in a course of conduct directed at) _____;**
2. **That the defendant did so intentionally and maliciously;**
3. **That such (following) (course of conduct) seriously alarmed, annoyed or harassed _____;**
4. **That such (following) (course of conduct) served no legitimate purpose;**

[5. That such course of conduct caused _____ to suffer substantial emotional distress;] and

[5.] or [6.] That these acts occurred between the _____ day of _____, 19____, and the _____ day of _____, 19____, in _____ County, Kansas.

[Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, and which would cause a reasonable person to suffer substantial emotional distress.]

Notes on Use

For authority, see K.S.A. 21-3438. Stalking is a severity level 10, person felony, except that any person who is convicted of stalking when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior against the same victim, is guilty of a severity level 9, person felony.

Any person who has a second or subsequent conviction within seven years of a prior conviction of stalking involving the same victim is guilty of a severity level 8, person felony.

Use bracketed paragraph if course of conduct is applicable.

This statute does not apply to conduct which occurs during labor picketing.

Constitutionally protected activity is not included within the meaning of "course of conduct".

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 _____ was under 14 years of age when the act of sexual intercourse occurred; and
   or
   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) (other substance), which condition was known by the defendant or was reasonably apparent 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. 21-3502. Rape is a severity level 2, person felony. The statute provides four categories when the consent of the victim was not obtained. The appropriate category should be selected. In addition, PIK 3d 57.02,

Sexual Intercourse - Definition, and PIK 3d 54.01-A, General Criminal Intent, should be given.

Comment

In 1992, the Legislature amended K.S.A. 21-3502 to include as rape, sexual intercourse with a child under 14 years of age. Therefore, sexual intercourse with a child under 14 years of age is rape regardless of whether the child actually consented to the sexual intercourse.

The age limitation for indecent liberties with a child was amended in 1992 to include children under 16 years but 14 or more years of age. See PIK 3d 57.05, Indecent Liberties with a Child.

In *Carmichael v. State*, 255 Kan 10, 872 P.2d 240 (1994), the Court, disapproving any contrary language in *State v. Moore*, 242 Kan. 1, 748 P.2d 833 (1987), held that where there was a single act of forcible sexual intercourse and the defendant was related to the victim as set out in K.S.A. 21-3603(a)(1), the defendant must be charged with the specific offense of aggravated incest and not the general offense of rape. If the defendant were convicted and sentenced for rape, the sentence would be vacated and the defendant resentenced for aggravated incest. The *Carmichael* Court held that a prisoner, who asserts that his or her sentence is illegal, may at any time, pursuant to K.S.A. 60-1507, move the court that imposed the sentence to correct or vacate the sentence.

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

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

In *State v. Lassley*, 218 Kan. 758, 761-762, 545 P.2d 383 (1976), the Supreme Court held it was duplicitous for the same act of force which was relied on for the charges of rape and kidnapping to also provide the basis for an aggravated assault charge.

Evidence of similar crimes with proper limiting instructions under K.S.A. 60-455 may be relevant and admissible in prosecutions for rape. See Comment to PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence.

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

Unless the defense is consent and the expert presenting the testimony has special training in psychiatry, evidence of the rape trauma syndrome is inadmissible. Even if the evidence is admissible, the expert is not permitted to express an opinion as to whether the victim was raped. See *State v. Bressman*, 236 Kan. 296, 303, 304, 689 P.2d 901 (1984).

Lewd and lascivious behavior consists of elements separate and distinct from the crime of rape. The trial court committed no error when it failed to give an instruction on lewd and lascivious behavior when the defendant was charged with rape. *State v. Davis*, 236 Kan. 538, 542, 694 P.2d 418 (1985).

Two acts of rape perpetrated by the same accused against the same victim on the same afternoon may support two separate rape convictions. *State v. Wood*, 235 Kan. 915, 920, 686 P.2d 128 (1984). The result in this case is distinguished from *State v. Dorsey*, 224 Kan. at 152. See also, *State v. Richmond*, 250 Kan. 375, 379, 827 P.2d 743 (1992).

In *Keim v. State*, 13 Kan. App. 2d 604, 608, 777 P.2d 278 (1989), the Court held that legislation prohibiting intercourse with a victim incapable of giving consent because of mental deficiency or disease was not unconstitutionally vague.

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 77, 519 P.2d 1097 (1974).

Rape is not a lesser included offense of aggravated kidnapping. *State v. Schriner*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

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

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

The crime of indecent liberties with a child is a lesser included offense of rape where the evidence establishes that the defendant forcibly raped a female under 16 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).

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57.14 PROSTITUTION

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

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

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

Notes on Use

For authority, see K.S.A. 21-3512. Prostitution is a class B, nonperson misdemeanor. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

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

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

57.15 PROMOTING PROSTITUTION

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

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

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

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution is a class A, nonperson misdemeanor when the prostitute is 16 or more years of age. Promoting prostitution when the prostitute is 16 or more years of age is a severity level 7, person felony if committed by a person who has previously been convicted of promoting prostitution. When the prostitute is under 16 years of age, promoting prostitution is a severity level 6, person felony.

The appropriate category of the offense should be selected.

Comment

In *State v. Dodson*, 222 Kan. 519, 565 P.2d 291 (1977), the Court stated that when the offer is implicit in the defendant's words and actions when taken in the context in which they occurred, no overt act is required to complete the offense of solicitation.

57.15-A PROMOTING PROSTITUTION - CHILD UNDER 16

The defendant is charged with the crime of promoting prostitution of a child under age 16. The defendant pleads not guilty.

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

1. **That the defendant (procured _____ as a prostitute for a house of prostitution) (induced _____ to become a prostitute) (solicited a patron for _____, a prostitute) (procured _____, a prostitute, for a patron) [(procured transportation for) (paid for the transportation of) (transported) _____ with the intent of assisting or promoting _____'s engaging in prostitution];**
2. **That _____ was then under 16 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. 21-3513. Promoting prostitution of a prostitute under 16 years of age is a severity level 6, person felony.

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

1. That the defendant intentionally touched the person of _____;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or another;
3. That _____ was then 16 or more years of age;
4. That the touching was done without the consent of _____ under circumstances when _____ was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (_other substance_), which condition was known by the defendant or was reasonably apparent to the defendant; 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. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

Comment

See Comment to PIK 3d 57.20, Aggravated Sexual Battery - Force or Fear.

57.26-57.39 RESERVED FOR FUTURE USE.

57.40 SEXUAL PREDATOR/CIVIL COMMITMENT

The State alleges the respondent is a sexually violent predator. The respondent denies the allegation.

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

1. **That the defendant has been (convicted of) (charged with) _____, a sexually violent offense; and**
2. **That the defendant suffers from a (mental abnormality) (personality disorder) which makes the defendant likely to engage in predatory acts of sexual violence.**

OR

1. **That the defendant has been convicted of _____ _____; and**
2. **That in that proceeding it was determined beyond a reasonable doubt the crime was sexually motivated.**
   or
   That the defendant suffers from a (mental abnormality) (personality disorder) which makes the defendant likely to engage in predatory acts of sexual violence.

Notes on Use

For authority, see K.S.A. 59-29a01. While designated a civil commitment, an action is only filed upon commission of a sexually violent offense, burden of proof in the proceeding is beyond a reasonable doubt, upon proper demand tried to a jury of twelve as provided in K.S.A. 22-3403, and the defendant is entitled to appointed counsel if indigent. The Committee concluded pattern instructions on this subject would be more conveniently accessed by insertion in PIK-Criminal 3d ancillary to Chapter 57.00 subject matter.

This legislation borrowed extensively from Washington State's Community Protection Act of 1990, codified at RCW 71.09. The Supreme Court of Washington upheld the constitutionality of the act in *In Re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). However, in *Young*, the court held inter alia that if the proceeding is brought against a person living in the community immediately prior to the initiation of proceedings, due process requires that the State plead and prove

the existence of a recent overt act to support a "dangerousness" showing, citing the United States Supreme Court's holding in *Foucha v. Louisiana*, 504 U.S. ____, 112 S.Ct. 1780, 118 L.Ed. 2d 437 (1992). [Syl. 8, pp.1006-07; 1008-09] The Kansas Act, like the Washington legislation, does not require proof of a recent overt act.

57.41 SEXUAL PREDATOR/CIVIL COMMITMENT - DEFINITIONS

The following definitions of words and phrases are applicable in this proceeding:

Mental abnormality means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

Predatory means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

[Sexually motivated means that one of the purposes for which the defendant committed the crime was the defendant's sexual gratification.]

Notes on Use

For authority, see K.S.A. 59-29a02. The bracketed definition should only be given when that is an allegation for the jury to decide.

The term "personality disorder" is not defined by the statute. For a psychiatric definition, see American Psychiatric Ass'n. *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 1994). The constellation of various conditions recognized by the American Psychiatric Association as constituting personality disorders make impossible a pattern definition. Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual.

57.42 SEXUAL PREDATOR/CIVIL COMMITMENT - BURDEN OF PROOF

The State has the burden to prove its claim in this proceeding. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find for the respondent. If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find for the State.

Notes on Use

For authority, see K.S.A. 59-29a07.

58.04 AGGRAVATED INCEST

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

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

1. **That the defendant married _____;**
2. **That _____ was under 18 years of age;**

OR

1. **That the defendant engaged in (sexual intercourse) (sodomy) with _____;**

   or

   That the defendant (engaged in lewd fondling or touching of the person of _____) (submitted to lewd fondling or touching of [his][her] person by _____) with the intent to arouse or to satisfy the sexual desires of either _____ or the defendant, or both;
2. **That _____ was at least 16 years old but under 18 years old;**
3. **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**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

(Sexual intercourse) (sodomy) (lewd fondling or touching) means: _____.

Notes on Use

For authority, see K.S.A. 21-3603. Aggravated incest is a severity level 7, person felony, except when it results from otherwise lawful sexual intercourse or sodomy which is a severity level 5, person felony.

Reference should be made to PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

Comment

In 1993, the Legislature amended K.S.A. 21-3603 so that it covers sexual acts with children between the ages of 16 and 18. Sexual acts with children under 16 are addressed by other sex offenses.

It is the Committee's opinion that the words "otherwise lawful" are intended to distinguish this crime from other offenses and are not necessary in the instruction.

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 3d 57.05, Indecent Liberties with a Child, Notes on Use.

In *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), the Court held that where there was a single act of forcible sexual intercourse and the defendant was related to the victim as set out in K.S.A. 1993 Supp. 21-3603(a)(1), the defendant could be charged and convicted of the specific offense of aggravated incest and not the general offense of rape. If the defendant were convicted and sentenced for rape, the sentence would be vacated and the defendant resentenced for aggravated incest. Language to the contrary in *State v. Moore*, 242 Kan. 1, 748 P.2d 833 (1987), was disapproved.

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the Supreme Court compared the then existing 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(a), 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. *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994).

The aggravated incest statute, K.S.A. 21-3603, is not applicable to the sexual relationship between a half-blood uncle and the minor daughter of a half-brother. *State v. Craig*, 254 Kan. 575, 867 P.2d 1013 (1994) (Overruling *State v. Reedy*, 44 Kan. 190, 24 Pac. 66 [1890]).

The 1993 legislation amended K.S.A. 21-3606 so that it covers sexual acts with children between the ages of 16 and 18. Sexual acts with children under 16 are addressed by other sex offenses.

59.01 THEFT

The defendant is charged with the crime of theft of property of the value of ($25,000 or more) (at least $500 but less than $25,000) (less than $500). The defendant pleads not guilty.

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

1. **That _____ was the owner of the property;**
2. **That the defendant (obtained) (exerted) unauthorized control over the property;**
   or
   That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant;
   or
   That the defendant obtained by threat control over property;
   or
   That the defendant obtained control over property knowing the property to have been stolen by another;
3. **That the defendant intended to deprive _____ permanently of the use or benefit of the property;**
4. **That the value of the property was ($25,000 or more) (at least $500 but less than $25,000) (less than $500); and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3701. Theft of property of the value of $25,000 or more is a severity level 7, nonperson felony. Theft of property of the value of at least $500 but less than $25,000 is a severity level 9, nonperson felony. Theft

of property of the value of less than $500 is a class A, nonperson misdemeanor, except that it is a severity level 9, nonperson 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 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

For a definition of "deprive permanently", see PIK 3d Chapter 53.00, Definitions and Explanation 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 3d 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 criminal deprivation of property (PIK 3d 59.04), see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

Comment

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

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

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

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

To convict a defendant of theft under K.S.A. 21-3701a(4), 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 3d 59.01-A should be used with PIK 3d 59.01 in possession of stolen property cases.

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. 21-3701a(2), that the victim was deceived by reliance in whole or in part upon the false statement. See also, *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701a(2) 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." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

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. 21-3701a(2) 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. 839 (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. 21-3701a(1) 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. 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.

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

59.01-A THEFT - KNOWLEDGE PROPERTY STOLEN

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

Notes on Use

The instruction should be used with PIK 3d 59.01, Theft, in a prosecution for violation of K.S.A. 21-3701a(4), receiving stolen property.

State v. Bandt, 219 Kan. 816, 549 P.2d 936 (1976), requires that knowledge of the stolen character of the property exists at the time control first occurs where defendant is charged under K.S.A. 21-3701a(4).

Comment

Stolen property, once recovered either by the owner or law enforcement officers, is no longer stolen property as contemplated in K.S.A. 21-3701a(4). Therefore, one cannot be convicted of theft by obtaining control over stolen property when actual physical possession of the stolen property has been recovered by the owner or by law enforcement officers as agents for the owner, before delivery of the property to the accused. *State v. Sterling*, 230 Kan. 790, 640 P.2d 1264 (1982).

For a discussion of the definition of "obtain" found in K.S.A. 21-3110(11) which relates to K.S.A. 21-3701a(4), and a definition of "obtains or exerts control" as found in K.S.A. 21-3110(12) which relates to K.S.A. 21-3701a(1), see *State v. Myers*, 6 Kan. App. 2d 906, 908, 636 P.2d 213 (1981).

59.16 POSSESSION OF FORGERY DEVICES

The statute upon which this instruction was based (K.S.A. 21-3714) was repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

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__) which is a dwelling;**

   or

   That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (__describe type of structure__) which is not a dwelling;

   or

   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) (sexual battery) therein; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).

***Special Advisory:**

In preparing this instruction, the Committee relied on the amendments to K.S.A. 21-3715 contained in 1993 Senate Bill No. 423. The primary purpose of 1993 SB 423 was to reconcile the differences between L. 1992, ch. 239 (sentencing guidelines) and L. 1992, ch. 298 (recodification of criminal code), prior to their effective dates of July 1, 1993.

For the most part, the 1992 sentencing guidelines legislation amended the substantive offenses by conforming the penalty provisions to the new sentencing scheme under the guidelines. In a limited number of instances, new substantive provisions were adopted. These included burglary. L. 1992, ch. 239, New Sec. 114.

The joint recommendation of the Sentencing Commission and the Judicial Council for reconciling the 1992 versions of burglary was adopted by the Legislature in § 74 of 1993 SB 423. However, through inadvertence, New Sec. 114 of L. 1992, ch. 239 was not repealed.

Notes on Use

For authority, see K.S.A. 21-3715. Burglary as described in the first alternative paragraph 1 is a severity level 7, person felony. Burglary as described in the second alternative paragraph 1 is a severity level 7, nonperson felony. Burglary as described in the third alternative paragraph 1 is a severity level 9, nonperson 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 3d 59.18, Aggravated Burglary, Notes on Use.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

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).

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).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also, *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. The legislature's 1980 amendment to what is now K.S.A. 1993 Supp. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

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) (a manufactured home) (a mobile home) (a tent) (describe type of structure) (a motor vehicle) (an aircraft) (a watercraft) (a 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) (sexual battery) 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.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a severity level 5, person felony.

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

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

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 947 (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).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

See PIK Civil 2d, 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 nor required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & 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 the basis for an instruction, if needed.

59.25 CRIMINAL TRESPASS

The defendant is charged with 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, nonperson misdemeanor. Property under this section can be any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft.

Comment

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires a proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass

also requires proof of actual or constructive notice. The Legislature's 1980 amendment to what is now K.S.A. 1993 Supp. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 859 P.2d 387 (1994).

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59.37 UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS

The defendant is charged with the crime of unlawful manufacture or disposal of false tokens. The defendant pleads not guilty.

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

1. **That the defendant (manufactured for sale) (offered for sale) (gave away) false _____ calculated to be used in a coin-operated machine or equipment;**
2. **That the defendant did so with the intent to cheat the operator of a coin-operated machine or equipment; 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. 21-3730. Unlawful manufacture or disposal of false tokens is a class B, nonperson misdemeanor.

The use of a false token to obtain goods or services is theft, PIK 3d 59.01, and does not fall within the purview of this section.

59.38 CRIMINAL USE OF EXPLOSIVES

The defendant is charged with criminal use of explosives. The defendant pleads not guilty.

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

1. That the defendant (had in [his][her] possession) (manufactured) (transported) _____, which the defendant intended to use to commit a crime;

or

That the defendant delivered _____ to _____ knowing that _____ intended to commit a crime;

2. That _____ is an explosive; and

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

Notes on Use

For authority and types of explosives, see K.S.A. 21-3731. Criminal use of explosive is a severity level 8, person felony, except that it is a severity level 6, person felony if: (a) the possession, manufacture or transportation is intended to be used to commit a crime or is delivered to another with knowledge that it is intended to be used by the deliveree to commit a crime, (b) a public safety officer is placed at risk to defuse the explosive, or (c) the explosive is placed in a building in which there is another human being.

Note that PIK Chapter 64.00, Crimes Against the Public Safety, contains instructions relating to several crimes dealing with explosives.

59.70 VALUE IN ISSUE

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

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

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

Notes on Use

It is necessary to use this instruction with PIK 3d 68.11, Verdict Form - Value in Issue, when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

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

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CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

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

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

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

Notes on Use

For authority, see K.S.A. 21-3830. Dealing in false identification documents is a severity level 10, nonperson felony.

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

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

Comment

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

60.31 HARASSMENT OF COURT BY TELEFACSIMILE

The defendant is charged with the crime of harassment of court 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 of court by telefacsimile communication is a class A, nonperson misdemeanor.

60.32 AIRCRAFT REGISTRATION

The defendant is charged with the crime of failure to register an aircraft. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed an aircraft;**
2. **That the aircraft was not registered in accordance with the regulations of the Federal Aviation Administration with the Secretary of Transportation; 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. 21-3840. Failure to register an aircraft is a severity level 8, nonperson felony.

Registration of aircraft must be in accord with regulations of the Federal Aviation Administration. Those regulations are presently in Title 14, Chapter 1, parts 47-49 of the Code of Federal Regulations and an instruction defining eligibility for registration should be given.

60.33 FRAUDULENT REGISTRATION OF AIRCRAFT

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

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

1. **That the defendant knowingly (possessed) (operated) an aircraft;**
2. **That the aircraft was registered to a (nonexistent [person] [firm] [business] [corporation]) ([firm] [business] [corporation] which is no longer a legal entity); 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. 21-3841. Fraudulent registration of an aircraft is a severity level 8, nonperson felony. See PIK 3d 60.34 for fraudulent registration by providing false information.

60.34 FRAUDULENT AIRCRAFT REGISTRATION - SUPPLYING FALSE INFORMATION

The defendant is charged with the crime of supplying false information regarding ownership of an aircraft. The defendant pleads not guilty.

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

1. That the defendant knowingly supplied false information to a government entity regarding the (name) (address) (business name) (business address) of the owner of an aircraft (in) (operated in) Kansas;
   or
   That the defendant knowingly supplied false information to a government entity regarding ownership by (the defendant) (a firm) (a business) (a corporation) (another) of an aircraft (in) (operating in) Kansas;
   or
2. That the (firm) (business) (corporation) is not, or has never been, a legal entity in any state;
   or
   That the (firm) (business) (corporation) has lapsed into a state of no longer being a legal entity in Kansas and no documented attempt has been made to correct such information with the government entity for a period of 90 days after the date on which such lapse took effect with the Kansas Secretary of State;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3841. Supplying false information regarding an aircraft is a severity level 8, nonperson felony. See PIK 3d 60.33 for fraudulent registration.

60.35 AIRCRAFT IDENTIFICATION - FRAUDULENT ACTS

The defendant is charged with the crime of fraudulent acts relating to aircraft identification numbers. The defendant pleads not guilty.

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

1. That the defendant knowingly [(bought) (sold) (offered for sale) (received) (disposed of) (concealed) (possessed) (operated)] [(attempted to buy) (attempted to sell) (attempted to offer for sale) (attempted to receive) (attempted to dispose of) (attempted to conceal) (attempted to possess) (attempted to operate)] an aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations; and

   or

   That the defendant knowingly (possessed) (manufactured) (sold) (exchanged) (offered for sale or exchange) (supplied in blank) (gave away) a counterfeit manufacturer's aircraft identification number plate or decal used for the identification of an aircraft; 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. 21-3842. Fraudulent acts regarding aircraft identification numbers is a severity level 8, nonperson felony. See Title 14, Chapter 1, parts 47.15 and 47.16 of the Code of Federal Regulations for requirements of the Federal Aviation Administration as to assigned identification numbers. The trial judge will need to draft an appropriate instruction as to the relevant requirements based upon the evidence.

notwithstanding expungement, is forever disqualified from holding public office or employment. For sports bribery, see PIK 3d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 3d 61.03, Compensation for Past Official Acts.

Comment

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

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61.02 OFFICIAL MISCONDUCT

The statute upon which this instruction was based (K.S.A. 21-3902) has been repealed.

Comment

K.S.A. 21-3902 was held to be unconstitutionally vague in *State v. Adams*, 254 Kan. 436, 866 P.2d 1017 (1994). Defendant was convicted of committing an act of misconduct or abuse of authority under paragraph (a) of the statute. The Court held that misconduct was impermissibly vague as a standard of conduct because persons of common understanding must necessarily guess at its meaning and differ as to its application. Paragraph (b) of K.S.A. 21-3902 describes a completely different act (demanding or receiving a fee or reward known to be illegal for the execution of an official act or performance of a duty required by law), but the Court struck down the entire statute.

61.03 COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

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

1. **That _____ was a public (officer) (employee);**
2. **That _____ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;**
   or
   That _____ performed an act of official misconduct, as follows: _____
   _____;
3. **That the defendant (gave) (offered to give) to _____ any benefit, reward or consideration intending it to be compensation for the act; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 3d 61.04, Compensation for Past Official Acts - Defense.

In Element No. 2, designate the act alleged to constitute "official misconduct."

62.03 BREACH OF PRIVACY - INTERCEPTING MESSAGE

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

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

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

Notes on Use

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

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

Comment

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

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

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

See Comment to PIK 3d 62.01, Eavesdropping. *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984).

Disclosure of the information intercepted is not an element of the offense under paragraph (a)(1) of this statute. The interception itself completes the offense. *MGM, Inc. v. Liberty Mut. Ins. Co.*, 253 Kan. 198, 203, 855 P.2d 77 (1993).

62.04 BREACH OF PRIVACY - DIVULGING MESSAGE

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

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

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

Notes on Use

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

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

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

Comment

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

Also, see Comment citing cases under PIK 3d 62.03, Breach of Privacy - Intercepting Message.

62.06 CRIMINAL DEFAMATION

The statute upon which this instruction was based (K.S.A. 21-4004) has been repealed.

Comment

K.S.A. 21-4004 was held to be unconstitutionally overbroad in *Phelps v. Hamilton*, 828 F. Supp. 831 (D. Kan. 1993). The statute failed to require proof of actual malice under the requirement of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), when the alleged falsehood refers to a public officer or public figure.

62.07 CRIMINAL DEFAMATION - TRUTH AS A DEFENSE

It is a defense to the charge of criminal defamation that the alleged defamatory information communicated was true.

Notes on Use

For authority, see K.S.A. 21-4004. For the instruction concerning the elements of a charge of defamation, see PIK 3d 62.06, Criminal Defamation. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

63.14-A (HARASSMENT OF COURT BY TELEFACSIMILE previously appeared at this location. It has been moved to 60.31.)

63.15 DESECRATION OF FLAGS

The statute upon which this instruction was based (K.S.A. 21-4114) was repealed, effective July 1, 1993. See PIK 3d 63.11, Criminal Desecration - Flags.

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

64.01 CRIMINAL USE OF WEAPONS - FELONY

The defendant is charged with criminal use of weapons. The defendant pleads not guilty.

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

1. That the defendant knowingly (sold) (manufactured) (purchased) (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 the 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;
   or
   That the defendant knowingly possessed a device or attachment of any kind (designed) (used) (intended for use) in silencing the report of any firearm; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

Authority for the first alternative under claim no. 1 is found in K.S.A. 21-4201(a)(7); authority for the second alternative under claim no. 1 is found in K.S.A. 21-4201(a)(8); and authority for the third alternative is found in K.S.A. 21-4201(a)(6). The offenses of criminal use of weapons under subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201 are severity level 9, nonperson felonies.

Comment

K.S.A. 21-4201(a)(7) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. It should be noted that the offense under

64.02-A CRIMINAL DISCHARGE OF A FIREARM

The defendant is charged with criminal 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) (a non-navigable body of water) of another;

or

That the act occurred (upon) (from) any (public road) (public road right-of-way) (railroad right-of-way) that adjoins land of another;

3. That the defendant did not have the permission of the owner or person in possession of such land to discharge a firearm; and

OR

B. 1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an unoccupied dwelling; and

OR

C. 1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (railroad car) (_designate other means of conveyance of person or property_);

2. That the person(s) therein (was)(were) not placed in immediate apprehension of bodily harm; and

OR

D. 1. That the defendant maliciously and intentionally, without authorization, 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

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

Notes on Use

Authority for section [A] is K.S.A. 21-4217, a class C misdemeanor. Authority for section [B] is K.S.A. 21-4219(a), a severity level 8, person felony. Authority for section [C] is K.S.A. 21-4219(b), a severity level 7, person felony. Authority for section [D] is K.S.A. 21-4219(b), a severity level 5, person felony.

The provisions of K.S.A. 21-4219 were enacted to address the so-called "drive by shootings" and presumably fill a perceived need not provided under K.S.A. 21-3410 and 21-3414.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

See PIK 3d 56.04, Homicide Definitions, for a definition of maliciously.

64.02-B CRIMINAL DISCHARGE OF A FIREARM - AFFIRMATIVE DEFENSE

It is a defense to the charge of criminal 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). Insert in the blank space the applicable description of an exempt person under the applicable statute. If this instruction is given, PIK 3d 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 PIK 3d 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. This statute has been amended to include convictions from other jurisdictions which are substantially the same as a Kansas person felony. Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201.

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (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 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

It is a defense to the charge of (criminal 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 (b) through (f) 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 3d 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 CRIMINAL DISPOSAL OF FIREARMS

The defendant is charged with criminal disposal of firearms. The defendant pleads not guilty.

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

A. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to _____;

2. That _____ was a person under 18 years of age; and

OR

B. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ was both addicted to and an unlawful user of _____, a controlled substance; and

OR

C. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding five years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and

OR

D. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding 10 years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony, and had not had the conviction of the crime [expunged] [pardoned]); and

OR

E. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had been convicted of a felony and had been found to be in possession of a firearm at the time of the commission of the offense; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

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

Several important amendments were enacted with the 1994 Session Laws. Alternative C concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within five years of the act charged. For the purposes of this alternative, the specified felony conviction is defined as any felony except a felony as defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, or L. 1994, ch. 348, SB 551, §§1-5, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony. It is important to note that there is no longer any barrel length specification.

Alternative D concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony with 10 years of the act. The specified felony conviction for this alternative is any felony defined by K.S.A. 3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, or L. 1994, ch. 348, SB 551, §§1-5, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

The specified crime for alternative C has the proviso that the transferee "was found not to have been in possession of a firearm at the time of the commission of the offense." The specified crimes for alternative D have the proviso that the transferee "was not found to have been in the possession of a firearm at the time of the commission of the offense." The Committee believed it improbable that a court would make those specific findings unless by implication as to alternative D by the fact of conviction of a crime that did not involve the use of a firearm as an element of the charge. It would be hard to image a situation in which a court made the specific finding that one was not in possession of a firearm at the time of the commission of the crime. Similarly, in alternative E it presumed that the

finding of possession of a firearm at the time of the commission of the offense would be derived from the elements of the charge.

Alternative	Status of Transferee	Barrel Length	Prior Crime	Prior Crime Time Limit
A.	Less than 18 Years	Less than 12"	N/A	N/A
B.	Addict and User	N/A	N/A	N/A
C.	Felon	N/A	Specified felony without firearm	Five years
D.	Felon	N/A	Specified felony without firearm	Ten years
E.	Felon	N/A	Any felony with firearm	No time limit

64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY

The defendant is charged with criminal possession 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 knowingly had possession of a firearm;

2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

B. 1. That the defendant knowingly had possession of a firearm;

2. That the defendant within 10 years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony);

3. That the defendant (did not have the conviction of such crime expunged) (had not been pardoned for such crime); and

OR

C. 1. That the defendant knowingly had possession of a firearm;

2. That the defendant had been (convicted of _____, a person felony) (convicted of _____, a violation of the Uniform Controlled Substances Act of Kansas or any

other jurisdiction) (adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a person felony or a violation of any provision of the Uniform Controlled Substances Act); and

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

Notes on Use

Authority for alternative A is K.S.A. 21-4204(a)(3). Authority for alternative B is K.S.A. 21-4204(a)(4). Alternative C is new, authority for which is found at L. 1994, ch. 348, § 4(a)(2). Each crime is a severity level 8, nonperson felony.

K.S.A. 21-4204(b) as amended provides that subsection (a)(4) shall apply to a felony under K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, or L. 1994, ch. 338, SB 856, §§ 1-5, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.

Alternative A has the proviso that with the conviction of a specified crime the defendant "was found not to have been in possession of a firearm at the time of the commission of the offense." Alternative B contained a proviso that with the conviction of a specified crime the defendant "was not found to have been in the possession of a firearm at the time of the commission of the offense." The Committee believes it improbable that a court would make those specified findings. The proviso of Alternative B, however, may be implied from the elements of the charge upon which the defendant was convicted. Similarly, the proviso of Alternative C that the defendant "was found to have been in possession of a firearm at the time of the commission of the offense" may be implied from the elements of the charge upon which the defendant was convicted. It is not felt, however, that such questions are questions of fact for the jury once the conviction has been established.

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 or herself. 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 criminal 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 CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal 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; and**

OR

1. **That the defendant knowingly had possession of a firearm and was not a law enforcement officer;**
2. **That the defendant was [in or on school (property) (grounds) upon which was located a (building) (structure) used by (a unified school district) (an accredited nonpublic school) for student (instruction) (attendance) (extracurricular activities) for pupils enrolled in (kindergarten) (any of the grades 1 through 12)] [at a regularly scheduled school sponsored activity or event]; and**

OR

1. **That the defendant knowingly had possession of a firearm;**
2. **That the defendant refused to (surrender) (immediately remove) the firearm (from school [property] [grounds]) (at a regularly scheduled school sponsored activity or event) when (requested) (directed) by a (duly authorized school employee) (law enforcement officer); and**
3. **That this act occurred on or about the _____ day of _____, 19____ in _____ County, Kansas.**

Notes on Use

Authority for the first alternative is K.S.A. 21-4204(a)(1). Authority for the second alternative is K.S.A. 21-4204(a)(5). A violation of the first or second alternative is a class B, nonperson select misdemeanor. Authority for the third alternative is K.S.A. 21-4204(a)(6), a class A, nonperson misdemeanor.

Felony criminal possession of a firearm is proscribed under subsections (a)(2) and (a)(3) of K.S.A. 21-4204 and it is the subject of PIK 3d 64.06, Criminal Possession of a Firearm - Felony. See Comment to PIK 3d 64.06.

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).

64.07-A POSSESSION OF A FIREARM (IN) (ON THE GROUNDS OF) A STATE BUILDING OR IN A COUNTY COURTHOUSE

The defendant is charged with the crime of possession of a firearm ([in] [on the grounds of] a state building) (in a county courthouse). 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;**
2. **That the defendant was ([in] [on the grounds of] the [set forth the name and address of the statutorily named building]) (within the governor's residence) ([on the grounds of] [in a building on the grounds of] the governor's residence) (within [describe building], a [state-owned] [state-leased] building, so designated by the secretary of administration by rules and regulations and with conspicuously placed signs that clearly stated that firearms were prohibited within the building) (within the courthouse of _____ County, Kansas); 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. 21-4218. Possession of a firearm on the grounds of or in state buildings or county courthouses is a class B, nonperson select misdemeanor.

Subsection (a) of K.S.A. 21-4218 provides that possession of a firearm on the grounds of or in such state buildings does not apply to certain law enforcement officers, or to any person summoned by any such officer to assist in making arrests or preserving the peace while actually engaged in assisting such officer, or to members of military of this state of the United States, when such officers are performing and carrying out official duties. Subsection (a) further provides that the firearms are prohibited in county courthouses, unless by resolution, the

county commissioners authorize the possession of a firearm in the courthouse.

Subsection (b) of K.S.A. 21-4218 provides that it is not a violation of the statute for the governor, the governor's immediate family, or specifically authorized guests of the governor to possess a firearm on the grounds of or in any building on the grounds of the governor's residence.

64.07-B CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE

The defendant is charged with criminal possession of a firearm by a juvenile. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed a firearm with a barrel less than 12 inches long;**
2. **That at the time of the act the defendant was less than 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 L. 1994, ch. 270, SB 500. Criminal possession of a firearm by a juvenile is a class A, nonperson misdemeanor.

64.07-C CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE - AFFIRMATIVE DEFENSES

It is a defense to the charge of criminal possession of a firearm by a juvenile that at the time of the commission of the act the defendant was _____.

Notes on Use

For authority, see L. 1994, ch. 270, new § 1(c). Insert in the blank space the applicable defense as specified by statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses-Burden of Proof, should be given.

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, nonperson misdemeanor.

Comment

It should be noted that under K.S.A. 21-4205(b) 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.

64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES

The defendant is charged with the crime of failure to register sale of explosives. The defendant pleads not guilty.

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

1. **That the defendant was the seller of an explosive or detonating substance;**
2. **That the defendant failed to register the sale or disposition of such explosive; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

The register of sales must contain the dates of the sale or other disposition; the name, address, age, and occupation of the person to whom the explosive is sold or delivered; the kind and amount of explosive delivered; the place at which it is to be used; and for what purpose it is to be used.

Notes on Use

For authority, see K.S.A. 21-4207. Failure to register sale of explosives is a class B, nonperson misdemeanor.

See also, PIK 3d 59.38, Criminal Use of Explosives.

64.10 FAILURE TO REGISTER RECEIPT OF EXPLOSIVES

The defendant is charged with the crime of failure to register receipt of explosives. The defendant pleads not guilty.

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

1. **That a quantity of explosives or detonating substance was delivered to the defendant;**
2. **That the defendant failed to sign (his)(her) name in the register of sales of explosives on the page where the record of such delivery is entered; 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. 21-4208. Failure to register receipt of explosives is a class C misdemeanor.

For form of register of sales, see K.S.A. 21-4207 and PIK 3d 64.09, Failure to Register Sale of Explosives. See also, PIK 3d 59.38, Criminal Use of Explosives.

64.10-A EXPLOSIVE - DEFINITION

The term "explosive" is defined as any chemical compound, mixture, or device, of which the primary purpose is to function by explosion, and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

Notes on Use

For authority, see K.S.A. 21-4209b.

64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

The defendant is charged with criminal disposal of explosives. 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]) ([an explosive substance] [a detonating substance]) to _____;**
2. **That _____ was a person under 21 years of age; and**
   or
   That the defendant knew _____ was (a person who was both addicted to and an unlawful user of a controlled substance, _____) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been 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. 21-4209. Criminal disposal of explosives is a severity level 10, person felony. The applicable bracketed reference in each parentheses mentioned in element nos. 1 and 2 should be selected. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor. See K.S.A. 21-3202.

See also, PIK 3d 56.38, Criminal Use of Explosives.

64.11-A CRIMINAL POSSESSION OF EXPLOSIVES

The defendant is charged with criminal possession of explosives. 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 any explosive or detonating substance;**
2. **That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4209a. Criminal possession of explosives is a severity level 7, person felony.

See also, PIK 3d 56.38, Criminal Use of Explosives.

64.11-B CRIMINAL POSSESSION OF EXPLOSIVES - DEFENSE

K.S.A. 21-4209a(b) was amended by L. 1992, ch. 298, § 72 by repealing the defense of possession of explosives in the course of a person's lawful employment.

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-only 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, nonperson misdemeanor for the first offense and a severity level 9, nonperson felony for a second or subsequent offense.

Note that if a prosecution for unlawfully obtaining prescription-only drugs may be brought under the provisions of K.S.A. 65-4127a or 65-4127b of the Uniform Controlled Substances Act, or sections 1 through 5 of L. 1994, ch. 338, prosecutions may not be brought under this section.

64.17 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG FOR RESALE

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

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

1. That the defendant intentionally obtained a prescription-only drug by (making) (altering) (signing) a prescription order at a time when defendant was not a practitioner;

   or

   That the defendant intentionally obtained a prescription-only drug by delivering a prescription order, knowing it to have been (made) (altered) (signed) by a person other than a practitioner;

   or

   That the defendant intentionally obtained a prescription-only drug by providing false information to a practitioner;
2. That the defendant (intentionally sold the prescription-only drug so obtained) (intentionally offered for sale the prescription-only drug so obtained) (intentionally possessed with intent to sell the prescription-only drug so obtained); and
3. 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. 21-4215. Obtaining a prescription-only drug by fraudulent means for resale is a severity level 6, nonperson felony. The appropriate alternative situation should be used.

The provisions of this section are not applicable to prosecutions involving prescription-only drugs which could be brought under the Uniform Controlled Substances Act and to which the provisions of K.S.A. 65-4127a or 65-4217b, or sections 1 through 5 of L. 1994, ch. 338, and amendments thereto, would be applicable. See PIK 3d 67.13-67.16.

65.01 PROMOTING OBSCENITY

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

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

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

   or

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

   or

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

   or

   That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which was obscene or which contributed to its obscenity; and

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

Notes on Use

For authority, see K.S.A. 21-4301. Promoting obscenity is a class A, nonperson misdemeanor for the first conviction. For second and subsequent convictions, this offense is a severity level 9, person felony. For affirmative defenses, see PIK 3d 65.05. For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

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

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304 (1957). In June of 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller*, the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* held that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejected the standard that the work must be utterly without redeeming social value. Additionally, the Court rejected a national standard for obscene material within the context of the First Amendment.

In March, 1976 in *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court, following *Miller*, upheld the constitutionality of the then existing obscenity statute by construing the word "obscenity" as a word of constitutional meaning. In 1976, the Kansas Legislature amended K.S.A. 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself.

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

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

enhance punishment.

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed 2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the Court followed the obscenity standards of *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973). *Ferber* held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301 was upheld against allegations that the statute was unconstitutional as a violation of due process, because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of the police power.

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

In 1993, the Kansas Legislature amended K.S.A. 21-4301(c)(3) to exclude from the definition of "obscene device" such devices "disseminated or promoted for the purpose of medical or psychological therapy."

65.02 PROMOTING OBSCENITY TO A MINOR

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

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

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

Notes on Use

For authority, see K.S.A. 21-4301a. Promoting obscenity to a minor is a class A, nonperson misdemeanor, for the first conviction. For second and subsequent convictions, this offense is a severity level 8, person felony. For affirmative defenses, see PIK 3d 65.05-A.

For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 Legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and the decision of the Supreme Court of Kansas in *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The Legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

Notes on Use

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

Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, Element No. 2 of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

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

65.07 GAMBLING - DEFINITIONS

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

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

Lottery is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. As used in this definition, a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

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

Gambling device is any so-called "slot machine" or any other machine, mechanical device, electronic device or other contrivance an essential part of which is a drum or reel with insignia thereon, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any other machine, mechanical device, electronic device or other contrivance (including, but not limited to, roulette wheels and similar devices) which is equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or is otherwise designed, manufactured or altered primarily for use in connection with gambling, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may

become entitled to receive, as the result of chance, any money or property; any subassembly or essential part intended to be used in connection with any such machine, mechanical device, electronic device or other contrivance, but which is not attached to any such machine, mechanical device, electronic device or other contrivance as a constituent part; or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device.

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

Notes on Use

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

K.S.A. 21-4302(a)(1), (2), (3), (4), (5) and (6) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited, to contracts of indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the State of Kansas by an organization licensed by the State of Kansas to manage, operate or conduct games of bingo; a lottery operated by the State pursuant to the Kansas Lottery Act; and any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act.

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

K.S.A. 21-4302(c) declares that the term "consideration" shall not include sums

of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the State of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate or conduct bingo games under the laws of the State of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations; sums of money paid by or for participants in any lottery operated by the State pursuant to the Kansas Lottery Act; and sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

Gambling device does not include any machine, mechanical device, electronic device or other contrivance used or for use by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission or by the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission; any machine, mechanical device, electronic device or other contrivance, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (i) which when operated does not deliver, as a result of chance, any money, or (ii) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money; or any so-called claw, crane, or digger machine and similar devices which are designed and manufactured primarily for use at carnivals or county or state fairs.

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

Comment

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

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

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

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

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

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

K.S.A. 21-4302(e) "contains no requirement that the premises must have been used previously as a gambling place before it is rendered a gambling place. The statute does not expressly require that the place have as 'one of its principal uses' the making and settling of bets." *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

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65.33 UNLAWFUL SALE OF A LOTTERY TICKET

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

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

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

   or

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

   or

   That the defendant sold a lottery ticket or share to _____ knowing that _____ was a person under 18 years of age; and

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

Notes on Use

For authority, see K.S.A. 74-8718. Unlawful sale of a lottery ticket is a class A, nonperson misdemeanor upon conviction for a first offense, and a severity level 9, nonperson felony upon conviction for a second or subsequent offense.

65.34 UNLAWFUL PURCHASE OF A LOTTERY TICKET

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

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

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

   or

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

   or

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

   or

   That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ _____ knowing _____ was a person who resided in the same household as (the executive

65.52 PARIMUTUEL RACING ACT - DEFINITIONS

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

Breakage means the odd cents by which the amount payable on each dollar wagered in a parimutuel pool exceeds:

1. A multiple of $.10, for parimutuel pools from races conducted in this state; and
2. A multiple of such other number of cents as provided by law of the host jurisdiction, for interstate combined wagering pools.

Commission means the Kansas Racing Commission created by this Act.

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

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

Executive Director means the executive director of the commission.

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

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

Fair association means an association organized pursuant to Kansas Law (see 2-125 *et seq.*) or a nonprofit association determined by the commission to be otherwise organized to conduct fair activities pursuant to findings of

fact entered by the commission in a license order.

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

Greyhound means any greyhound breed of dog properly registered with the National Greyhound Association of Abilene, Kansas.

Horsemen's association means any association or corporation:

1. All officers, directors, members and shareholders of which are licensed owners of horses or licensed trainers of horses, or both;
2. which is applying for or has been issued a facility owner license authorizing ownership of Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities; and
3. none of the officers, directors, members or shareholders of which holds another facility owner license or is an officer, director, member or shareholder of another facility owner licensee.

Horsemen's nonprofit organization means any nonprofit organization:

1. All officers, directors, members or shareholders of which are licensed owners of horses or licensed trainers of horses, or both; and
2. which is applying for or has been issued an organization license authorizing the conduct or horse races at Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities.

Host facility means the racetrack at which the race is run or, if the race is run in a jurisdiction which is not participating in the interstate combined wagering pool, the racetrack or other facility which is designated as the host

facility.

Host jurisdiction means the jurisdiction where the host facility is located.

Interstate combined wagering pool means a parimutuel pool established in one jurisdiction which is combined with comparable parimutuel pools from one or more racing jurisdictions for the purpose of establishing the amount of money returned on a successful wager in the participating jurisdictions.

Intertrack wagering means wagering on a simulcast race at a licensed racetrack facility or at a facility which is licensed in its racing jurisdiction to conduct live races.

Intrastate combined wagering pool means a parimutuel pool which is combined with comparable parimutuel pools from one or more racetrack facilities for the purpose of establishing the amount of money returned on a successful wager at the participating racetrack facilities.

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

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

Nonprofit organization means:

1. A corporation which is incorporated in Kansas as a not-for-profit corporation pursuant to Kansas general corporation code and the net earnings of which do not inure to the benefit of any shareholder, individual member or person; or
2. a fair association.

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

Off-track wagering means wagering on a simulcast race at a facility which is not licensed in its jurisdiction to

conduct live races.

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

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

Parimutuel wagering means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denomination on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are paid prizes from such pool in amounts proportional to the total receipts in the pool.

Race meeting means the entire period of time for which an organization licensee has been approved by the commission to hold horse or greyhound races at which parimutuel wagering is conducted, including such additional time as designated by the Commission for the conduct of official business before or after the races.

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

Racing jurisdiction or jurisdiction means a governmental authority which is responsible for the regulation of live or simulcast racing in its jurisdiction.

Racing or wagering equipment or services licensee means any person, partnership, corporation or association licensed by the commission to provide integral racing or wagering equipment or services, as designated by the commission, to an organization licensee.

Recognized greyhound owners' group means the duly recognized group elected by a majority of the Kansas licensed greyhound owners at the racetrack facility.

Recognized horsemen's group means the duly recognized group, representing the breeds of horses running at a racetrack facility, elected by a majority of the licensed owners and trainers at the racetrack facility. If the licensee does not have a recognized horsemen's group, the Commission shall designate as the recognized horsemen's group one that serves another organization licensee, but not one that serves a county fair association organization licensee.

Simulcast means a live audio-visual broadcast of an actual horse or greyhound race at the time it is run.

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

Notes on Use

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

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CHAPTER 66.00

CRIMES AGAINST BUSINESS

66.01 RACKETEERING

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

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

1. That _____ was (the owner of) (the proprietor of) (a person having a financial interest in) a business;
2. That the defendant (demanded) (solicited) (received) from _____ a thing of value by means of an express or implied (threat) (promise) that the defendant would (cause the competition of _____ to be diminished or eliminated) (cause the price of goods or services [purchased] [sold] in the business of _____ to be increased, decreased, or maintained at a stated level) (protect the [property used in the business of _____] [person of _____] [family of _____] from injury by violence or other unlawful means); 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. 21-4401. Racketeering is a severity level 7, nonperson felony. The name of the victim should be placed in the blank spaces in paragraphs (1) and (2). Where there is an issue as to the making of a "threat" or "promise" the jury should be informed that the threat or promise may be express or implied.

66.02 DEBT ADJUSTING

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

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

1. **That the defendant engaged in the business of making express or implied contracts with a debtor whereby said debtor agreed to pay defendant a certain amount of money periodically; and**
2. **That the defendant agreed for a consideration to distribute such money among (his)(her) creditors of the debtor; 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. 21-4402. Debt adjusting is a class B, nonperson misdemeanor.

The provisions of this statute do not apply to debt adjusting incidental to the lawful practice of law in the State of Kansas. The contracts with a debtor may be express or implied.

66.03 DECEPTIVE COMMERCIAL PRACTICES

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

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

1. **That the defendant (used deception) (knowingly misrepresented a material fact) in connection with the sale of merchandise as follows: _____ _____;**
2. **That the defendant intended that _____ _____ should rely on such false representations whether or not such person was misled, deceived or damaged thereby; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Merchandise means any object, wares, goods, commodities, intangibles, real estate or services.

Sale means any sale, offer for sale, or attempt to sell any merchandise for any consideration.

Notes on Use

For authority, see K.S.A. 21-4403. Deceptive commercial practices is a class B, nonperson misdemeanor.

The term "person" is defined in section (b)(2) of the statute and has not been included in the instruction since the status of the person deceived would normally be a question of law. The section excludes application of the act to owners or publishers of newspapers, magazines, or other printed matter or owners or operators of radio or television stations where they had no knowledge of the intent, design or purpose of the advertisement.

In paragraph (1), the deceptive commercial practice should be described with particularity.

In paragraph (2), the name of the victim should be placed in the blank space.

66.05 COMMERCIAL BRIBERY

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

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

1. **That _____ was (an agent or employee of _____) (a person acting in a fiduciary capacity as _____) ([a lawyer] [a physician] [an accountant] [an appraiser] [a professional advisor] employed by _____) (an [officer] [director] [partner] [manager] of _____, a [corporation] [partnership] [unincorporated association]) (an [arbitrator] [adjudicator] [referee]);**
2. **That the defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) a benefit as consideration for (knowingly violating) (agreeing to violate) a duty of fidelity or trust; 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. 21-4405. Commercial bribery is a severity level 8, nonperson felony.

66.06 SPORTS BRIBERY

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

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

1. That _____ was a (sports participant) (sports official);
2. That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) not to give (his)(her) best efforts as a sports participant in a sports contest; and

   or

   That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) to improperly perform (his)(her) duties as a sports official; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4406. Sports bribery is a severity level 9, nonperson felony.

66.07 RECEIVING A SPORTS BRIBE

The defendant is charged with the crime of receiving a sports bribe. The defendant pleads not guilty.

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

1. That the defendant, a sports participant (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that defendant would thereby be influenced not to give (his)(her) best efforts in a sports contest; and

   or

   That the defendant, a sports official, (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that the defendant would improperly perform (his)(her) duties as a sports official; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4407. Receiving a sports bribe is a class A, nonperson misdemeanor. The definitions contained in the instruction are the same as those in K.S.A. 21-4406 and as set forth in PIK 3d 66.06, Sports Bribery.

66.08 TAMPERING WITH A SPORTS CONTEST

The defendant is charged with the crime of tampering with a sports contest. The defendant pleads not guilty.

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

1. **That the defendant (sought to influence _____, a [sports participant] [sports official]) (tampered with an animal or equipment involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages governing such contest);**
2. **That the defendant had the intent to influence the outcome of such contest; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4408. Tampering with a sports contest is a severity level 9, nonperson felony.

The definitions contained in the instruction are the same as those in K.S.A. 21-4406 and as set forth in PIK 3d 66.06, Sports Bribery.

CHAPTER 67.00
CONTROLLED SUBSTANCES

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 third edition.

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS - POSSESSION

The defendant is charged with the crime of violation of the Uniform Controlled Substances Act of the State of Kansas as it pertains to possession of 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] [her] control) a (narcotic drug) (stimulant) known as _____;**
2. **That the defendant did so intentionally; 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. 65-4160 which was enacted in 1994. The previous statute, K.S.A. 65-4127a(a), was repealed. A first conviction under K.S.A. 65-4160 is a drug severity level 4 felony. Upon conviction for a second offense, such person shall be guilty of a drug severity level 2 felony and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

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 controlled substance analog is involved, see PIK 3d 67.26.

If a definition of "possession" is necessary, see PIK 3d Chapter 53.00 or the instruction defining possession approved in *State v. Galloway*, 16 Kan. App. 2d 54, 63, 817 P.2d 1124 (1991).

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.

Comment

Sale of narcotic drugs was included in PIK 3d 67.13 because it was a part of the same statute, K.S.A. 65-4127a, now repealed. Sale of narcotic drugs is now covered by K.S.A. 65-4161, a new statute. See PIK 3d 67.13-B for the instruction on sale of narcotic drugs.

When a defendant is in nonexclusive possession of the premises upon which drugs are found it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991).

Possession of cocaine and possession of drug paraphernalia are two independent crimes. Where the only cocaine possessed is the residue on the drug paraphernalia, both crimes may be charged. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991).

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

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

K.S.A. 65-4160 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a provision, K.S.A. 65-4116, under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be lawfully possessed.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

In *State v. Tucker*, 253 Kan. 38, 43, 853 P.2d 17 (1993), it was held that possession and intent to sell are separate elements of the crime of possession with intent to sell cocaine. A finding of guilty of possession with the intent to sell requires proof of possession. Conversely, proof of possession without proof of intent to sell is still sufficient proof of a crime.

67.13-A CONTROLLED SUBSTANCES - 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).

67.13-B NARCOTIC DRUGS AND CERTAIN STIMULANTS - SALE, ETC.

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 with intent to sell, deliver or distribute) (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;

[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 18 years of age or over;] and [3.] or [5.] That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

[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 grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4161 which was enacted in 1994. The previous statute, K.S.A. 65-4127a(b), was repealed. A first conviction under K.S.A. 65-4161 is a drug severity level 3 felony. Upon conviction for a second offense, such person shall be guilty of a drug severity level 2 felony, and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

Upon conviction of a first offense, the defendant is guilty of a drug severity level 2 felony if the defendant was 18 years of age or over and the substances involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in, on or within 1,000 feet of any 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.

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 controlled substance analog is involved, see PIK 3d 67.26.

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).

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. *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.

Comment

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, 836 P.2d 11 (1992).

K.S.A. 65-4161 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." 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, 65-4117, 65-4122, 65-4123, and 65-4138.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the

offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

In *State v. Tucker*, 253 Kan. 38, 43, 853 P.2d 17 (1993), it was held that possession and intent to sell are separate elements of the crime of possession with intent to sell cocaine. A finding of guilty of possession with the intent to sell requires proof of possession. Conversely, proof of possession without proof of intent to sell is still sufficient proof of a crime. Possession of cocaine is not a lesser degree of possession with intent to sell because both are class C felonies. It is, however, an included crime as defined in K.S.A. 21-3107(2)(d).

67.14 STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - POSSESSION 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, deliver or distribute 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 18 years of age or over;] and

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

[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. 65-4163 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(b) was repealed. K.S.A. 65-4163 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, marijuana, mescaline, and peyote, among others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (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 No. 1 of the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

Generally, a violation of K.S.A. 65-4163 is a drug severity level 3 felony. If the defendant was 18 years of age or over 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 drug severity level 2 felony. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

The Committee notes that possession with intent to deliver or distribute is not included in the more serious offense of subsection (b).

Comment

Possession of a drug prohibited by K.S.A. 65-4163 is a lesser included offense of possession with intent to sell and when the evidence warrants it, PIK 3d 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. 167, 836 P.2d 11 (1992).

The Committee notes that the only substance incorporated under K.S.A. 65-4163 that is defined in the "definitions" section of the Uniform Act is "marijuana." See K.S.A. 65-4101(o), where marijuana is defined in terms of the plant *cannabis*.

K.S.A. 65-4163 qualifies the acts specified as unlawful with the premise, "[e]xcept as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-4101(e)) may be lawfully manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

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*, 218 Kan. 272, Syl. ¶ 1, 543 P.2d 934 (1975).

When a defendant is in nonexclusive possession of the premises upon which drugs are found, it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991).

67.15 STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - SALE, ETC.

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 18 years of age or over;] and

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

[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. 65-4163 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(b), was repealed. K.S.A. 65-4163 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, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (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 No. 1 of the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

Generally, a violation of K.S.A. 65-4163 is a drug severity level 3 felony. If the defendant was 18 or more 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 drug severity level 2 felony. K.S.A. 65-4163(b). 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 3d 67.13-B, Narcotic Drugs and Certain Stimulants-Sale, Etc.

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 3d 67.14, Stimulants, Depressants and Hallucinogenic Drugs or Anabolic Steroids - Possession 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, 836 P.2d 11 (1992).

67.16 STIMULANTS, DEPRESSANTS, HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - POSSESSION

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][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. 65-4162 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(a), was repealed. K.S.A. 65-4162 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, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4162(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (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 No. 1 of the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

A violation of K.S.A. 65-4162 is a class A nonperson misdemeanor except if a person has a prior conviction under 65-4162 or a conviction for a substantially similar offense from another jurisdiction, the person is guilty of a drug severity level 4 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." *State v. Loudermilk*, 221 Kan. 157, Syl. ¶ 1, 557 P.2d 1229 (1976).

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).

In *State v. Tucker*, 253 Kan. 38, 43, 853 P.2d 17 (1993), it was held that possession and intent to sell are separate elements of the crime of possession with intent to sell cocaine. A finding of guilty of possession with the intent to sell requires proof of possession. Conversely, proof of possession without proof of intent to sell is still sufficient proof of a crime. Possession of cocaine is not a lesser degree of possession with intent to sell because both are class C felonies. It is, however, an included crime as defined in K.S.A. 21-3107(2)(d).

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

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

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

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

Notes on Use

For authority, see K.S.A. 65-4152. A violation of K.S.A. 65-4152 is a class A misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

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

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

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

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the Court determined a less restrictive Overland Park act to be constitutional on an attack of its being

67.20 REPRESENTATION THAT A NONCONTROLLED SUBSTANCE IS A CONTROLLED SUBSTANCE

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

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

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

   or

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

   or

   (c) That the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and

[3. That the defendant was 18 or more years of age;
4. That (name of person to whom substance was delivered);
5. That the defendant was at least three years older than (name of person to whom substance was delivered);]

3. or 6. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4155. Violation of K.S.A. 65-4155 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this State of Kansas a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the delivery is made is guilty of a nondrug severity level 9, nonperson felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65,-4109, 65-4111, and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

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

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

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

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

67.21 UNLAWFULLY MANUFACTURING A CONTROLLED SUBSTANCE

The defendant is charged with the crime of unlawfully manufacturing a controlled substance. The defendant pleads not guilty.

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

1. That the defendant manufactured a controlled substance known as (Include here a controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113);

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 18 years of age or over;] and

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

[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 grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4159. A violation of K.S.A. 65-4159 is a drug severity level 2 felony. For a second or subsequent offense it is a drug severity level 1 and the sentence shall not be subject to statutory provisions for suspended sentence, community work service or probation. A more severe penalty is imposed where the defendant is 18 or more years of age and the offense occurred within 1,000 feet of school property.

If the defendant is charged with selling the controlled substance on or within 1,000 feet of school property, the bracketed elements of the instruction and the definition of "school" should be included in the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

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 committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) 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 (committing) (causing the actual commission of) (facilitating the actual commission of) _____; and
   or
   That the defendant intentionally used a _____ in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of _____; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

(Conspiracy means 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.)

(Solicitation means 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.)

(Facilitate means to aid, assist, or make easier fulfillment of a goal.)

The elements of _____ are (set forth in Instruction No. ____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 65-4141. A violation of K.S.A. 65-4141 is a nondrug severity level 8 nonperson felony.

The particular communication facility used should be inserted in the first blank of Element No. 1. 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. 65-4160, 65-4161, 65-4162, 65-4163, 65-4164, or 65-4159 should be inserted in the second blank of Element No. 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

Comment

In *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993), the Court held that in a prosecution under K.S.A. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 65-4127a and K.S.A. 65-4127b, the State is required to prove the actual commission of the underlying felony violation. Proof of the actual commission of the underlying felony is not required in a prosecution under K.S.A. 65-4141 based upon conspiracy or solicitation. *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993).

67.23 SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113 (MEDICINALS WITH A LOWER POTENTIAL FOR ABUSE) - SELLING, OFFERING TO SELL, POSSESSING WITH INTENT TO SELL OR DISPENSING 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. 65-4164 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(c) was repealed. K.S.A 65-4164 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. 65-4164 is a drug severity level 4 felony if the intended recipient of the controlled substance was a child under 18 years of age.

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. 65-4164 qualifies the acts specified as unlawful with the premise, "except as authorized by the Uniform Controlled Substances Act." See Comment to PIK 3d 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.

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67.25 RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM A VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT

The defendant is charged with the crime of (receiving) (acquiring) (engaging in a transaction involving) proceeds derived from a violation of the Uniform Controlled Substances Act. The defendant pleads not guilty.

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

1. That the defendant (received or acquired proceeds) (engaged in a transaction involving proceeds) known to be derived from _____, a violation of the Controlled Substances Act;

   or

   That the defendant (gave) (sold) (transferred) (traded) (invested) (concealed) (transported) (maintained an interest in) (made available) _____, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of _____, a violation of the Controlled Substances Act;

   or

   That the defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from _____, a violation of the Controlled Substances Act;

   or

   That the defendant conducted a financial transaction involving the proceeds derived from _____, a violation of the Controlled Substances Act which was designed (to conceal or disguise the [nature] [location] [source] [ownership] [control]) of the proceeds (known to be derived from _____, a violation of the Controlled Substances Act) (to avoid _____, a

transaction reporting requirement under [state] [federal] law);

2. **That the defendant did so knowingly or 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. 65-4142. A violation of K.S.A. 65-4142 is a severity level 7, nonperson felony.

67.26 CONTROLLED SUBSTANCE ANALOG - POSSESSION, SALE, ETC.

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 controlled substance analog known as _____. The defendant pleads not guilty.

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

1. **That the chemical structure of (_name of analog_) is substantially similar to the chemical structure of a controlled substance known as _____;**
2. **That (_name of analog_) has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of (_name of controlled substance_);**

   or

   That the defendant (represented) (intended) that (_name of analog_) (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of (_name of controlled substance_);

   [Here insert appropriate elements from PIK 3d 67.13, 67.13-B, 67.14, 67.15, 67.16 or 67.21.]

(__.) **That the defendant did so with the intent that (_name of analog_) be used for human consumption; and**

(__.) **That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4159(a) and (b), 65-4160(*e*), 65-4161(f), 65-4162(c) and 65-4163(d). These subsections state that the prohibitions contained in

their respective sections apply to controlled substance analogs as defined in K.S.A. 65-4101(bb). To be a controlled substance analog, a substance must have a chemical structure and an effect, or intended effect, on the central nervous system substantially similar to a controlled substance contained in the schedules in K.S.A. 65-4105 or 65-4107. The name of the controlled substance to be inserted in the appropriate blanks in element nos. 1 and 2 must be a substance contained in K.S.A. 65-4105 or 65-4107.

Depending on the prohibited act involved, the appropriate elements from PIK 3d 67.13, 67.13-B, 67.14, 67.15, 67.16 or 67.21 should be added following Element No. 2 of this instruction.

CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS

68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

_____
District Judge

_____, 19____

68.09 LESSER INCLUDED OFFENSES

The offense of (principal offense charged) with which defendant is charged includes the lesser offense(s) of (lesser included offense or offenses).

You may find the defendant guilty of (principal offense charged) (first lesser included offense) (second lesser included offense) or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only.

Your Presiding Juror should sign the appropriate verdict form. The other verdict forms are to be left unsigned.

Notes on Use

For authority, see K.S.A. 21-3107(2), (3) and 21-3109.

This instruction should be given when the evidence presents circumstances from which a lesser included offense or offenses may be inferred. The instruction should be completed by specifying the principal offense and each lesser included offense. See PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

Some deviation from this form may be used as a lead-in for the elements instruction for the lesser included offenses. For example, see PIK 3d 69.01, Illustrative Sets of Instructions, Element Nos. 3, 4, and 5.

This instruction should not be used when the crime is Murder In The First Degree under the theory of premeditated murder or felony murder in the alternative. Instead, use PIK 3d 68.15, Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Instruction, and PIK 3d 68.16, Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Form.

Comment

Failure to instruct the jury on some lesser degree of the crime charged is not ground for reversal if the evidence at the trial excludes a theory of guilt on a lesser offense. *State v. Lott*, 207 Kan. 602, Syl. ¶ 1, 485 P.2d 1314 (1971).

The trial court has an affirmative duty to instruct on lesser included offenses where required by the evidence even in the absence of a request by counsel. The evidence requires such instruction under circumstances where the accused might reasonably have been convicted of a lesser offense if the instruction had been

given. *State v. Mason*, 208 Kan. 39, 490 P.2d 418 (1971); *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972); *State v. Deavers*, 252 Kan. 149, 843 P.2d 695 (1992); *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). An instruction on battery as a lesser offense of aggravated battery may or may not be necessary depending on whether the evidence is such that the defendant might reasonably have been convicted of the lesser offense or the evidence excludes a theory of guilt on the lesser offense. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Deggs*, 251 Kan. 342, 834 P.2d 376 (1992). However, the possession of marijuana is not a lesser included offense in a prosecution for the unlawful sale of marijuana. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

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

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

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

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

In *State v. Fike*, 243 Kan. 365, 367, 368, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107. The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the indictment, complaint, or information as well as the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an "included crime" under the definition in K.S.A. 21-3107(2)(d).

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

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

The general principles of multiplicity and lesser included offenses are reviewed and the relationship and distinction between the two concepts as recognized in the Kansas case law are examined in *State v. Warren*, 252 Kan. 169, 843 P.2d 224 (1992). Under the second prong of the *Fike* test, aggravated battery was held to be a lesser included offense of aggravated robbery. The necessary elements of proof for aggravated robbery also established the necessary elements of proof for aggravated battery. The crimes were multiplicitous under the facts in *Warren* because the same act of violence provided the basis for each conviction.

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

Under K.S.A. 21-3107(2)(d), the offense of driving under the influence of alcohol is a lesser included offense of involuntary manslaughter when: (1) the underlying misdemeanor to the involuntary manslaughter complaint is the driving under the influence of alcohol, and (2) all of the elements of the DUI are required to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 858 (1987).

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

The offenses of attempted second-degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first-degree murder. The trial court erred in failing to instruct the jury on the lesser included offense of attempted murder in the second degree. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).

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

Examples of lesser included offenses are:

1. **First Degree Murder** - The Court's duty to instruct on the lesser offenses of second degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second degree murder is included where the

issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses.

2. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
3. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987).
4. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied* 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986).
5. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).
6. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriner*, 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). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required.

8. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Hollaman*, 214 Kan. 636, 522 P.2d 364 (1974).
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); *State v. Cameron & Bentley*, 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. **Aggravated 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 (1974).
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** - Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
14. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984). Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
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, 607 P.2d 88 (1980). Theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are forms of the same crime of larceny and the former is a lesser included offense of the latter (assuming, of course, that the property is of a value of at least $500.) *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992).
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. Wilbanks*, 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. Coberly*, 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). In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), aggravated sexual battery was held not to be a lesser included offense of aggravated kidnapping, attempted aggravated sodomy or attempted aggravated rape because of the additional elements of a nonspousal relationship and intent to arouse or satisfy sexual desires. The dissent argued the rationale that single act of force cannot provide the basis for multiple convictions, which was the basis of the findings that aggravated battery and aggravated robbery were multiplicitous in *State v. Warren*, 252 Kan. 159, 843 P.2d 244 (1992).
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); *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989).
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 (1977).
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, 397-398, 607 P.2d 519 (1980); K.S.A. 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. K.S.A. 21-3301, K.S.A. 21-3107(2).
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-A-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist: [The jury shall set forth here in legible print each such aggravating circumstance.]

_____

_____

_____

_____

_____

_____

and so, therefore, unanimously sentence the defendant to death.

_____

Presiding Juror

_____, 19____.

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended L. 1994, ch. 252, § 4.

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68.14-B-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH (Alternative Verdict)

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 are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

☐ **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]**

☐ **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**

☐ **[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.]**

☐ **[That the defendant authorized or employed another person to commit the crime.]**

☐ **[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**

☐ **[That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]**

☐ **[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**

☐ **[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.]**

and so, therefore, unanimously sentence the defendant to death.

_____
Presiding Juror

_____, 19____.

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended L. 1994, ch. 252, § 4.

The applicable bracketed clauses should be included in the verdict form.

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A-1 that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

68.15 MURDER IN THE FIRST DEGREE - PREMEDITATED MURDER AND FELONY MURDER IN THE ALTERNATIVE - VERDICT INSTRUCTION

The defendant is charged with one offense of murder in the first degree. This verdict instruction will guide you on the verdicts you shall consider.

You may find the defendant guilty of murder in the first degree; or murder in the second degree; or voluntary manslaughter; or involuntary manslaughter; or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only. Your Presiding Juror will sign the verdict form upon which you agree. The other verdict forms are to be left unsigned.

First, you shall consider whether the defendant is guilty of murder in the first degree. If you find defendant is guilty of murder in the first degree, the Presiding Juror shall sign the applicable verdict form and, in addition, you shall then determine the alternative theory or theories contained in "Theory 1(a)", "Theory 1(b)", or "Theory 1(c)". The Presiding Juror shall sign the applicable alternative theory verdict form(s).

Second, if you do not find the defendant guilty of murder in the first degree, you should then consider the lesser offense of murder in the second degree as defined in Instruction No. _____.

Third, in considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter as defined in Instruction No. _____.

Fourth, if you do not find the defendant guilty of voluntary manslaughter, you should then consider the lesser offense of involuntary manslaughter as defined in Instruction No. _____.

Fifth, if you do not find the defendant guilty of involuntary manslaughter, you shall find defendant not guilty.

Notes on Use

For authority, see *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976). The pattern should be given along with PIK 3d 68.16, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder.

The instruction should be used instead of an instruction under PIK 3d 68.07, Multiple Counts - Verdict Instruction and PIK 3d 68.08, Multiple Counts - Verdict Forms. In addition, the applicable lesser included offenses should be selected.

Comment

The basic purpose of the felony murder rule is to relieve the State of the burden of proving premeditation and malice when the death of the victim is caused by the defendant in the commission of a felony. *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

As felony murder is a method of proof to support a verdict of first degree murder, the Court in *Wilson*, held that when an accused is charged in one count of an information with both premeditated murder and felony murder it ". . . matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose. In such case the verdict is unanimous and guilty of murder in the first degree has been satisfactorily established. If a verdict of first degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another." *State v. Wilson*, 220 Kan. at 345.

The holding in *Wilson* has consistently been followed by the Supreme Court. See *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991); *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Wise*, 237 Kan. 117, 697 P.2d 1295 (1985); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

The enactment of the mandatory minimum 40 year sentence in premeditated murder, effective July 1, 1990, requires, however, an instruction to determine whether the jury unanimously found the defendant guilty of premeditated murder. See K.S.A. 21-4624. The purpose of this pattern and PIK 3d 68.16, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, is to provide a verdict form for the jury to determine whether the defendant is guilty of first degree murder under the alternative theories of

premeditated murder or felony murder. As to a charge of first degree murder committed on or after July 1, 1990, and prior to July 1, 1994, if the jury finds unanimously that the defendant is guilty of premeditated murder, the State having been given the required notice, the matter proceeds to a sentencing hearing before the trial jury to determine whether the mandatory minimum sentence of 40 years should be imposed. On the other hand, if the jury unanimously finds the defendant guilty of murder in the first degree from a combination of premeditated murder and felony murder, the matter does not proceed to the "Hard 40" sentencing hearing.

With the enactment of the crime of capital murder (L. 1994, ch. 252, § 1), the legislature eliminated the procedure for a jury determination of application of the minimum 40-year sentence upon findings of aggravating and mitigating factors. That procedure is now used in cases of capital murder if the death sentence is requested. K.S.A. 21-4622 to 21-4624, as amended L. 1994, ch 252, § 4. If the defendant is convicted of first degree murder, rather than capital murder, upon a finding of premeditation, the court may impose the mandatory minimum 40-year sentence. L. 1994, ch. 252, § 10. The finding of premeditation remains a jury function, and the foregoing instruction must be given where the State introduces evidence upon theories of premeditation and felony murder.

68.16 MURDER IN THE FIRST DEGREE - PREMEDITATED MURDER AND FELONY MURDER IN THE ALTERNATIVE - VERDICT FORM

VERDICT FORM

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

_____
Presiding Juror

Theory 1(a) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of premeditated murder.

_____
Presiding Juror

Theory 1(b) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of felony murder.

_____
Presiding Juror

Theory 1(c) We, the jury, unable to agree under Theory 1(a) or 1(b), do unanimously find the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder.

Presiding Juror

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

Presiding Juror

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

Presiding Juror

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

Presiding Juror

5. We, the jury, unanimously find the defendant not guilty.

Presiding Juror

Notes on Use

For authority, see *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

The instruction should be given with PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

The prosecuting attorney may only then ask for the "Hard 40" under the provisions of K.S.A. 21-4624, if the jury returns a unanimous verdict of guilty of first degree murder under the theory of premeditated murder. As to the crime of murder in the first degree committed on or after July 1, 1994, there is no procedure for a separate sentencing hearing to determine if the defendant should be required to serve a mandatory minimum term of imprisonment of 40 years. The Court may impose the mandatory minimum 40-year sentence upon a finding of premeditation, so, as explained in the Comment to PIK 3d 68.15, this verdict form will continue to be used where the State introduces evidence on the theories of premeditation and felony murder.

If the evidence of the underlying felony for felony murder is weak or if there is evidence to support the lesser included offenses, the applicable lesser offenses should be submitted to the jury.

Comment

See Comment to PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

68.17 CAPITAL MURDER - SENTENCE OF DEATH - VERDICT FORM FOR SENTENCE AS PROVIDED BY LAW

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously determined that a sentence as provided by law be imposed by the Court.

_____
Presiding Juror

_____, 19____.

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended by L. 1994, ch. 252, § 4. If the jury does not reach a verdict of a recommendation of death upon conviction of capital murder, the court *may* sentence the defendant to the mandatory minimum 40-year term. L. 1994, ch. 252, § 10.

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CHAPTER 70.00

SELECTED MISDEMEANORS

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

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

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

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

(The phrase "under the influence of alcohol" or "under the influence of a drug" means that the defendant's control of [his][her] mental or physical function was impaired to a degree that [he][she] was incapable of safely driving a vehicle.)

Notes on Use

For authority, see K.S.A. 8-1567(a)(3) and K.S.A. 8-1005. If the evidence is limited to either alcohol, a drug, a combination of drugs or a combination of alcohol and any drugs, reference to the inapplicable category or categories should be deleted from the instruction.

For the definition of attempt, see PIK 3d 55.01.

Comment

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

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

The word "operate" as used in K.S.A. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle

while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980).

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

The phrase "driving under the influence" is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984).

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

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 201, 737 P.2d 880 (1987).

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

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

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

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

70.01-A TRAFFIC OFFENSE - ALCOHOL CONCENTRATION .08 OR MORE

The defendant is charged with the crime of operating or attempting to operate a vehicle while the alcohol concentration in (his)(her) blood or breath is .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]. The defendant pleads not guilty.

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

1. **That the defendant drove or attempted to drive a vehicle;**
2. **That the defendant, while driving had an alcohol concentration in (his)(her) blood or breath of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

The phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

Notes on Use

For authority, see K.S.A. 8-1567(a)(1) and (a)(2) and K.S.A. 8-1005 which were amended in 1993 to change .10 to .08.

Comment

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

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. 838 (1987).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993).

70.03 TRANSPORTING AN ALCOHOLIC BEVERAGE IN AN OPENED CONTAINER

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

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

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

Notes on Use

For authority, see K.S.A. 41-804. The 1994 amendment broadened the application of the statute to cover any cereal malt beverage. A person convicted of this offense shall be punished by a fine of not more than $200, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition to fine and/or imprisonment, the Court must suspend the defendant's driving privileges. K.S.A. 41-804(g).

Alcoholic beverage is defined in K.S.A. 41-804(a) to mean any alcoholic liquor, as defined by K.S.A. 41-102 or any cereal malt beverage, as defined in K.S.A. 41-2701.

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

Comment

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

reason to know that an opened container is in the vehicle.

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

In *State v. Bishop*, 14 Kan. App. 2d 223, 227, 786 P.2d 1152 (1990), it was held that transporting open containers of alcoholic liquor in violation of K.S.A. 41-804 applies to passengers as well as drivers. It further held that to sustain a conviction of transporting an open container, the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported, and that the doctrine of constructive possession does not extend to unknowing passengers who are accused of transporting an open container.

70.08 IGNITION INTERLOCK DEVICE VIOLATION

The defendant is charged with the crime of an ignition interlock device violation. The defendant pleads not guilty.

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

1. [That the defendant tampered with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative;]
   or
   [That the defendant requested or solicited _____ to blow into an ignition interlock device, or to start a motor vehicle equipped with such a device, for the purpose of providing an operable motor vehicle to _____, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device;]
   or
   [That the defendant blew into or started a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to _____, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device;]
   or
   [That the defendant operated a motor vehicle not equipped with an ignition interlock device during a period in which (his)(her) driving privileges were restricted to driving a motor vehicle equipped with such a device;]
2. That the defendant did so intentionally;
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Ignition interlock device means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such a person has consumed an alcoholic beverage.

Notes on Use

For authority, see K.S.A. 8-1017. Violation of this section is a class A, nonperson misdemeanor.

Ignition interlock device is defined in K.S.A. 1994 Supp. 8-1013(d). See also, K.S.A. 1994 Supp. 8-1015 which sets forth the authorized restrictions of driving privileges and how they are imposed.

PIK CRIMINAL INDEX