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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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

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

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

Notes on Use

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

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

Notice might be given in this way:

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

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

Comment

The Committee recommends that the above basic instructions be given to the jury before the introduction of evidence, so that the jury will have a better understanding of its function.

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 because 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 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.

51.11 CAMERAS IN THE COURTROOM

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

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

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

Comment

See Kansas Supreme Court Rule 1001.

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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 required to be proved 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 required to be proved 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 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". See *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994) and *State v. McCloud*, 257 Kan. 1, 891 P.2d 324 (1995).

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).

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 therein.

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 Committee's recommendation that no separate instruction on reasonable doubt be given 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); *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994); and *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995).

52.05 STIPULATIONS AND ADMISSIONS

The following facts have been agreed to by the parties and are to be considered by you as true:

(1) _____.

(2) _____.

(3) _____.

Comment

K.S.A. 22-3217 provides for pretrial conferences in criminal matters. The statutory tools for disclosures and admissions in the criminal procedural code are as follows:

K.S.A. 22-3211, Depositions.

K.S.A. 22-3212, Discovery and inspection.

K.S.A. 22-3213, Production of statements and reports.

State v. Trotter, 245 Kan. 657, 667, 783 P.2d 1271 (1989), held it was not prejudicial error to fail to give this instruction after introduction of a stipulation since the stipulation was made during jury trial rather than at a pretrial.

52.06 PROOF OF OTHER CRIME - LIMITED ADMISSIBILITY OF EVIDENCE

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

Notes on Use

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

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

For recent cases approving admission of evidence of earlier wrongful acts, see: *State v. Jones*, 247 Kan. 537, 546, 793 P.2d 748 (1990), relationship of the parties and continuing course of action; *State v. Hall*, 246 Kan. 728, 740, 793 P.2d 737 (1990), failure to give this instruction at the time the evidence was admitted was permissible at trial court discretion; *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990), general tests for admissibility of other-crimes evidence. Admissibility tests are examined in *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992).

Comment

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

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977); *State v. Cross*, 216 Kan. 511, 517, 532 P.2d 1357 (1975); *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). The same evidentiary question exists in civil actions. Since the principal focus of most civil actions is not the plaintiff's or defendant's

commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

The reluctance of the judiciary to allow the wholesale admission of other-crimes evidence is based upon a recognition that when evidence is introduced to show that a defendant committed a crime on a previous occasion, an inference arises that the defendant has a disposition to commit crime and, therefore, committed the crime with which the defendant has been charged. Advisory Committee [on the Revised Code of Civil Procedure], *Kansas Judicial Council Bulletin*, Special Report, November 1961, pp.129-130. While the evidence of other crimes may have some probative value, the courts are properly reluctant to admit evidence that may incite undue prejudice and permit the introduction of pointless collateral issues. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 416 (1972). The commentary in Vernon's Kansas Code of Civil Procedure § 60-455 (1965), which was noted by the Court in *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397 (1974), suggests that there are at least three types of prejudice that might result from the use of other crimes as evidence:

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

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

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

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

commit crimes, reads as follows:

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

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

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

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

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

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

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

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

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

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

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

(1) *Motive.* Motive may be defined as the cause or reason which induces action. While evidence of other crimes or civil wrongs may occasionally prove

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

In *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992), "motive" is defined as the moving power that impels one to action for a definite result. Motive is that which incites or stimulates a person to do an action.

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

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

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

Where criminal intent is obviously proved by the mere commission of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it was error to admit. *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

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

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

(5) *Plan.* Plan refers to the antecedent mental condition that points to the commission of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Admission of evidence under K.S.A. 60-455 to show plan has been upheld under at least two theories. "In one the evidence, though unrelated to the crime charged, is admitted to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes. . . . The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts. In such cases the evidence is admissible to show the plan or method of operation and the conduct utilized by the defendant to accomplish the crimes or acts. (citations omitted). . . . Another line of cases has held evidence of prior crimes or acts is admissible to show plan where there is some direct or causal connection between the prior conduct and the crimes charged (citations omitted)." *State v. Damewood*, 245 Kan. 676, 681-83, 783 P.2d 1249 (1989).

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

(7) *Identity.* Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness *is* important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also, *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

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

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

D. *Limiting Jury Instruction Required.* In *every* case where evidence of other crimes is admitted solely under the authority of K.S.A. 60-455, the trial court must give an instruction (PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence) limiting the purpose for which evidence of similar offenses is to be considered by the jury. *State v. Bly*, 215 Kan. at 176. The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. An instruction concerning the purpose of evidence of other offenses should include only those factors of K.S.A. 60-455 that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. at 176.

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

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

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

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

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

* *Prior or Subsequent Crime.* Evidence of either prior or subsequent crimes may be introduced pursuant to K.S.A. 60-455 if the other requirements

of admission are met. *State v. Carter*, 220 Kan. 16, 23, 551 P.2d 851 (1976); *State v. Bly*, 215 Kan. at 176-177; *State v. Morgan*, 207 Kan. 581, 582, 485 P.2d 1371 (1971).

* *Remoteness in Time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also, *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction); *State v. Fannan*, 167 Kan. 723, 207 P.2d 1176 (1949) (proper admission of 17-year-old conviction); *State v. Owen*, 162 Kan. 255, 176 P.2d 564 (1947) (28-year-old conviction excluded for lack of probative value).

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

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

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

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

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

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

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

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

(a) *Evidence of Specific Instances of Bad Conduct.* K.S.A. 60-447 allows evidence of specific instances of conduct to prove a trait to be bad only if the conduct resulted in a conviction.

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

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

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

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

State v. Ferris, 222 Kan. 515, 516-517, 565 P.2d 275 (1977); *State v. Davis*, 256 Kan. 1, 21, 883 P.2d 735 (1994).

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455 if the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. *State v. Wood*, 230 Kan. 477, 638 P.2d 938 (1982); *State v. Crossman*, 229 Kan. 384, 624 P.2d 461 (1981); *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

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

(6) *Admissible Evidence of the Crime Charged which Discloses Other Crimes.* Evidence tending directly to establish the crime charged is not rendered inadmissible because it discloses the commission of another and separate offense. Testimony about other crimes may be admissible as a part of the background and circumstances when the defendant made damaging admissions which connected him with the crime charged. *State v. Schlicher*, 230 Kan. 482, 639 P.2d 467 (1982); *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980), reaffirming *State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976).

(7) *Rebuttal of Credibility Evidence.* After the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior crimes for the purpose of impeaching the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a *conviction* of a crime involving *dishonesty* or *false statement.* The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Trucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors.

Trucker v. Lower, 200 Kan. at 5. See also, *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976).

(8) *Other Crimes of a Witness Other Than a Defendant.* K.S.A. 60-455 does not apply to a witness in a criminal case other than the accused, and evidence that such a witness may have committed a crime or civil wrong may not be introduced thereunder. Evidence of prior criminal convictions of a witness is subject to the restrictions found in K.S.A. 60-421 where the credibility of a witness can only be impeached by crimes involving dishonesty unless that witness has introduced evidence solely for the purpose of supporting his or her credibility. *State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980).

(9) *Rebuttal of Entrapment Defense.* If the defendant introduces evidence to establish the defense of entrapment (K.S.A. 21-3210), the State may introduce relevant evidence of the defendant's prior disposition to commit such crimes. *State v. Amodei*, 222 Kan. 140, 142-143, 563 P.2d 440 (1977); *State v. Reichenberger*, 209 Kan. 210, 495 P.2d 919 (1972). See also, Note, *Criminal Law: Kansas' Statutory Entrapment Defense in Narcotic Sales Cases*, 12 Washburn L. J. 231 (1973); Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 Washburn L. J. 64 (1972).

(10) *Rebuttal of Specific Statement.* The State may introduce evidence of other crimes to specifically rebut the incorrect testimony of a witness tending to establish a defense. *State v. Burnett*, 221 Kan. 40, 42-43, 558 P.2d 1087 (1976); *State v. Faulkner*, 220 Kan. at 158-159. The use and extent of rebuttal rests in the sound discretion of the trial court. *State v. Burnett*, 221 Kan. at 43.

IV. CONCLUSIONS AND RECOMMENDATIONS

The trial court should use great caution in admitting evidence of other crimes. There will be a great temptation by prosecutors to introduce prior-crimes evidence to secure convictions. The trial court must be aware of the high degree of prejudice inherent in any evidence of other crimes. This prejudice must be weighed against the probative value of the evidence. Where the evidence is offered pursuant to K.S.A. 60-455, the other parts of the three-part test must be applied. In addition, other-crimes evidence should not be admitted where the other evidence of guilt is overwhelming and the prior-crimes evidence would serve only as an overkill mechanism.

52.07 MORE THAN ONE DEFENDANT - LIMITED ADMISSIBILITY OF EVIDENCE

You should give separate consideration to each defendant. Each is entitled to have (his)(her) case decided on the evidence and the law which is applicable to (him)(her).

Any evidence which was limited to (name specific defendant) should not be considered by you as to any other defendant.

Notes on Use

This instruction should be given only when there is more than one defendant. See K.S.A. 22-3204, Joinder of defendants; separate trials.

Comment

In *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975), this instruction was approved as appropriate to give in a case of multiple defendants charged in the same information.

52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

A. The defendant raises (describe the defense claimed) as a defense. 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.

OR

B. The defendant raises (describe the defense claimed) as a defense. Unless the government disproves this defense beyond a reasonable doubt, (describe the defense claimed) will provide a defense to the crime charged.

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 - Defenses
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

Comment

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).

In *State v. Crabtree*, 248 Kan. 33, 40, 805 P.2d 1 (1991), the Court reaffirmed that "P.I.K. Crim. {3d} 52.08 should be given whenever an affirmative defense is asserted in a criminal case." However, the Court went on to hold that if other instructions such as P.I.K. 52.02 are given and these instructions make it clear that the burden of proof is on the State, then the failure to give 52.08 is not clearly erroneous.

52.09 CREDIBILITY OF WITNESSES

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

Notes on Use

This instruction should be given in every criminal case. See K.S.A. 22-3415, Laws applicable to witnesses. See K.S.A. 60-417, Disqualification of witness; interpreters. See also, K.S.A. 60-419, 420, 421 and 422 covering necessity of knowledge or experience on the part of a witness, evidence relating to credibility, limitation on evidence of conviction of crimes, and other limitations on admissibility of evidence affecting credibility.

The Committee recommends that this instruction be given without any expansion. While not clearly erroneous, expansion of this instruction generally is not approved. *State v. Hunt*, 257 Kan. 388, 849 P.2d 178 (1995). Where objection to expanding the instruction was made in *State v. DeVries*, 13 Kan. App. 2d 609, 617-19, 780 P.2d 1118 (1989), the expansion was held to be reversible error. See also, *State v. Hartfield*, 245 Kan. 431, 449, 781 P.2d 1050 (1989), where objection was made to expanding this instruction by adding the "false in one thing, false in all" concept. While such expansion was noted as less preferable than using this instruction, it was held not to be reversible error because of the particular circumstances existing in the case.

Comment

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

See also, *State v. Pioletti*, 246 Kan. 49, 58, 785 P.2d 963 (1990), *State v. Land*, 14 Kan. App. 2d 515, 519, 794 P.2d 668 (1990).

52.10 DEFENDANT AS A WITNESS

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

Comment

If the defendant testifies, his or her testimony, like that of any other witness, should be considered as set forth in PIK 3d 52.09, Credibility of Witnesses.

See PIK 3d 52.13, Defendant's Failure to Testify.

See PIK 3d 52.09, Credibility of Witnesses, Notes on Use.

The Supreme Court has noted "the trend to eliminate instructions which focus on the credibility of certain testimony" and the belief of this Committee that such instructions are not justified. *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987). See also, *State v. DeVries*, 13 Kan. App. 2d 609, 618, 780 P.2d 1118 (1989); *State v. Land*, 14 Kan. App. 2d 515, 518, 794 P.2d 668 (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 that a trial court should not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error. See also, *State v. Goseland*, 256 Kan. 729, 887 P.2d 681 (1994) (giving this instruction without a request from the defendant is not clearly erroneous).

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 holdings in *Perry* and *Goseland* are in accordance with *Lakeside*. That does not, however, in any way alter the recommendation of the Committee: Do not give this instruction 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. In *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995), the court found no error in the trial court's refusal to give an expert witness instruction.

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

52.15 IMPEACHMENT

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

Comment

The Committee believes that the standard instruction in PIK 3d 52.09, Credibility of Witnesses, provides adequate jury guides.

See PIK 2d 2.30, Impeachment.

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

52.16 CIRCUMSTANTIAL EVIDENCE

The Committee recommends that there be no separate instruction given as to circumstantial evidence.

Comment

In *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 728 (1974), the Supreme Court held that an instruction on circumstantial evidence is unnecessary when a proper instruction on "reasonable doubt" is given. The Court went on to overrule all previous decisions which required such an instruction.

To give this type of instruction, however, was held to not constitute reversible error in *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

In *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), the Supreme Court affirmed defendant's conviction although he requested this type instruction and the request was refused. The opinion notes the recommendation of the Committee. See also, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).

52.17 CONFESSION

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

Comment

State v. Stephenson, 217 Kan. 169, 535 P.2d 940 (1975); *State v. Hardwick*, 220 Kan. 572, 552 P.2d 987 (1976), held that it was not necessary to give an instruction relating to a confession. The Committee's recommendation is noted with apparent approval in *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), and with specific approval in *State v. Mason*, 238 Kan. 129, 133, 708 P.2d 963 (1985).

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

52.18 TESTIMONY OF AN ACCOMPLICE

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

Comment

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

Whether a cautionary instruction relating to the testimony of an accomplice is required depends upon several factors including whether the testimony is corroborated and whether such an instruction is requested by the defendant.

Older case law indicated that there was no duty to give a cautionary instruction if there was no request for such an instruction, even though the testimony of the accomplice was uncorroborated and was sufficient to convict. *State v. Stiff*, 148 Kan. 224, 80 P.2d 1089 (1938). However, in *State v. Moore*, 229 Kan. 73, 80, 622 P.2d 631 (1981), the Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be in error. Whether the error is prejudicial and reversible, however, must be determined upon the facts of the individual case."

Where a defendant does not request a cautionary instruction on accomplice testimony, the failure of the court to give such an instruction will not be disturbed unless it is clearly erroneous. *State v. Thomas*, 252 Kan. 564, 847 P.2d 1219 (1993). A jury instruction is clearly erroneous only if there is a real possibility that the jury would have reached a different verdict absent the error. *State v. Deavers*, 252 Kan. 149, 164-65, 843 P.2d 695 (1992).

If the accomplice testimony is fully corroborated, and there is a request for a cautionary instruction, the failure to give such an instruction is not reversible error. *State v. Wood*, 196 Kan. 599, 413 P.2d 90 (1966).

If the accomplice testimony is partially corroborated, and there is a request for a cautionary instruction, failure to give such an instruction is error, but may or may not be reversible error depending upon what other cautionary instructions were given. *State v. Moody*, 223 Kan. 699, 576 P.2d 637 (1978). See also, *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Ferguson*, 228 Kan. 522, 618 P.2d 1186 (1980).

"A party may not assign as error the giving or failure to give an instruction unless he objects to the instruction stating the specific grounds for the objection.

Absent such objection, an appellate court may reverse only if the trial court's failure to give [or the giving of] the instruction was clearly erroneous. The failure to give [or the giving of] an instruction is clearly erroneous only if the reviewing court reaches a firm conviction that if the trial error had not occurred there was a real possibility the jury would have returned a different verdict." *State v. DeMoss*, 244 Kan. 387, 391-92, 770 P.2d 441 (1989).

It is clearly erroneous to give an accomplice instruction when the accomplice is also a co-defendant, and the instruction is not neutral or singles out the accomplice co-defendant. *State v. Land*, 14 Kan. App. 2d 515, 794 P.2d 668 (1990) (no objection made to the instruction).

52.18-A TESTIMONY OF AN INFORMANT - FOR BENEFITS

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

Notes on Use

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

Ordinarily, it is error to refuse to give a cautionary instruction on the testimony of a paid informant or agent where such testimony is substantially uncorroborated and is the main basis for defendant's conviction. Where, however, no such instruction is requested nor objection made to the court's instructions, and such testimony is substantially corroborated, the absence of a cautionary instruction is not error and is not grounds for reversal of the conviction.

The cautionary instruction for paid informants is not necessary where the informant is a Drug Enforcement Agency agent on special assignment and paid a salary because the agent is not a "paid informant whose remuneration was tied to the sale of specific information, nor was he a participant in the crime with a promise of immunity." *State v. Gumbrel*, 20 Kan. App. 2d 944, 894 P.2d 235 (1995).

52.19 ALIBI

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

Notes on Use

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

Comment

The Committee's recommendation is approved in *State v. Skinner*, 210 Kan. 354, 359, 503 P.2d 168 (1972); *State v. Murray*, 210 Kan. 748, 749, 504 P.2d 247 (1972); and *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

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

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

52.20 EYEWITNESS IDENTIFICATION

The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he)(she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you first should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

1. **The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;**
2. **The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;**
3. **Whether the witness had observed the defendant(s) on earlier occasions;**
4. **Whether a significant amount of time elapsed between the crime charged and any later identification;**
5. **Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification;**
6. **The degree of certainty demonstrated by the witness at the time of any identification of the accused; and**
7. **Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.**

Notes on Use

This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. The judge should omit from the instruction any factors that clearly do not relate to evidence introduced at trial.

This instruction was approved in *State v. Willis*, 240 Kan. 580, Syl. ¶ 2, 731 P.2d 287 (1987).

Comment

The appropriateness of this type of instruction was indicated by our Supreme Court in *Haines v. Goodlander*, 73 Kan. 183, 84 Pac. 986 (1906). In *Haines*, the Court stated that to comment by way of indicating to a jury the weight to give particular evidence would not be allowable, but "[Y]et there is no reason why the court should not in some cases refer to particular parts of the evidence and advise the jury as to the rules of law applicable to such facts." 73 Kan. at 190-191.

State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981), sets forth "rules of law applicable to" facts attending eyewitness identifications. If "eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony." 230 Kan. at 397.

52.21 CHILD'S HEARSAY EVIDENCE

It is for you to determine what weight and credit to give the statement claimed to have been made by (the child). You should consider (his)(her) age and maturity, the nature of the statement, the circumstances existing when it was claimed to have been made, any possible threats or promises that may have been made to (him) (her) to obtain the statement, and any other relevant factors.

Notes on Use

For authority, see K.S.A. 60-460(dd) which provides for the admissibility of this type of evidence in (a) a criminal proceeding if the child is a victim of the crime charged, (b) a proceeding to determine if the child is a "child in need of care", or (c) to determine if the child is a "juvenile offender."

Before admitting this type of evidence, the judge must hold a hearing and determine that (a) the child is disqualified or unavailable as a witness, (b) the statement is apparently reliable, and (c) the child was not induced to make the statement(s) falsely by use of threats or promises.

Comment

In some cases, this type of evidence may be admissible without use of this statute. An example would be a "contemporaneous statement" under K.S.A. 60-460(d). See *State v. Rodriquez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983).

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Kansas Supreme Court held that the defendant's Sixth Amendment right to confront and cross-examine witnesses was not compromised by the hearsay statements allowed under K.S.A. 60-460(dd).

In *State v. Clark*, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986), the court held that PIK 52.21 should be given if a child's hearsay statement was admitted pursuant to § 60-460(dd), and that the use of the general instruction on witness credibility (PIK 52.09) was inappropriate.

The hearing to determine unavailability and reliability must be more than a simple statement by counsel. See *In re M.O.*, 13 Kan. App. 2d 381, 383, 770 P.2d 856 (1989).

The 60-460(dd) hearsay exception can also be applied to hearings for the severance of parental rights. See *In re D.V.*, 17 Kan. App. 2d 788, 790, 844 P.2d 752 (1993).

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

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. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983); and *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 *City of Overland Park v. McBride*, 253 Kan. 774, 861 P.2d 1323 (1993); *State v. Graham*, 244 Kan. 194, 768 P.2d 259 (1989); *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987); *State v. Flinchpaugh*, 232 Kan. 831, 833, 659 P.2d 208 (1983); *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977); *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976); and *State v. Neal*, 215 Kan. 737, 529 P.2d 114 (1974). 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

54.01 PRESUMPTION OF INTENT

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

Notes on Use

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

This instruction must not be confused with PIK 3d 54.01-A, General Criminal Intent. The above instruction is a rule of evidence and does not deal with the required element of criminal intent necessary for conviction in those cases where criminal intent is a necessary element of the offense. *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973).

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

Comment

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

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

This instruction has been approved in *State v. McDaniel & Owens*, 228 Kan. 172, 180, 612 P.2d 1231 (1980); *State v. Costa*, 228 Kan. 308, 320, 613 P.2d 1359 (1980); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 306, 624 P.2d 964 (1981); *State v. Beebe*, 244 Kan. 48, 58, 766 P.2d 158 (1988). It also has been thoroughly discussed in *State v. Mason*, 238 Kan. 129, 708 P.2d 963 (1985); *State v. Ransom*, 239 Kan. 594, 605, 722 P.2d 540 (1986); and in *State v. Stone*, 253 Kan. 105, 853 P.2d 662 (1993).

54.01-A GENERAL CRIMINAL INTENT

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

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

Notes on Use

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

The above instruction should not be given where intentional conduct is not a necessary element of the offense, as set out in K.S.A. 21-3201(c), reckless conduct; 21-3204, absolute liability for misdemeanor or traffic infraction; and 21-3405, vehicular homicide.

This instruction must not be confused with PIK 3d 54.01, Presumption of Intent, which is a rule of evidence and does not purport to charge the jury to find criminal intent necessary for conviction.

Comment

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

54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE

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

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

(b) That person fails to return personal property within seven days after receiving a (registered) (certified) letter giving notice that the property had not been returned within 10 days of the time required by the lease or rental agreement;
or

(c) That person destroys, breaks or opens a lock, chain, key switch, enclosure, or other device used to secure the property in order to obtain control over the property;
or

(d) That person destroys or substantially damages or alters the property so as to make the property unusable or unrecognizable in order to obtain control over the property;
or

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

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

(Notice will be presumed to have been given three days following deposit of the notice as registered or certified matter in the U.S. mail, addressed to the person who has

[leased or rented the property] [borrowed the book(s) or other material from a library] as the address appears in the information supplied by the person at the time of the [leasing or renting] [borrowing] or at [his][her] last known address.)

Notes on Use

For authority, see K.S.A. 21-3702(a)(1) on false identification; (a)(2) on failure to return leased or rented property; (a)(3) on destroying locks and other securing devices; (a)(4) on destroying the property taken; and (b) on failure to return book(s) or other material from a library. "Notice" is defined in 21-3702(c). See PIK 3d Chapter 59.00, Crimes Against Property, for the use of this instruction. Paragraph (c) of the instruction is to be used only for prosecution of a misdemeanor under K.S.A. 21-3701 where the object of the alleged theft is a book or other material borrowed from a library.

Comment

State v. Smith, 223 Kan. 192, 573 P.2d 985 (1977), upheld the constitutionality of a statutory presumption where it is rebuttable and governs only the burden of going forward with the evidence, not the ultimate burden of proof. The Court stated: ". . . the use of a presumption to establish prima facie evidence does not destroy a defendant's presumption of innocence, nor does it invade the province of the jury as fact finders." It does require the defendant to go forward with evidence to rebut the presumption. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976). See Comment to PIK 3d 54.01, Presumption of Intent, on the matter of shifting the burden on the defendant to produce evidence.

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

54.02 CRIMINAL INTENT - IGNORANCE OF STATUTE OR AGE OF MINOR IS NOT A DEFENSE

It is not a defense that the accused did not have knowledge of (the existence or constitutionality of or the scope or meaning of the terms used in the statute under which the accused is prosecuted) (the age of a minor, even though age is a material element of the crime with which [he][she] is charged).

Notes on Use

For authority, see K.S.A. 21-3202.

54.10 MENTAL DISEASE OR DEFECT (For Crimes Committed Prior To January 1, 1996)

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

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

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

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

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

Notes on Use

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

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

Comment

For authority, see *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960), in which the M'Naghten rule is discussed and applied. In *State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), the Court reaffirmed the M'Naghten test, saying ". . . no other test better protects society as well as serves its needs." (pp. 211-219)

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

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

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

Nonexpert witnesses who are shown to have had special opportunities to observe the defendant may give opinion evidence as to sanity. *State v. Shultz*, 225 Kan. 135, 587 P.2d 901 (1978).

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

An insane person cannot be required to plead to a criminal charge and cannot be tried. *State v. English*, 198 Kan. 196, 424 P.2d 601 (1967). The test of responsibility for crime differs from that of mental competency to stand trial. These tests are stated and distinguished in *Van Dusen v. State*, 197 Kan. 718, 421 P.2d 197 (1966). See also, *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970). For procedure, see K.S.A. 22-3302. For verdict form, see PIK 3d 68.06, Not Guilty Because of Insanity.

54.10 MENTAL DISEASE OR DEFECT (For Crimes Committed January 1, 1996 Or Thereafter)

The defendant has denied criminal responsibility because of a mental disease or defect at the time the alleged offense of _____ was committed. You are instructed the defendant is not criminally responsible for (his)(her) acts if because of mental disease or defect the defendant lacked the necessary mental state (set out the particular mental state which is an element of the crime charged).

Notes on Use

For authority, see K.S.A. 22-3219. This statute was amended so that, effective January 1, 1996, the term "insanity" has been replaced by "mental disease or defect."

This instruction should be given where the defense of mental disease or defect is asserted and evidence has been introduced in support of such claim.

See K.S.A. 22-3219 for the requirement that defendant serve notice of intent to assert defense of mental disease or defect.

54.10-A INSANITY - COMMITMENT

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

Notes on Use

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

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

Comment

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

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

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

54.12 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, 883 P.2d 1144 (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).

"The distinction between a general intent crime and a crime of specific intent is whether, in addition to the intent required by K.S.A. 21-3201, the statute defining the crime in question identifies or requires a further particular intent which must accompany the prohibited acts." *State v. Bruce*, 255 Kan. 388, 394, 874 P.2d 1165 (1994).

"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, 883 P.2d 1144 (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, 883 P.2d 1144 (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."

54.13 COMPULSION

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

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

Notes on Use

For authority, see K.S.A. 21-3209. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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

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

Comment

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

The Committee is of the opinion that the same rationale the Court applied in *Hundley* applies in compulsion cases.

In *State v. Crawford*, 253 Kan. 629, 861 P.2d 791 (1993), the Supreme Court held that the district court did not err by adding the following language to the

instruction: "A threat of future injury is not enough, particularly after danger from the threat has passed."

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

A person charged with escape from lawful custody may not claim the defense of compulsion unless the following conditions exist: (1) The prisoner is faced with a threat of imminent infliction of death or great bodily harm; (2) there is no time for complaint to the authorities or there exists a history of futile complaints which makes any result from such complaints illusory; (3) there is not time or opportunity to resort to the courts; (4) there is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992). The Court noted that the fifth condition should refer to "imminent threat", rather than "immediate threat", to conform to the statutory language. 250 Kan. at 309.

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

54.16 RESTITUTION

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

Comment

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

54.17 USE OF FORCE IN DEFENSE OF A PERSON

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

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

Notes on Use

For authority, see K.S.A. 21-3211 and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." See also, *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

The existence of the battered woman syndrome in and of itself does not operate as a defense to murder. In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. *State v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988).

In *State v. Scobee*, 242 Kan. 421, 428, 748 P.2d 862 (1988), the Court held that Kansas does not impose a duty to retreat on a person acting in self-defense.

Under proper circumstances the instruction should be modified to so provide. In *State v. Ricks*, 257 Kan. 435, 894 P.2d 191 (1995), the court commented that the "no duty to retreat" instruction will be required only in infrequent situations such as where a nonaggressor defendant is followed to and menaced on home ground.

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

54.18 USE OF FORCE IN DEFENSE OF A DWELLING

The defendant has claimed (his)(her) conduct was justified as a lawful defense of (his)(her) dwelling.

A person is justified in the use of force to the extent it appears to the person and the person reasonably believes that such conduct is necessary to prevent another from unlawfully (entering into) (remaining in) (damaging) that person's dwelling. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority, see K.S.A. 21-3212. The applicable parenthetical phrase or phrases should be selected. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

See *State v. Countryman*, 57 Kan. 815, 827, 48 Pac. 137 (1897); *State v. Farley*, 225 Kan. 127, 133-34, 587 P.2d 337 (1978). See also, Comment to PIK 3d 54.17, Use of Force in Defense of a Person, and cases cited.

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. Collins*, 257 Kan. 408, 893 P.2d 217 (1995); *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994); *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.

In order to convict a defendant of an attempt to commit a crime, the State must show the commission of an overt act plus the actual intent to commit that particular crime. See *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985). One cannot intend to commit an accidental, negligent, or reckless homicide. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Following the premise that one cannot intend to commit an unintentional act, Kansas does not recognize an attempt to commit involuntary manslaughter. *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995). For a discussion of whether Kansas recognizes an attempted assault, see *State v. Martinez*, 20 Kan. App. 2d 824, 893 P.2d 267 (1995).

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.

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. See also, *State v. William*, 248 Kan. 389, 807 P.2d 1292 (1991); *State v. DeHerrara*, 251 Kan. 143, 834 P.2d 918 (1992).

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

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 *State v. Johnson*, 253 Kan. 356, 856 P.2d 134 (1993).

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: _____)(set forth 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.

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) (in 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.

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 instructive 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;

56.02 MURDER IN THE FIRST DEGREE - FELONY MURDER

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

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

1. That the defendant killed _____;

2. That such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) _____; and

3. 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. 21-3401. Felony murder is an off-grid person felony.

In addition to this instruction, the elements of the underlying inherently dangerous felony should be set out. Effective July 1, 1993, an "inherently dangerous felony" is defined to include murder in the first degree under K.S.A. 21-3401(a), murder in the second degree under K.S.A. 21-3402(a), voluntary manslaughter under K.S.A. 21-3403(a), kidnapping, aggravated kidnapping, robbery, aggravated robbery, rape, aggravated criminal sodomy, abuse of a child, felony theft under K.S.A. 21-3701(a) or (c), burglary, aggravated burglary, arson, aggravated arson, treason, and any felony offense as provided in K.S.A. 65-4127a, 65-4127b, 65-4159 or 21-4219. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment below for authority to instruct on both theories. The elements of the applicable underlying felony should be set forth either by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

Comment

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

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

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

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

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

Cases defining which crimes are inherently dangerous to human life have been supplanted by K.S.A. 21-3436.

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

In *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994), the court ruled that Kansas does not recognize the crime of attempted felony murder.

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. But see *State v. Carpenter*, 228 Kan. 115, 126, 612 P.2d 163 (1980) (Although premeditation is an element of first-degree murder but not second-degree murder, "it is not incumbent upon the State to disprove premeditation when there is a malicious killing and defendant has only been charged with second-degree murder.") and *State v. Caldwell*, 21 Kan. App. 2d 466, _____ P.2d _____ (1995) (In cases where the defendant is charged with a felony drive-by shooting, the State is not required to present proof that the victim was not placed in immediate apprehension of bodily harm.)

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.

56.06 INVOLUNTARY MANSLAUGHTER

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

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

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

1. That the defendant unintentionally killed _____;

2. That it was done:

(a) recklessly;

or

(b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) _____;

or

(c) during the commission of a lawful act in an unlawful manner; 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. 21-3404. Involuntary manslaughter is a severity level 5, person felony.

If the information charges involuntary 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. K.S.A. 21-3404(b) provides that a felony or a misdemeanor can serve as the basis for an involuntary manslaughter charge if the statute was enacted for the protection of

human life or safety and is not an inherently dangerous felony as defined in K.S.A. 21-3436. K.S.A. 8-1566, 8-1567 and 8-1568 are specifically cited as misdemeanors which were enacted for the protection of human life or safety.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.06, Involuntary Manslaughter.

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.

The use of excessive force may be found to be an "unlawful manner" of committing the "lawful act" of self-defense, and thereby supply an element of involuntary manslaughter. *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). *State v. Warren*, 5 Kan. App. 2d 754, 624 P.2d 476, *rev. denied* 229 Kan. 671 (April 29, 1981).

In *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995), the court ruled that Kansas does not recognize the crime of attempted involuntary manslaughter.

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. 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.

When there is an issue as to whether the defendant was "armed with a dangerous weapon" the bracketed definition should be used. *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989). In *Colbert*, the Court held in Syl. ¶ 3: "Whether or not a robber is "armed with a dangerous weapon" for aggravated robbery purposes is determined from the victim's point of view (K.S.A. 21-3427). An object can be a dangerous weapon if intended by the user to convince the victim that it is a dangerous weapon and the victim reasonably believes it is a dangerous weapon. Hence, an unloaded gun or a gun with a defective firing mechanism may be a dangerous weapon within the purview of the aggravated robbery statute."

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.

56.39 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 intentionally, maliciously and repeatedly (followed) (harassed) _____;**
2. **That the defendant made a credible threat against _____ with the intent to place _____ in reasonable fear for (his)(her) safety; and**
3. **That these acts occurred between the _____ day of _____, 19____, and the _____ day of _____, 19____, in _____ County, Kansas.**

[Harassment means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.]

[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, and must actually cause substantial emotional distress to the person.]

[Credible threat means a verbal or written threat or a threat implied by a pattern of conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety.]

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.

This statute was amended by the Legislature in 1994 and 1995. Please consult the 1993 Stalking instruction and the PIK 3d 1994 Supplement for instructions which apply to alleged offenses between July 1, 1993 through June 30, 1994; and July 1, 1994 through June 30, 1995.

The bracketed definitions should be given when harassment is alleged.

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".

56.41 INJURING A PREGNANT WOMAN

The defendant is charged with the crime of injuring a pregnant woman. The defendant pleads not guilty.

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

1. **That _____ was pregnant;**
2. **That she was injured by defendant while defendant was committing the crime of _____;**
3. **That the injury caused her to suffer a miscarriage; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

[Miscarriage means the interruption of the normal development of the fetus, other than by live birth, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.]

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

Notes on Use

For authority, see K.S.A. 21-3440.

Injury to a pregnant woman in the commission of a felony is a severity level 4, person felony. Injury to a pregnant woman in the commission of a violation of K.S.A. 21-3412, and amendments thereto, is a severity level 5, person felony. Injury to a pregnant woman in the commission of a misdemeanor other than a violation of K.S.A. 21-3412, and amendments thereto, is a class A person misdemeanor.

56.42 INJURY TO A PREGNANT WOMAN BY VEHICLE

The defendant is charged with the crime of injuring a pregnant woman by vehicle. The defendant pleads not guilty.

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

1. **That _____ was pregnant;**
2. **That she was injured by defendant while defendant was unlawfully operating a motor vehicle, as follows: _____;**
3. **That the injury caused her to suffer a miscarriage; and**
4. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

[Miscarriage means the interruption of the normal development of the fetus, other than by live birth, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.]

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

Notes on Use

For authority, see K.S.A. 21-3441.

Injury to a pregnant woman by vehicle while committing a violation of K.S.A. 8-1567, and amendments thereto, is a severity level 5, person felony.

Injury to a pregnant woman by vehicle while committing a violation of law related to the operation of a motor vehicle other than K.S.A. 8-1567, and amendments thereto, is a class A person misdemeanor.

CHAPTER 57.00

SEX OFFENSES

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).

Whether a victim is overcome by fear, for purposes of K.S.A. 21-3502(1)(a), is a question to be resolved by the factfinder. The force required to sustain a rape conviction does not require a rape victim to resist the assailant to the point of becoming the victim of a battery or aggravated assault nor does Kansas law require

that a rape victim be physically overcome by force in the form of beating or physical restraint in addition to forced sexual intercourse. See *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

57.01-A RAPE - DEFENSE OF MARRIAGE

It is a defense to the charge of rape of a child under 14 years of age that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3502(b). This instruction should be given only with respect to a prosecution of rape of a child under 14 years of age.

57.02 SEXUAL INTERCOURSE - DEFINITION

Sexual intercourse means any penetration of the female sex organ by (a finger) (the male sex organ) (any object). Any penetration, however slight, is sufficient to constitute sexual intercourse.

(Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of the performance of:

(a) Generally recognized health care practices; or

(b) a body cavity search conducted in accordance with the law.)

Notes on Use

For authority, see K.S.A. 21-3501. This instruction should be given in all rape prosecutions. The applicable parenthetical reference should be selected.

Comment

The Kansas Legislature amended the definition of sexual intercourse in 1983 to include rape by an object or a finger. The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). See also, *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936), and 65 Am. Jur. 2d, Rape, § 3.

The trial court's failure to give a definition of sexual intercourse was not reversible error when no objection was raised at trial and the instruction given was complete. *State v. James*, 217 Kan. 96, 100, 535 P.2d 991 (1975).

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

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

Actual penetration of the vagina or rupturing of the hymen is not required; penetration of the vulva or labia is sufficient to constitute sexual intercourse. *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

Comment

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

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

See also, *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

57.05 INDECENT LIBERTIES WITH A CHILD

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

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

1. **That the defendant submitted to lewd fondling or touching of (his)(her) person by _____, with intent to arouse or to satisfy the sexual desires of either _____ or the defendant, or both;**
   or
   That the defendant fondled or touched the person of _____ in a lewd manner, with intent to arouse or to satisfy the sexual desires of either _____ or the defendant, or both;
   or
   That the defendant solicited _____ to engage in lewd fondling or touching of the person of another with the intent to arouse or to satisfy the sexual desires of _____, the defendant or another;
2. **That _____ was then a child 14 or more years of age but less than 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. 21-3503. If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00.

Indecent liberties with a child is a severity level 5, person felony.

Comment

In 1992, the Legislature amended K.S.A. 21-3503 to remove "sexual intercourse" from the statute. Sexual intercourse with children under 14 years of

57.12-A SEXUAL EXPLOITATION OF A CHILD

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

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (insert name of child) to engage in sexually explicit conduct for the purpose of promoting any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (play) (other live presentation) (photocopy) (video tape) (video laser disk) (computer [hardware] [software]) (floppy disk) (any computer related equipment) (any computer generated image that incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk);

   or

   That the defendant possessed a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (photocopy) (video tape) (video laser disk) (computer [hardware] [software]) (floppy disk) (any computer related equipment) (any computer generated image that incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk) (audio tape recording) in which (insert name of child) is (shown) (heard) engaging in sexually explicit conduct with intent to arouse or to satisfy the sexual desires or appeal to the prurient interest of the offender, (insert name of child) or another;

   or

   That the defendant was a (parent) (guardian) (other person having custody or control of a

child) and knowingly permitted the child to (engage in) (assist another to engage in) sexually explicit conduct for the purpose of: [promoting any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (play) (other live presentation)] [possessing any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (photocopy) (video tape) (video laser disk) (computer [hardware] [software]) (floppy disk) (any computer related equipment) (any computer generated image that that incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk)] with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, (insert name of child) or another;

or

That the defendant promoted any (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (play) (other live presentation), (photocopy) (video tape) (video laser disk) (computer [hardware] [software]) (floppy disk) (any computer related equipment) (any computer generated image that incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk) knowing the character and content of the (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (photocopy) (video tape) (video laser disk) (computer [hardware] [software]) (floppy disk) (any computer related equipment) (any computer generated image that incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk) (play) (other live

presentation) included sexually explicit conduct by (insert name of child);

2. That _____ was then a child under the age of 16 years; and
3. That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.

These definitions apply to this instruction:

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

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

(i) for pecuniary profit;

or

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

c. Performance means any film, photograph, negative, slide, book, magazine or other printed medium, any audio tape recording or photocopy, video tape, video laser disk, computer hardware, software, floppy disk, or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, videotape or video laser disk or any play or other live presentation.

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

Notes on Use

For authority, see K.S.A. 21-3516. In 1995, the Legislature expanded the media that are considered pornographic to include videos, digital images, and computer related items.

Sexual exploitation of a child is a severity level 5, person felony. The applicable parenthetical words under Element No. 1 of the instruction should be selected as well as the applicable bracketed phrases under the definition of "sexually explicit conduct". For a definition of the word "lewd", see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

Comment

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of sexual exploitation of a child. In addition, the provisions of K.S.A. 21-3106(2) provide that the prosecution for the crime of sexual exploitation of a child must be commenced within five years after its commission if the victim is less than 16 years of age.

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57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

The statute upon which this instruction was based (K.S.A. 21-3519) was repealed in 1992. L. 1992, ch. 298. The crime of promoting sexual performance by a minor has been incorporated into the crime of sexual exploitation of a child. See PIK 3d 57.12-A, Sexual Exploitation of a Child.

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 UNLAWFUL SEXUAL RELATIONS WITH INMATES, ETC.

The defendant is charged with the crime of unlawful sexual relations. The defendant pleads not guilty.

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

1. **The defendant engaged in consensual (sexual intercourse) (sodomy) with _____;**
2. **That the defendant and _____ are not married;**

[3. That the defendant is an employee of (the Department of Corrections) (a contractor who is under contract to provide services in a correctional institution);

4. **That _____ is an inmate;] and**

OR

[3. That the defendant is a parole officer;

4. **That _____ has been released on (parole) (conditional release) (post-release supervision) and is under the direct supervision and control of 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. 21-3520. Unlawful sexual relations with inmates, etc. is a severity level 10, person felony.

57.27 - 57.39 RESERVED FOR FUTURE USE.

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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.

On September 11, 1995, the Kansas Supreme Court heard the case *In the Matter of the Care and Treatment of Leroy Hendricks*, S.Ct. Docket No. 73,039. The case challenged the constitutionality of the sexual predator law, but the decision in the case was not available at the time this supplement was drafted.

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

58.01 BIGAMY

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

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

1. **That the defendant entered into a marriage in the State of Kansas while married to another; and**
   or
   That the defendant entered into a marriage in the State of Kansas with a person the defendant knew was the spouse of another; and
   or
   That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse while married to another at the time of the cohabitation; and
   or
   That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse whom the defendant knew was a spouse of another at the time of the cohabitation; and
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3601(a). Bigamy is a severity level 10, nonperson felony.

Comment

Annulment of the second (bigamous) marriage does not bar prosecution for bigamy. *State v. Fitzgerald*, 240 Kan. 187, 726 P.2d 1344 (1986).

58.02 AFFIRMATIVE DEFENSE TO BIGAMY

It is a defense to the charge of bigamy that at the time of the (marriage) (cohabitation) the defendant reasonably believed that the earlier marriage had been dissolved by (death) (divorce) (annulment).

This belief must have been based on circumstances which would have led a reasonable person to conclude that the earlier marriage had been dissolved.

Notes on Use

For authority, see K.S.A. 21-3601(b). This instruction should be given whenever there is evidence that the defendant believed an earlier marriage was dissolved. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

Comment

For discussion of "reasonable belief", see *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

Annulment of the second (bigamous) marriage does not bar prosecution for bigamy. *State v. Fitzgerald*, 240 Kan. 187, 726 P.2d 1344 (1986).

58.03 INCEST

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

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

1. **That the defendant (married) (engaged in sexual intercourse with) (engaged in sodomy with) _____;**
2. **That _____ was a person 18 or more years of age;**
3. **That _____ was known to the defendant to be related to the defendant as biological (parent) (child) (grandparent of any degree) (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) means: _____

_____.

Notes on Use

For authority, see K.S.A. 21-3602. Incest is a severity level 10, person felony.

As required by the facts, reference should be made in section one of the instruction to PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18(d), Sex Offenses - Definitions, for a definition of sodomy.

Comment

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

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 _____ who was under 18 years of age;**
2. **That the defendant knew that _____ was related to the defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]);**

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.**

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.

As the facts require, 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). See also, *State v. Rowell*, 256 Kan. 200, 883 P.2d 1184 (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.

In *State v. McMullen,* 20 Kan. App. 2d 985, 894 P.2d 251 (1995), the Court of Appeals upheld the conviction of a mother for aiding and abetting aggravated sodomy and for aiding and abetting indecent liberties of her own child even though she could not be charged as a principal in those crimes.

58.05 ABANDONMENT OF A CHILD

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

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

1. **That the defendant was a (parent) (guardian) of _____;**
   or
   That the defendant was a person to whom the care and custody of _____ had been entrusted;
2. **That the defendant left _____ in a place where _____ may suffer because of neglect;**
3. **That the defendant left _____ with the intent to abandon the child;**
4. **That at the time _____ was under 16 years of age; and**
5. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3604. Abandonment of a child is a severity level 8, person felony.

58.05-A AGGRAVATED ABANDONMENT OF A CHILD

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

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

1. **That the defendant was a (parent) (guardian) of _____;**
   or
   That the defendant was a person to whom the care and custody of _____ had been entrusted;
2. **That the defendant left _____ in a place where _____ might suffer because of neglect;**
3. **That the defendant left _____ with the intent to abandon _____;**
4. **That _____ suffered great bodily harm because of the abandonment;**
5. **That at the time _____ was under 16 years of age; and**
6. **That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3604a. Aggravated abandonment of a child is a severity level 5, person felony.

58.06 NONSUPPORT OF A CHILD

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

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

1. **That the defendant was (a biological parent) (an adoptive parent) of _____ who was under the age of 18 years;**
2. **That the defendant willfully and without just cause (failed) (neglected) (refused) to provide for the support and maintenance of _____ who was then in necessitous circumstances; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

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

Notes on Use

For authority, see K.S.A. 21-3605(a)(1). Nonsupport of a child is a severity level 10, nonperson felony.

Comment

In *State v. Kirkland*, 17 Kan. App. 2d 425, 837 P.2d 846 (1992), the Court of Apppeals ruled that "without lawful excuse" as used in this statute is equivalent to "without just cause".

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

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances, if they would have been in such condition had they not been provided for by someone

else." *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *State v. Knetzer*, 3 Kan. App. 2d 673, 600 P.2d 160 (1979).

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

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

Necessitous circumstances was defined in *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913), and was cited with approved in *State v. Knetzer*, supra.

58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD

If the sole reason for the charge of endangering a child is that defendant relied upon or furnished treatment by spiritual means through prayer in lieu of medical treatment or remedial care of the child, it is a defense to the charge of endangering a child that the defendant in good faith selected and depended upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination.

Notes on Use

For authority, see K.S.A. 21-3608(b).

This instruction should only be given if the defendant is the parent or guardian of the child. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

58.11 ABUSE OF A CHILD

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

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

1. **That the defendant intentionally (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) (shook _____, which resulted in great bodily harm to) _____;**
2. **That _____ was a 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. 21-3609. Abuse of a child is a severity level 5, person felony.

Comment

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

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

In a felony-murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the

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

In *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), *aff'd on rehearing* 244 Kan. 193, 767 P.2d 1308 (1989), the Court addressed the question left open in *Brown*. The Court concluded that a single instance of assaultive conduct cannot be the underlying felony justifying a charge of felony-murder. Moreover, when a child dies from an act of assaultive conduct, prior acts of abuse cannot be used as the basis for charging felony-murder. See also, *State v. Prouse*, 244 Kan. 292, 297, 767 P.2d 1308 (1989).

In *Lucas*, the Court expressed concern that the *Rueckert* test for merger is misleading. The key is "whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide." 243 Kan. at 469.

After the *Lucas* and *Prouse* decisions, the Legislature amended K.S.A. 21-3401 to provide that felony murder includes a killing committed in the perpetration of abuse of a child. In 1993, the Legislature included abuse of a child in the list of inherently dangerous felonies for purposes of felony murder. See K.S.A. 21-3436.

In *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991), the Supreme Court held K.S.A. 21-3609 to be constitutional and that it does not require proof of a specific intent to injure.

The words "willfully torturing" in K.S.A. 21-3609 do not cause child abuse to be a specific intent crime. *State v. Bruce*, 255 Kan. 388, 874 P.2d 1165 (1994).

58.12 FURNISHING ALCOHOLIC LIQUOR TO A MINOR

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

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

1. **That the defendant directly or indirectly (sold alcoholic liquor to) (bought alcoholic liquor for) (gave alcoholic liquor to) (furnished alcoholic liquor to) _____;**
2. **That _____ was a person under the age of 21 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. 21-3610. Furnishing alcoholic liquor to a minor is a class B, person misdemeanor for which the minimum fine is $200.

Comment

See K.S.A. 41-102 for definitions of alcoholic liquor and minor.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986) (knowledge of the age of a minor is not a requirement of the statute).

K.S.A. 21-3610 is not intended to impose civil liability for injuries or death sustained by a minor as a result of having become intoxicated. *Mills v. City of Overland Park*, , 251 Kan. 434, 837 P.2d 370 (1992).

See PIK 3d 58.12-C, Furnishing Alcoholic Beverages to a Minor - Defense, for defense available to licensed retailer, club, drinking establishment or caterer.

or

(g) (sheltered) (concealed) a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers; and

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

Child in need of care means: (include appropriate definition from K.S.A. 38-1502(a)). Runaway means: (include appropriate definition from K.S.A. 21-3612(c)).

[The elements of _____ are as follows: _____.]

Notes on Use

For authority, see K.S.A. 21-3612. Contributing to a child's misconduct or deprivation is a class A, nonperson misdemeanor, except that causing or encouraging a child to commit an act which, if committed by an adult would be a felony, is a severity level 7, person felony and sheltering or concealing a runaway (with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers) is a severity level 8, person felony. For a definition of "child in need of care", see K.S.A. 38-1502.

Where the defendant is charged with causing or encouraging a child to commit a criminal act, the elements of such crime should be set forth in the concluding portion of the instruction.

In *State v. Ferris*, 19 Kan. App. 2d 180, 865 P.2d 1058 (1993), the Court of Appeals held that K.S.A. 21-3612(1)(a) is a "lesser included offense" of K.S.A. 21-3612(1)(f) and remanded the case for resentencing.

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CHAPTER 59.00

CRIMES AGAINST PROPERTY

Comment

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

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

59.04 CRIMINAL DEPRIVATION OF PROPERTY

The defendant is charged with criminal deprivation of property. The defendant pleads not guilty.

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

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

Notes on Use

For authority, see K.S.A. 21-3705. Criminal deprivation of property other than a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A, nonperson misdemeanor. Upon a second or subsequent conviction, the sentence shall be not less than 30 days imprisonment and not less than a $100 fine, except where such sentence and fine would result in a manifest injustice.

Criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a nonperson felony. Upon a first conviction of this subsection, a person shall be sentenced to not less than 30 days nor more than one year's imprisonment and fined not less than $100. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 60 days nor more than one year's imprisonment and fined not less than $200. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice.

For definition of "temporarily deprive", see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

When instructing on this crime as a lesser included offense of theft, see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

Comment

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. 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.

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present crime.

If the amount of the check, order or draft is in issue, it will be necessary to include PIK 3d 59.70 in the jury instruction and to use PIK 3d 68.11, Verdict Form.

Defenses to the charge of giving a worthless check are set forth in PIK 3d 59.07, Worthless Check - Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit, and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(b), then PIK 3d 59.06-A, should be given and modified accordingly.

Comment

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

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

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

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

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

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

There is a presumption that defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with a (bank) (credit union) (savings and loan association) (depository) where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds and:

1. **Defendant failed to pay the holder of the (check) (order) (draft) the amount due thereon and a lawful service charge for each (check) (order) (draft) within seven days after defendant received notice that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository); or**
2. **Defendant postdated the (check) (order) (draft) without the knowledge and consent of the payee.**

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

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

Notes on Use

For authority, see K.S.A. 21-3707(b). If an issue exists as to the receipt of

written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

Comment

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973), upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(b) which enables the State to establish a *prima facie* case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions, see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment to PIK 3d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

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

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

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

59.07 WORTHLESS CHECK - DEFENSES

A. **It is a defense to the charge of giving a worthless (check) (order) (draft) if it was postdated and was presented for payment prior to the postdated date.**

OR

B. **It is a defense to the charge of giving a worthless (check) (order) (draft) if it was given to (name of payee) who had knowledge or had been informed when (name of payee) accepted the (check) (order) (draft), that (name of maker) did not have sufficient funds in the hands of (name of drawee) to pay such (check) (order) (draft) upon presentation, and the (check) (order) (draft) was presented for payment prior to the date (name of maker) informed the payee there would be sufficient funds.**

Notes on Use

For authority for "A", see K.S.A. 21-3707(c)(1); for authority for "B", see K.S.A. 21-3707(c)(2). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK

The defendant is charged with the crime of causing an unlawful prosecution for worthless check. The defendant pleads not guilty.

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

1. **That the defendant (filed a complaint before a judge upon which _____ was charged with the crime of giving a worthless check) (gave information upon which _____ was charged with the crime of giving a worthless check);**
2. **That the defendant knew when (he)(she) accepted it that the (check) (order) (draft) was dated later than the date on which it was actually accepted and defendant presented it for payment prior to the date on the (check) (order) (draft); and**

   or

   The the defendant knew when (he) (she) accepted the (check) (order) (draft) that (name of maker) did not have (any) (sufficient) funds on deposit; and yet defendant presented the (check) (order) (draft) for payment prior to the date (name of maker) informed defendant there would be sufficient funds; and
3. **That this act occurred on or about the _____ day of _____, 19____, in _____County, Kansas.**

Notes on Use

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

Act as used in Element No. 3 refers to the complaint that was filed or the information that was given as stated in Element No. 1.

Comment

See K.S.A. 21-3707.

59.11 FORGERY - MAKING OR ISSUING A FORGED INSTRUMENT

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

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

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

   or

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

Notes on Use

For authority, see K.S.A. 21-3710(a)(1) and (2). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(3).

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

Comment

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

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 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 personally served with a restraining order prohibiting defendant from (entering into) (remaining on) the property;
2. **That the defendant intentionally, without authority, (entered into) (remained on) the 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. 21-3721. 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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59.42 IMPAIRING A SECURITY INTEREST - SALE OR EXCHANGE

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

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

1. **That the defendant (sold) (exchanged) (disposed of) _____;**
2. **That the defendant knew _____ was security for a debt owed to _____;**
3. **That the security agreement did not authorize the (sale) (exchange) (disposal) of _____;**
4. **That _____ did not consent in writing to the (sale) (exchange) (disposal) of _____;**
5. **That the property subject to the security interest (was of the value of $25,000 or more and was subject to a security interest of $25,000 or more) (was of the value of at least $500 and either the value of the property or the security interest was less than $25,000) (was of the value of less than $500, or of the value of $500 or more but subject to a security interest of less than $500); and**
6. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3734(a)(2). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of $25,000 or more and is subject to a security interest of $25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least $500 and is subject to a security interest of at least $500 and either the value of the property or the security interest is less than $25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than $500, or of the value of $500 or more but subject to a security interest of less than $500.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (3).

In the prosecution for impairing a security interest by sale or exchange, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

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

Also, see Comment to PIK 3d 59.41, Impairing a Security Interest - Concealment or Destruction.

Prior to its amendment July 1, 1987, K.S.A. 21-3734 did not require proof of an intent to defraud. In *State v. Jones*, 11 Kan. App. 2d 612, 731 P.2d 881 (1987), the Court held that absent an intent to defraud, the statute violated the prohibition against imprisonment for a debt under Section 16 of the Bill of Rights of the Kansas Constitution. The Court also noted that this element was absent from the corresponding PIK 2d instructions 59.42 and 59.43. The Supreme Court reversed the Court of Appeals in *State v. Jones*, 242 Kan. 385, 748 P.2d 839 (1988). The Supreme Court held that an agreement which creates a security interest under the Uniform Commercial Code does not create a debt within the prohibition of Section 16 and that the creditor retains title to the property and in its proceeds until payment is made. The Court then discussed the statutory distinction between general intent crimes and specific intent crimes. The Court held that violations of K.S.A. 21-3734 are general intent crimes. The Court concluded K.S.A. 21-3734 "does not punish for a *debt* in the form of a theft -- it punishes for a *willful act to deprive a secured party of its property* and, thus, is not unconstitutional imprisonment for debt." 242 Kan. at 392. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

59.43 IMPAIRING A SECURITY INTEREST - FAILURE TO ACCOUNT

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

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

1. **That _____ had a security interest in _____;**
2. **That the defendant (sold) (exchanged) (disposed of) _____ and received _____;**
3. **That the security agreement required that in the event of the (sale) (exchange) (disposal) of _____, the proceeds were to be given to _____;**
4. **That the defendant intentionally failed to account for the ([proceeds] [collateral]) ([within a reasonable time] [as specified in the security agreement]);**
5. **That the property subject to the security interest (was of the value of $25,000 or more and was subject to a security interest of $25,000 or more) (was of the value of at least $500 and either the value of the property or the security interest was less than $25,000) (was of the value of less than $500, or of the value of $500 or more but subject to a security interest of less than $500); and**
6. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3734(a)(3). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of $25,000 or more and is subject to a security interest of $25,000 or more. Impairment of a security interest is a severity level 9, nonperson felony when the property subject to the security interest is of the value of at least $500 and is subject to a security interest of at least $500 and

either the value of the property or the security interest is less than $25,000. Impairing a security interest is a class A, nonperson misdemeanor if the property subject to a security interest is of the value of less than $500, or of the value of $500 or more but subject to a security interest of less than $500.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (2).

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

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

Comment

See Comment to PIK 3d 59.42, Impairing a Security Interest - Sale or Exchange.

60.05 PERJURY

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

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

1. **That the defendant intentionally, knowingly and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon (his)(her) oath or affirmation legally administered by a person authorized to administer oaths; and**

   or

   That the defendant intentionally, knowingly and falsely subscribed as true and correct under penalty of perjury a material matter in a (declaration) (verification) (certificate) (statement); and

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

Notes On Use

For authority, see K.S.A. 21-3805. Perjury is a severity level 7, nonperson felony if the false statement is made upon the trial of a felony charge. Perjury is a severity level 9, nonperson felony if the false statement is made in a proceeding other than the trial of a felony charge or is made under penalty of perjury in any declaration, verification, certificate or statement as provided in K.S.A. 53-601.

Comment

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

However, in *United States v. Gaudin*, _____ U.S. _____, _____ L.Ed.2d _____, _____ S.Ct. _____ (1995), the Court held the element of materiality in a perjury prosection under 18 U.S.C. § 1001 must be resolved by a jury and the trial judge's refusal to submit the question of materiality to the jury was violative of the defendant's Fifth and Sixth Amendment rights. It was also noted in *Gaudin* that the parties agreed upon the following definition of "materiality":

"the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed."

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60.06 CORRUPTLY INFLUENCING A WITNESS

Prior editions of PIK Criminal contained instruction 60.06. The statute on which such instruction was based (K.S.A. 21-3806) was repealed effective July 1, 1983. The crime of corruptly influencing a witness has been replaced with the crimes of intimidation of a witness or a victim and aggravated intimidation of a witness or victim. See PIK 3d 60.06-A and 60.06-B for instructions on these offenses.

60.11 AGGRAVATED ESCAPE FROM CUSTODY

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

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

A. 1. That the defendant was being held in custody (on a written charge of a felony) (following conviction of a felony) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity of a felony) (for evaluation as a sexually violent predator) (upon commitment to a treatment facility as a sexually violent predator);

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

or

That the defendant intentionally failed to return to custody following (temporary leave authorized by law) (temporary leave granted by a court order); and

OR

B. 1. That the defendant was being held in custody (on a written charge of a crime) (following conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity) (for evaluation as a sexually violent predator) (upon commitment to a treatment facility as a sexually violent predator);

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

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

Custody as used in this instruction means (here insert legal basis for custody).

Notes on Use

For authority, see K.S.A. 21-3810 and 21-3809. The legal basis for custody to be inserted in the body of the instruction may come from the list provided in K.S.A. 21-3809 or from the circumstances delineated in K.S.A. 21-3810. Aggravated escape from custody is a severity level 6, person felony if such escape is effected or facilitated by the use of violence or the threat of violence against any person. Under all other circumstances, it is a severity level 8, nonperson felony.

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

Comment

See Comment to PIK 3d 60.10, Escape from Custody.

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).

61.02 OFFICIAL MISCONDUCT

Defendant is charged with the crime of official misconduct. The defendant pleads not guilty.

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

1. That the defendant was a public (officer)(employee);
2. That the defendant knowingly and willfully used or authorized the use of ([an aircraft] [a vehicle] [a vessel]) ([under the defendant's control or direction] [in the defendant's custody]) exclusively for the private benefit or gain of (the defendant) (another);
   or
   That the defendant knowingly and willfully failed to serve civil process when required by law;
   or
   That the defendant knowingly and willfully used information confidential by law acquired in the course of and related to the defendant's office or employment (for the private benefit or gain of [the defendant][another])(to cause harm maliciously to another);
   or
   That the defendant knowingly and willfully and with the intent to reduce or eliminate competition among bidders or prospective bidders on any contract or proposed contract (disclosed confidential information regarding proposals or communications from bidders or prospective bidders on any contract or proposed contract) (accepted any bid or proposal on a contract or proposed contract after the deadline for acceptance of such bid or proposal) (altered any bid or proposal submitted by a bidder on a contract or proposed contract);
   or
   That the defendant knowingly and willfully (destroyed) (tampered with) (concealed) evidence of a crime;
   or
   That the defendant knowingly and willfully

submitted to a governmental entity a claim for expenses which (was false) (duplicated expenses for which a claim was submitted to [such governmental entity] [another governmental entity] [a private entity]); and

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

As used in this instruction, knowingly and willfully means acting purposefully and intentionally and not accidentally.

Notes on Use

For authority, see K.S.A. 21-3902, amended L. 1995, ch. 184, § 2. For definitions of an aircraft, a vehicle and a vessel, see respectively K.S.A. 3-102, 8-1485 and 32-1102. For purposes of 21-3902, vehicle does not mean only a motor vehicle but it also does not mean a human-powered vehicle or railroad train.

Confidential information is defined for purposes of K.S.A. 21-3902 as any information not subject to mandatory disclosure pursuant to K.S.A. 45-221. The latter statute sets forth at length (in 38 paragraphs, many with subparagraphs) the records which a public agency is not required to disclose to the public. Whether a particular record falls within the definitions of that statute is a question of law.

K.S.A. 21-3902 also provides that respecting the use of aircraft, vehicles and vessels, defined in paragraph (a)(1) as a crime if unauthorized, the statue does not apply to use authorized by law or by formal government policy, in which case it would not be for the private benefit or gain of defendant or another. Such authorization would be a legal issue if the question were whether the law or policy authorized the particular use. Also respecting paragraph (a)(1), it does not apply if the use constitutes misuse of public funds as defined in K.S.A. 21-3910. That is a third question of law under the statutes involved.

The definition of "knowingly and willfully" is adapted from 21-3201(b).

Official misconduct committed by the acts defined in the first four alternatives of Element No. 2 of the instruction is a class A, nonperson misdemeanor. If the crime is committed by destroying, tampering with or concealing evidence of a crime, it is a severity level 8, nonperson felony if the evidence is of a felony, and a class B misdemeanor if the evidence is of a misdemeanor. If the crime is committed by submitting a false or duplicate claim, it is a severity level 7, nonperson felony if the claim is for $25,000 or more; a level 9, nonperson felony if the claim is for at least $500 but less than $25,000; and a class A, nonperson misdemeanor if the claim is for less than $25,000.

Upon conviction of official misconduct, a public officer or employee shall forfeit his or her office or employment.

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."

61.11 MISUSE OF PUBLIC FUNDS

The defendant is charged with the crime of misuse of public funds. The defendant pleads not guilty.

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

1. **That the defendant was a (custodian) (person having control) of public money by virtue of (his)(her) official position;**
2. **That the defendant (used) (lent) (permitted another to use) public money in a manner (he)(she) knew was not authorized by law; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3910. Misuse of public funds is a severity level 8, nonperson felony.

K.S.A. 21-3910 was amended L. 1995, ch. 184, § 3 to provide that upon conviction of misuse of public funds, the convicted person shall forfeit the person's official position.

61.12 UNLAWFUL USE OF STATE POSTAGE

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

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

1. **That the defendant intentionally used United States postage for (his)(her) personal benefit;**
   or
   That the defendant intentionally permitted _____ to use United States postage for the personal benefit of _____;
2. **That the postage was paid for with funds of the State of 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. 21-3911. Unlawful use of State postage is a class C misdemeanor.

62.06 CRIMINAL DEFAMATION

The defendant is charged with criminal defamation. The defendant pleads not guilty.

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

1. **That the defendant communicated to another person orally, in writing or by any other means, information which (tended to expose another living person to public hatred, contempt or ridicule)**
   or
   (tended to deprive such person of the benefits of public confidence and social acceptance)
   or
   (tended to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives or friends);
2. **That the communication was made with actual malice; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

As used in this instruction, actual malice means making a false statement with knowledge that it was false or with reckless disregard of whether it was false or not.

Notes on Use

For authority, see K.S.A. 21-4004.

Comment

Criminal defamation is a class A, nonperson misdemeanor. The statute defining criminal defamation, K.S.A. 21-4004, was amended by L. 1995, ch. 251, § 14. The previous version of the statute had been held unconstitutional in *Phelps v. Hamilton*, 828 F.Supp. 831 (D.Kan. 1993). The infirmity was overbreadth. In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that a public official could not recover damages for civil libel except on proof the statement was made with actual malice. Actual malice requires proof that "the statement was made with

knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The court in *Phelps* found that the Kansas statute permitted recovery by a public official or public figure upon a finding of common-law malice -- an act done intentionally, wrongfully and without just cause or excuse as defined in PIK 56.04 and, formerly, in this instruction. The court observed that "malice" as used in Kansas criminal law, statutory law and common law has nothing to do with "actual malice" as used in *New York Times*. The court notes the distinction between actual malice under the *New York Times* standard and the concept of malice as an evil intent or a motive arising from spite or ill will set forth in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 596, 1111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). (*Phelps*, 828 F.Supp. at 847). The court in *Phelps* held that the statute was not subject to a narrowing and curing instruction to include the constitutional standard for speech concerning a public official or public figure.

The 1995 amendment of K.S.A. 21-4004 has a curious effect. Knowledge that the information was false is an element of the crime. Actual malice is the second element of the crime. Since actual malice may be proven by evidence that the statement was made with knowledge that it was false, the statute is in that case redundant. Actual malice may also be proven by evidence that the statement was made with reckless disregard of whether it was false or true, in which case the statute is self-contradictory. Knowledge of falsity and reckless disregard of truth or falsity must be proved at the same time. If the redundancy and conflict are resolved by construing actual malice as used in the statute to mean common-law or statutory malice, the statute becomes subject to the same constitutional infirmity identified in *Phelps*.

The Committee is of the opinion that the 1995 Legislature sought to remedy the constitutional deficiencies of the statute by defining the crime in terms of actual malice under the *New York Times* standard. The additional element of knowing the information to be false is surplusage.

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. The elements of criminal defamation are set forth in PIK 3d 62.06, Criminal Defamation.

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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 had been (convicted of _____, [a person felony] [a violation of the Uniform Controlled Substances Act]) (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] [violation of the Uniform Controlled Substances Act]); and

OR

B. 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

C. 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) (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

D. 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 nonperson 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 nonperson felony); and

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

Notes on Use

This instruction has been modified to reflect 1995 statutory changes. Authority for Alternative A is K.S.A. 21-4204(a)(2), Alternative B is K.S.A. 21-4204(a)(3), Alternative C is K.S.A. 21-4204(a)(4)(A), and Alternative D is K.S.A. 21-4204(a)(4)(B). Each crime is a severity level 8, nonperson felony.

Alternatives A and D are to be used when the defendant was found to have been in possession of a firearm at the time of the commission of the prior felony. The Committee believes that while such a prior finding may not have been specifically made by the court it may be implied from the elements of the charge upon which the defendant was convicted. Alternatives B and C, however, have the negative requirement that the defendant was found not to have been in possession of a firearm at the time of the commission of the offense. The Committee believes that it is improbable that a court would have made that specific negative finding. In any event, it is not felt that such questions are questions of fact for the jury once the conviction has been established.

The prior crime addressed in Alternative A is a person felony or a violation of the Uniform Controlled Substances Act with no time limit. The prior crime addressed in Alternative B is any felony not addressed in Alternative C with a 5-year time limit. The prior crime addressed in Alternative C is specified by statute number in K.S.A. 21-4204(a)(4)(A) with a 10-year time limit. The prior crime addressed in Alternative D is a nonperson felony with a 10-year time limit.

Alternative	Time Limit	Type Prior Crime	Prior Possession Of Firearm During Prior Crime
A	None	Person Felony or Uniform Controlled Substances Act	Yes
B	5 years	Felony Other Than Alternative C	No
C	10 years	Felony Specified in K.S.A. 21-4204(a)(4)(A)	No
D	10 years	Nonperson Felony	Yes

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.

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:

A. 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

B. 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

C. 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 Alternative A is K.S.A. 21-4204(a)(1). Authority for Alternative B is K.S.A. 21-4204(a)(5). A violation of Alternative A or B is a class B, nonperson select misdemeanor. Authority for Alternative C 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), (3) and (4) 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 or 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

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

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.

"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.

"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.

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).

State v. Finney, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994), defines the terms lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution.

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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65.11 DEALING IN GAMBLING DEVICES - PRESUMPTION FROM POSSESSION

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

Notes on Use

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

65.12 POSSESSION OF A GAMBLING DEVICE

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

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

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

Notes on Use

For authority, see K.S.A. 21-4307. Possession of a gambling device is a class B, nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

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

65.14 FALSE MEMBERSHIP CLAIM

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

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

1. **That the defendant intentionally misrepresented (himself) (herself) to be a member of _____ _____, a (fraternal) (veteran's) organization; 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. 21-4309. False membership is a class C misdemeanor.

Insert the name of the organization in which the defendant claimed membership in the blank space in the first element of this instruction.

65.15 CRUELTY TO ANIMALS

The defendant is charged with the crime of cruelty to animals. The defendant pleads not guilty.

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

1. **That the defendant:**
   (a) **intentionally (killed) (injured) (maimed) (tortured) (mutilated) (__the animal__); and**
   or
   (b) **(abandoned) (left) _____ without making provisions for its proper care; and**
   or
   (c) **had physical custody of _____ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) (__other care__) as needed for the health or well-being of that kind of animal; 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. 21-4310. Cruelty to animals is a class A, nonperson misdemeanor. The act or acts of cruelty specified in (1)(a), (b) or (c) appropriate to the case, should be used in the instruction.

Comment

K.S.A. 21-4313 defines "animal." K.S.A. 21-4311 provides for the taking into custody and disposition of a mistreated animal. K.S.A. 47-1701 provides other definitions such as food, water, etc.

It was held in *State, ex rel. v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute K.S.A. 21-4310.

65.18 UNLAWFUL CONDUCT OF DOG FIGHTING

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

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

1. **That the defendant caused for (amusement) (gain) a dog to (fight with) (injure) another dog; and**
   or
   That the defendant knowingly permitted a dog to (fight with) (injure) another dog for (amusement) (gain) on premises under the defendant's (ownership) (charge) (control); and
   or
   That the defendant (trained) (owned) (kept) (transported) (sold) any dog (for the purpose) (with the intent) of having it fight with or injure another dog; and
2. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4315. Unlawful conduct of dog fighting is a severity level 10, nonperson felony.

Comment

For a definition of dog, see K.S.A. 47-1701(g).

65.19 ATTENDING AN UNLAWFUL DOG FIGHT

The defendant is charged with the crime of attending an unlawful dog fight. The defendant pleads not guilty.

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

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

Dog fight means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.

Notes on Use

For authority, see K.S.A. 21-4315. Attending an unlawful dog fight is a class B, nonperson misdemeanor.

Comment

For a definition of dog, see K.S.A. 47-1701(g).

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

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

Notes on Use

For authority, see K.S.A. 74-8719. Unlawful purchase of a lottery ticket is a class A, nonperson misdemeanor upon conviction of the first offense, and a severity level 9, nonperson felony upon conviction of a second or subsequent offense.

For applicable definitions, see PIK 3d 65.35, Lottery Definitions.

Comment

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

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

65.35 LOTTERY DEFINITIONS

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

"Commission" means the Kansas Lottery Commission.

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

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

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

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

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

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

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

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

"Returned ticket" means any ticket which was transferred to a lottery retailer, which was not sold by the lottery retailer and which was returned to the Kansas Lottery for refund by issuance of a credit or otherwise.

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

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

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

Notes on Use

For authority, see K.S.A. 74-8702.

Comment

For a discussion of the definition of lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution, see *State v. Finney*, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994).

65.36 - 65.50 RESERVED FOR FUTURE USE.

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.

Comment

For cases discussing constitutionality of statute, see *Blue v. McBride*, 252 Kan. 894, 850 P.2d 852 (1993); *State ex rel. v. Koscot Interplanetary, Inc.*, 212 Kan. 668, 512 P.2d 416 (1973).

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.

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. If a person has a prior conviction under 65-4162, a conviction for a substantially similar offense from another jurisdiction, or a conviction of a violation of an ordinance of any city or resolution of any county for a substantially similar offense if the substance involved was marijuana or tetrahydrocannabinol as designated in

subsection (d) of K.S.A. 65-4105 and amendments thereto, 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

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). Aggravated battery classified as a severity level 4 felony includes the lesser offenses of the same crime classified as severity level 5, 7 or 8 felonies. *State v. Ochoa*, 20 Kan. App. 2d 1014, 895 P.2d 198 (1995).
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).

"Commission Of A Crime In Different Ways"

The Committee would also note to meet the exigencies of proof, the State may charge the commission of the same offense in different ways. The conviction can be upheld on only one count, the function of the added counts being to anticipate and obviate fatal variance between allegations and proof. By charging several counts in the information to provide for every possible contingency in the evidence, the jury may be properly instructed on the elements necessary to establish the crime under any of the statutorily-defined ways of committing the crime. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980). Two different means of commission of a crime are properly charged as alternative counts. This separates the elements instruction and the verdict forms and enables a reviewing court to determine precisely what the jury found. Further, it prevents the jury from hybridizing two means into some means of commission not specified in the statute defining the crime. *State v. Prouse*, 244 Kan. 292, 767 P.2d 1308 (1989).

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68.11 VERDICT FORM - VALUE IN ISSUE

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

_____ dollars ($_____) or more ☐
Less than _____ dollars ($_____) ☐

(Place an X in the appropriate square.)

_____
Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this form.

See Comment to and Notes on Use to PIK 3d 59.70, Value in Issue.

Comment

In *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814 (1987), the Court held that the trial court erred by allowing the jury to consider sales tax in its determination of the value of the merchandise stolen from a retail store.

The value to be used in determining whether theft is a felony or misdemeanor is the fair market value of the property taken. *State v. Robinson*, 4 Kan. App. 2d 428, 608 P.2d 1014 (1980).

68.12 DEADLOCKED JURY

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

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

Also, there is no reason to believe that the case would ever be submitted to 12 people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

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

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

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

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

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

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

Notes on Use

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

If the instruction is given with the other instructions before jury deliberations begin, the material in brackets should be deleted.

Comment

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

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

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

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

In *State v. Poole*, 252 Kan. 108, 843 P.2d 689 (1992), the Kansas Supreme Court emphasized the need to exercise caution in giving the Allen-type instruction. The Court stressed that ". . . timing can be very important in determining prejudicial error." It observed that the defendant had failed to furnish a record that affirmatively reflected prejudicial error as to when the deliberations began, when the Allen-type instruction was given, if the trial judge

made additional remarks, and when the jury reached its verdict. In the absence of such record, the Court acknowledged that there is a presumption that the actions of the trial court were proper.

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

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]) to a degree that rendered (him) (her) incapable of safely driving a vehicle; and**
3. **That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.**

Notes on Use

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

70.01-B B.A.T. .08 OR MORE OR DUI CHARGED IN THE ALTERNATIVE

The defendant is charged in the alternative with (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more or (operating) (attempting to operate) a vehicle while under the influence of alcohol. You are instructed that the alternative charges constitute one crime.

You should consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more and sign the verdict upon which you agree.

You should further consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol and sign the verdict upon which you agree.

Notes on Use

The Committee believes that K.S.A. 8-1567 defines a single offense. The State may, however, charge the offense in the alternative. See PIK 3d 70.01, Traffic Offense - Driving Under the Influence of Alcohol or Drugs, and PIK 3d 70.01-A, Traffic Offense - Alcohol Concentration .08 or more.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978), and *State v. McCowan*, 226 Kan. 752, 764, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844 (1980).

70.02 DRIVING UNDER THE INFLUENCE - IF CHEMICAL TEST USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. [If a test shows there was .08 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that (he)(she) was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.] [If a test shows there was less than .08 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).]

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

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. This instruction is to be used in conjunction with PIK 3d 70.01 when chemical tests have been administered. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used. This instruction is not applicable to a charge or alternative charge of a per se violation of K.S.A. 8-1567.

Comment

The constitutionality of a presumption is described in the Comment to PIK 3d 54.01 and 54.01-B.

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

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

PIK CRIMINAL INDEX