

**Pattern
Instructions for Kansas—**

CRIMINAL 3d

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Prepared by:

**KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS**

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21-3717.	Repealed
21-3718.	Arson
21-3719.	Aggravated Arson
21-3720.	Criminal Damage to Property
21-3721.	Criminal Trespass
21-3722.	Littering
21-3723.	Repealed
21-3724.	Tampering With a Landmark
21-3725.	Tampering With a Traffic Signal
21-3726.	Aggravated Tampering With a Traffic Signal
21-3727.	Injury to a Domestic Animal
21-3728.	Criminal Hunting
21-3729.	Criminal Use of a Financial Card
21-3730.	Unlawful Manufacture or Disposal of False Tokens
21-3731.	Criminal Use of Explosives
21-3732.	Repealed
21-3733.	Repealed
21-3734.	Impairing a Security Interest
21-3735.	Repealed
21-3736.	Warehouse Receipt Fraud
21-3737.	Unauthorized Delivery of Stored Goods
21-3738.	Automobile Master Key Violation
21-3739.	Posting of Political Pictures and Political Advertisements
21-3740.	Repealed
21-3741.	Repealed
21-3742.	Throwing or Casting Object onto Street, Highway or Railroad Right-of-way or Railroad Property
21-3743.	Sale of Recut or Regrooved Tires
21-3744.	Definition of "Passenger Vehicle"
21-3745.	Repealed
21-3746.	Repealed
21-3747.	Repealed
21-3748.	Piracy of Recordings
21-3749.	Dealing in Pirated Recordings

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Section

- 21-3750. Nondisclosure of Source of Recordings
- 21-3751. Sections Supplemental to Criminal Code
- 21-3752. Repealed
- 21-3753. Repealed
- 21-3754. Repealed
- 21-3755. Computer Crime; Criminal Computer Access
- 21-3755a. Repealed
- 21-3756. Adding Dockage or Foreign Material to Grain
- 21-3757. Odometers; Unlawful Acts; Penalties; Definitions
- 21-3758. Certificate of Titles; Failure to Show Complete Chain of Title; Penalty
- 21-3759. Commercial Fossil Hunting Without Landowner's Authorization; Unlawful Acts; Penalty
- 21-3760. Maintenance of a Common Nuisance
- 21-3761. Trespassing on Railroad Property; Causing Derailment of Railroad Equipment

ARTICLE 38. CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

- 21-3801. Treason
- 21-3802. Sedition
- 21-3803. Repealed
- 21-3804. Repealed
- 21-3805. Perjury
- 21-3806. Repealed
- 21-3807. Compounding a Crime
- 21-3808. Obstructing Legal Process or Official Duty
- 21-3809. Escape from Custody
- 21-3810. Aggravated Escape from Custody
- 21-3811. Aiding Escape
- 21-3812. Aiding a Felon or Person Charged with a Felony;
Aiding a Person Convicted of or Charged with
Committing a Misdemeanor
- 21-3813. Failure to Appear
- 21-3814. Aggravated Failure to Appear

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Section	
21-3815.	Attempting to Influence a Judicial Officer
21-3816.	Interference With the Administration of Justice
21-3817.	Corrupt Conduct by a Juror
21-3818.	Falsely Reporting a Crime
21-3819.	Performance of an Unauthorized Official Act
21-3820.	Simulating Legal Process
21-3821.	Tampering With a Public Record
21-3822.	Tampering With Public Notice
21-3823.	False Signing of a Petition
21-3824.	False Impersonation
21-3825.	Aggravated False Impersonation
21-3826.	Traffic in Contraband in a Correctional Institution
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21-3828.	Interference With the Conduct of Public Business in Public Buildings
21-3829.	Aggravated Interference With the Conduct of Public Business
21-3830.	Dealing in False Identification Documents
21-3831.	Witness or Victim Intimidation; Definitions
21-3832.	Intimidation of a Witness or Victim
21-3833.	Aggravated Intimidation of a Witness or Victim
21-3834.	Same; Civil Remedies; Court Orders Authorized
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21-3836.	Same; Pretrial Release, Conditions of
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21-3840.	Failure to Register an Aircraft
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21-3843.	Violation of a Protective Order
21-3844.	Kansas Medicaid Fraud Control Act; Citation
21-3845.	Definitions
21-3846.	Making a False Claim to the Medicaid Program

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- 21-3847. Unlawful Acts Relating to the Medicaid Program
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Medicaid Fraud Prosecution Revolving Fund
- 21-3852. Medicaid Fraud and Abuse Division in the Office of
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- 21-3902. Official Misconduct
- 21-3903. Compensation for Past Official Acts
- 21-3904. Presenting a False Claim
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- 21-3907. Repealed
- 21-3908. Repealed
- 21-3909. Repealed
- 21-3910. Misuse of Public Funds
- 21-3911. Unlawful Use of State Postage
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- 21-4005. Maliciously Circulating False Rumors Concerning Financial Status
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- 21-4007. Hypnotic Exhibition
- 21-4008. Repealed
- 21-4009. Smoking in a Public Place; Definitions
- 21-4010. Same; Smoking in Public Place Prohibited, Exceptions; Designated Smoking Areas
- 21-4011. Same; Posting Smoking Prohibited Signs and Designated Smoking Area Signs; Proprietor or Person in Charge of Public Place Authorized to Establish Designated Smoking Area
- 21-4012. Same; Unlawful Acts; Penalties; Action to Enjoin Repeated Violations
- 21-4013. Same; Local Regulation of Smoking
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21-4204.	Criminal Possession of a Firearm
21-4204a.	Criminal Possession of a Firearm by a Juvenile
21-4205.	Defacing Identification Marks of a Firearm
21-4206.	Confiscation and Disposition of Weapons
21-4207.	Failure to Register Sale of Explosives
21-4208.	Failure to Register Receipt of Explosives
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21-4213.	Unlawful Failure to Report a Wound
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21-4305. Permitting Premises to be Used for Commercial
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21-4306. Dealing in Gambling Devices
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21-4308. Installing Communication Facilities for Gamblers
21-4309. False Membership Claim
21-4310. Cruelty to Animals
21-4311. Cruelty to Animals; Custody of Animal; Disposition;
Damages for Killing, When; Expenses of Care
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21-4313. Definitions
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PART III

CLASSIFICATION OF CRIMES AND SENTENCING

ARTICLE 45. CLASSIFICATION OF CRIMES AND PENALTIES

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PATTERN INSTRUCTIONS FOR KANSAS 3d

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21-4603a.	Repealed
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PATTERN INSTRUCTIONS FOR KANSAS 3d

- Section
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- 21-4614. Deduction of Time Spent in Confinement
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- 21-4615. Rights of Imprisoned Persons; Restoration
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- 21-4620. Defendants Sentenced to Custody of Secretary of Corrections; Judgment Form and Contents; Diagnostic Reports to Accompany Defendant; Crimes Committed Prior to July 1, 1993
- 21-4621. Same; Order Transferring Custody to Corrections
- 21-4622 to
- 21-4631. Persons Convicted of Capital Murder
- 21-4632. Defendants Sentence to Custody of Secretary of Corrections; Judgment Form; Content; Presentence Investigation and Other Diagnostic Reports to Accompany Defendant; Crimes Committed On or After July 1, 1993
- 21-4633 to
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ARTICLE 47. SENTENCING GUIDELINES

- 21-4701 to
- 21-4728. Kansas Sentencing Guidelines Act

PATTERN INSTRUCTIONS FOR KANSAS 3d

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PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. See also *State v. Whitaker*, 255 Kan. 118, 872 P.2d 278 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

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.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 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."

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.

Under the Kansas Securities Act, the defendant in a securities violation prosecution has the burden of producing evidence to support the affirmative defenses set forth in K.S.A. 17-1262. However, the provisions of K.S.A. 17-1272 do not unconstitutionally shift the burden of proof to the defendant to disprove intent. *State v. Kershner*, 15 Kan. App. 2d 17, 19, 801 P.2d 68 (1990) and *State v. Ribadeneira*, 15 Kan. App. 2d 734, 817 P.2d 1105 (1991).

Alibi is not an affirmative defense. *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

"[A] true affirmative defense does not serve to disprove an essential element of the crime, but merely consists of facts which might exonerate a defendant." *State v. Kershner*, 15 Kan. App. 2d at 19.

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.

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).

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.11 NUMBER OF WITNESSES

The Committee recommends that there be no separate instruction given as to the number of witnesses.

Comment

An instruction as to number of witnesses calls attention to a fact you are telling the jury not to consider.

If the Court determines that such an instruction should be given because of special circumstances, the Committee suggests PIK 2d 2.21, Weighing Evidence - Number of Witnesses.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.12 TESTIMONY TAKEN BEFORE TRIAL

During this trial, evidence was presented by the reading of testimony of a witness taken under oath at another time and place. It is to be weighed by the same standards as other testimony.

Notes on Use

It is recommended that a similar instruction be given before any recorded testimony is read.

For authority relating to the taking and use of depositions, see K.S.A. 22-3211 which provides that civil rules apply in taking depositions.

Comment

This instruction does not have to be given where the transcript of the preliminary examination is used to impeach a witness. *State v. Trotter*, 245 Kan. 657, 666, 783 P.2d 1271 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

The Committee's recommendation is noted with apparent approval in *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

An accomplice instruction is proper even when the accomplice testimony is favorable to a criminal defendant and the defendant objects to the giving of the instruction. *State v. Anthony*, 242 Kan. 493, 749 P.2d 37 (1988).

"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.

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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).

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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

It is error to refuse to give this instruction when requested. *State v. Fuller*, 15 Kan. App. 2d 34, 47, 802 P.2d 599 (1990).

Comment

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. *State v. Novotny*, 252 Kan. 753, 760, 851 P.2d 365 (1993). Also see *State v. Brinkley*, 256 Kan. 808, 888 P.2d 819 (1995).

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).

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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.

Alibi is not an affirmative defense. *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

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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.

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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 Kansas Criminal Code. It is, however, used in K.S.A. 8-2101, Uniform Act Regulating Traffic, Parties to a crime established by uniform act; K.S.A. 48-3003, Code of Military Justice, Accessory after the fact; and K.S.A. 50-125, Restraint of trade, Acts deemed unlawful. In case law the term is used interchangeably with the concept of "aiding and abetting." See generally *State v. Kliever*, 210 Kan. 820, 504 P.2d 580 and *State v. McMullen*, 20 Kan. App. 2d 985, 894 P.2d 251 (1995). See also comment to PIK 3d 54.05 for discussion of the concept of "aiding and abetting."

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.

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Compulsion: K.S.A. 21-3209; PIK 3d 54.13, *Compulsion*; *State v. Dunn*, 243 Kan. 414, 421, 758 P.2d 718 (1988); *State v. Davis*, 256 Kan. 1, 883 P.2d 735 (1994). 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. See also K.S.A. 21-3102(1) regarding definitions of crimes.

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*.

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).

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

Heat of Passion: Any intense or vehement emotional excitement such as rage, anger, hatred, furious resentment, fright, or terror which was spontaneously provoked from the circumstances. 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. Gadelkarim*, 247 Kan. 505, 802 P.2d 507 (1990); *State v. Guebara*, 236 Kan. 791, 696 P.2d 381 (1985); *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); PIK 3d 56.04(e), Homicide Definitions.

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. Lewd fondling or touching does not require contact with the sex organ of one or the other. *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. See "crime" above.

Overt Act: For attempt, see Comment to PIK 3d 55.01, Attempt; for conspiracy, see PIK 3d 55.06, Conspiracy-Act in Furtherance Defined.

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).

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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.

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- 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 (I).
- 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

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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). Failure to give the instruction on request of the defendant is not error where the substance of the requested instruction is present in other instructions given by the district court. See *State v. Cheeks*, 253 Kan. 93, 853 P.2d 655 (1993).

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."

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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

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

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be considered only in determining whether the defendant had the state of mind required to commit the crime. You are instructed the defendant is not criminally responsible for (his)(her) acts if because of mental disease or defect the defendant lacked the (set out the particular state of mind which is an element of the crime or crimes charged).

Notes on Use

For authority, see K.S.A. 22-3220. 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. Where only general criminal intent is required for the crime charged, the language "intent to engage in the conduct" should be included in place of a particular state of mind in the concluding parenthetical. PIK 3d 54.01-A, General Criminal Intent, should also be given in such a case.

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

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**54.10-A MENTAL DISEASE OR DEFECT - COMMITMENT
(For Crimes Committed Prior to January 1, 1996)**

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 prior to amendments made by L. 1995, Ch. 251, §28.

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.

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**54.10-A MENTAL DISEASE OR DEFECT - COMMITMENT
(For Crimes Committed January 1, 1996 or Thereafter)**

If you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent, then the defendant 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 mental disease or defect.

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54.11 INTOXICATION - INVOLUNTARY

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

Notes on Use

For authority, see K.S.A. 21-3208(1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

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

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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. Unless evidence is presented that shows intoxication to the extent a defendant's ability to form the requisite intent was impaired, no voluntary intoxication instruction is required. *State v. Minski*, 252 Kan. 806, 850 P.2d 809 (1993).

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

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(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. Schriener*, 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).

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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.*

Evidence of intoxication of defendant 5-6 hours after the defendant's last contact with victim did not warrant an instruction on voluntary intoxication. *State v. Smith*, 254 Kan. 144, 864 P.2d 709 (1993).

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

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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).

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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. This instruction is applicable only to crimes committed before January 1, 1996.

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."

54.16 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); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996). 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.

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54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

For authority, see K.S.A. 21-3214(2). The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 584, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989). This instruction should not be confused with PIK 3d 54.22, Initial Aggressor's Use of Force. This instruction should be used with caution and limitations.

Comment

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

It is not error to give initial aggressor instructions where the question whether defendant was an aggressor is one of fact for the jury. *State v. Hunt*, 257 Kan. 388, 894 P.2d 178 (1995).

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54.22 INITIAL AGGRESSOR'S USE OF FORCE

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

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

Notes on Use

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

Comment

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

It is not error to give initial aggressor instructions where the question whether defendant was an aggressor is one of fact for the jury. *State v. Hunt*, 257 Kan. 388, 894 P.2d 178 (1995).

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

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

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

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

or

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

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

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

Such justification requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief.

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Notes on Use

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

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

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

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

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 3d 54.17, Use of Force in Defense of a Person, and 54.18, Use of Force in Defense of a Dwelling, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

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54.24 PRIVATE PERSON'S USE OF FORCE IN MAKING ARREST - NOT SUMMONED BY LAW ENFORCEMENT OFFICER

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is justified in the use of any force which (he)(she) reasonably believes to be necessary to effect the arrest and of any force which (he)(she) reasonably believes to be necessary to defend (himself)(herself)(another) from bodily harm while making the arrest.

(However, [he][she] is justified in using force likely to cause death or great bodily harm only when [he][she] reasonably believes that such force is necessary to prevent death or great bodily harm to [himself][herself][another]).

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. 21-3216(1). See also, PIK 3d 54.23, Law Enforcement Officer or Private Person Summoned to Assist - Use of Force in Making Arrest.

Comment

Whether the degree of force employed in making a citizen's arrest is "reasonable" is a jury question. *State v. Johnson*, 6 Kan. App. 2d 750, 752-53, 634 P.2d 1137 (1981), *rev. denied* 230 Kan. 819 (1981).

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 3d 54.17, Use of Force in Defense of a Person, and 54.18, Use of Force in Defense of a Dwelling, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

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54.25 USE OF FORCE IN RESISTING ARREST

A person is not authorized to use force to resist an arrest which (he)(she) knows is being made by a (law enforcement officer) (private person summoned and directed by a law enforcement officer to make the arrest) even if the person believes that the arrest is unlawful and the arrest is, in fact, unlawful.

Notes on Use

For authority, see K.S.A. 21-3217.

Comment

See 1968 Judicial Council comment following K.S.A. 21-3217.

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CHAPTER 55.00

ANTICIPATORY CRIMES

	PIK Number
Attempt	55.01
Attempt - Impossibility Of Committing Offense - No Defense	55.02
Conspiracy	55.03
Conspiracy - Withdrawal As A Defense	55.04
Conspiracy - Defined	55.05
Conspiracy - Act In Furtherance Defined	55.06
Conspiracy - Declarations	55.07
Conspiracy - Subsequent Entry	55.08
Criminal Solicitation	55.09
Criminal Solicitation - Defense	55.10

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55.01 ATTEMPT

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

OR

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

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

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

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

Notes on Use

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

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

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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).

An attempted crime requires specific intent as opposed to general intent. The requisite specific intent necessary for attempted murder is not satisfied by trying to prove attempted felony murder. Kansas does not recognize the crime of attempted felony murder. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Since it is logically impossible to specifically intend to commit an unintentional crime, Kansas does not recognize the crime of attempted second-degree murder [unintentional, as defined in K.S.A. 21-3402(b)] or the crime of attempted involuntary manslaughter. *State v. Shannon*, 258 Kan. 425, 905 P.2d 649 (1995); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996); *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995).

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. There is no definitive rule concerning what constitutes an overt act; each case depends on the inferences a jury may reasonably draw from the facts. The overt act necessarily must extend beyond mere preparations made by the accused and must approach sufficiently near to consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. *State v. Zimmerman*, 251 Kan. 54, 833 P.2d 925 (1992); *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988); *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985). See also, *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993); *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.

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).

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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).

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. Ganes*, 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).

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).

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**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. DeHerrera*, 251 Kan. 143, 834 P.2d 918 (1992).

For a discussion of factual impossibility, see *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

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

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

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concluding portion of the instruction.

Comment

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

In the trial of a conspiracy case, a court may become involved with the conspiracy evidence rule. Under this rule, statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception against the defendant to the hearsay rule. The rule is based on the concept that a party to an agreement to commit a crime is an agent or partner of the other. Therefore the statement of one conspirator is admissible against another conspirator. Because the rule is founded on the existence of an agreement, the prosecution must make a prima facie showing that an agreement exists before the hearsay statement of a co-conspirator may properly be admitted into evidence. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995). In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. K.S.A. 60-460(i). See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

In *Borserine*, the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. "A conspiracy may be established by direct proof, or circumstantial evidence, or both. Ordinarily when acts and declarations of one or more co-conspirators are offered in evidence against another co-conspirator by a third party witness or witnesses, the conspiracy should first be established prima facie, and to the satisfaction of the trial judge. But this cannot always be required. Where proof of the conspiracy depends on a vast amount of circumstantial evidence—a vast number of isolated and independent facts—it cannot be required. In any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced at the trial taken together shows that a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. (*State v. Winner*, 17 Kan. 298.)" (Syl.4) *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

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In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the Court stated that a specific intent is essential to the crime of conspiracy. The Court divided the concept of intent into two elements: (1) the intent to agree or conspire, and (2) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure* § 85, the Court recognized the obvious difficulty of proving the dual intent and concluded generally that no distinction should be made between the two specific intents. The Court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases.

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

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

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

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

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

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

A jury may properly consider overt acts of acquitted or dismissed co-conspirators in the trial of other co-conspirators. See *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d, 182, 205, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii (1978). In *State v. Taylor*, 2 Kan. App. 2d 532, 534, 583 P.2d 1033 (1978), the Court of Appeals of Kansas held that in its proof of conspiracy, the State is not limited to the overt acts alleged in the information.

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

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. 2d at 762-763.

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

55.04 CONSPIRACY - WITHDRAWAL AS A DEFENSE

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

Notes on Use

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

Comment

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

Withdrawal is a defense to conspiracy, but there is no statutory defense of withdrawal to aiding and abetting other crimes. *State v. Kaiser*, 260 Kan. 235, 918 P.2d 629 (1996).

55.05 CONSPIRACY - DEFINED

A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement.

The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all of the facts and circumstances.

Notes on Use

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

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Cox*, 258 Kan. 557, 908 P.2d 603 (1995); *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

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

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

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

55.06 CONSPIRACY - ACT IN FURTHERANCE DEFINED

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

Notes on Use

For authority, see K.S.A. 21-3302(a).

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977) and *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975).

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

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

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

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

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

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55.07 CONSPIRACY - DECLARATIONS

Declarations of one conspirator may be considered by you as evidence against all co-conspirators if the declarations were made when:

- 1. Two or more conspirators were participating in a plan to commit a crime; and**
- 2. The plan to commit the crime was in existence; and**
- 3. The plan to commit the crime had not been completed.**

Notes On Use

For authority, see K.S.A. 60-460(i)(2). The co-conspirator evidence rule is discussed in the Comment to PIK 3d 55.03, Conspiracy.

Comment

In *State v. Bird*, 238 Kan. 160, 176, 708 P.2d 946 (1985), the Supreme Court set forth the five prerequisites for utilizing K.S.A. 60-460(i)(2). See also, *State v. Shultz*, 252 Kan. 819, 850 P.2d 818 (1993). The co-conspirator's statement need not be "in furtherance" of the conspiracy but must be "relevant" to the conspiracy. See also *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 198-199, 577 P.2d 803 (1978).

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Comment

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation; whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905); and 21 Am. Jur. 2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993); *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act. *State v. Westfahl*, 21 Kan. App. 2d 159, 898 P.2d 87 (1995).

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

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

Solicitation to commit first-degree murder is a separate and independent criminal offense from aiding and abetting first-degree murder, and the jury need not be instructed on criminal solicitation as a lesser included offense. *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996); *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995).

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55.10 CRIMINAL SOLICITATION - DEFENSE

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

Notes on Use

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

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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

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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.

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**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.

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

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."

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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 guilt based on proof of premeditation while others arrive at a verdict of guilt 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.

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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 an off-grid 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, 901 P.2d 35 (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.)

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56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

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

For a collection of cases dealing with the definition of this term, see *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). See also, *State v. Wilson*, 215 Kan. 437, 524 P.2d 224 (1974); *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977); *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980); and *State v. Hill*, 242 Kan. 68, 82, 744 P.2d 1228 (1987).

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

(b) Deliberately and with premeditation.

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

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

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

(c) Willfully.

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

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

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- (d) **Intentionally.**
Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing," "willful," "purposeful" and "on purpose."
For authority, see K.S.A. 21-3201(b). See also, *State v. Stafford*, 223 Kan. 62, 65, 573 P.2d 970 (1977).
- (e) **Heat of Passion.**
Heat of passion means any intense or vehement emotional excitement which was spontaneously provoked from circumstances. Such emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection. For authority, see *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959); *State v. Ritchey*, 223 Kan. 99, 573 P.2d 973 (1977); and *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).
- (f) **Reckless.**
Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton negligence" and "wantonness" are included within "reckless."
For authority, see K.S.A. 21-3201(c).

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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

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human life or safety and is not an inherently dangerous felony as defined in K.S.A. 21-3436. K.S.A. 8-1566 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.

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56.06-A INVOLUNTARY MANSLAUGHTER - DRIVING UNDER THE INFLUENCE

The defendant is charged with the crime of involuntary manslaughter while driving under the influence of (alcohol)(drugs). The defendant pleads not guilty.

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

1. That the defendant unintentionally killed _____;
 2. That it was done (in the commission of) (while attempting to commit) (while in flight from [committing][attempting to commit]) the act of operating any vehicle in this state
 - (a) While 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/or
 - (b) While having an alcohol concentration in (his)(her) blood of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle];
- The phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood)(210 liters of breath).
- and/or
- (c) By a person who is a habitual user of any (narcotic) (hypnotic)(somnifacient)(stimulating) drug; 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. 21-3442. Involuntary manslaughter while driving under the influence is a severity level 4, person felony. See also, PIK 3d 70.01, Traffic

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Offense - Driving Under the Influence of Alcohol or Drugs, and 70.01-A, Traffic Offense - Alcohol Concentration .08 or More.

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act and the act pertaining to Hypnotic, Somnifacient or Stimulating Drugs, defines the term "narcotic drug" in K.S.A. 65-4101(p). The definition includes the term "opium and opiate," and a detailed definition of "opiate" is provided in K.S.A. 65-4101(q). The terms "hypnotic drug," "somnifacient drug," and "stimulating drug" are not expressly defined in the statutes.

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56.08 ASSISTING SUICIDE

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

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

1. That the defendant intentionally advised, encouraged or assisted _____ in the taking of (his)(her) own life; and
2. That the defendant's conduct resulted in the (suicide) (attempted suicide) of _____; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3406. Assisting suicide is a severity level 9, person felony.

Comment

This statute contemplates some participation in the events leading up to the commission of the final overt act by the suicide victim such as obtaining or furnishing the means for bringing about the death (e.g., gun, knife, poison).

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

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56.09 UNINTENDED VICTIM - TRANSFERRED INTENT

When a homicidal act is directed against one other than the person killed, the responsibility of the actor is exactly as it would have been had the act been completed against the intended victim.

Notes on Use

For authority, see *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

This instruction should be given in cases where there was an unintended victim, such as in cases of mistaken identity or where a bystander is killed.

Comment

It is no defense to the crime of murder that the defendant may have mistaken the victim for some other person, or that he may have supposed himself wronged by some other person. The fact that the homicidal act was directed against a person other than the person killed does not relieve the slayer of criminal responsibility. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967). Where a person intends to kill one person but actually kills another, he is just as responsible as if he had killed the person intended.

This principle rests on the basis of "transferred intent", and is equally applicable to prosecutions for assault and battery, notwithstanding proof of specific intent to injure is required. "The intent follows the bullet." 40 Am. Jur. 2d, Homicide § 11, pp.302-303. *State v. Stringfield*, 4 Kan. App. 2d 559, 608 P.2d 1041 (1980).

In *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996), the Supreme Court contrasted the transferred intent rule and the felony murder rule.

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56.16 BATTERY

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

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

1. That the defendant (intentionally) (recklessly) caused bodily harm to another person;
or
That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3412. Battery is a class B, person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

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56.16-A DOMESTIC BATTERY

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

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

1. That the defendant (intentionally)(recklessly) caused bodily harm to _____;

or

That the defendant intentionally caused physical contact with _____ in a rude, insulting or angry manner; and

2. That the defendant and _____ were family or household members.; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

“Family or household member” means persons 18 years of age or older who are (spouses) (former spouses) (parents and children) (stepparents and stepchildren) (persons who are presently residing together) (persons who have resided together in the past) (persons who have a child together regardless of whether they have been married or have lived together at any time) (a man and a woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time).

Notes on Use

For authority, see K.S. A. 21-3412. Domestic battery is classified as a class B person misdemeanor on the first conviction. On the second conviction within a five year period, domestic battery is a class A person misdemeanor. A third or subsequent conviction of domestic battery within a five year period is a person felony.

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56.16-B BATTERY AGAINST A SCHOOL EMPLOYEE

The defendant is charged with the crime of battery against a school employee. The defendant pleads not guilty.

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

1. That the defendant (intentionally)(recklessly) caused bodily harm to _____;

or

That the defendant intentionally caused physical contact with _____ in a rude, insulting or angry manner; and

2. That _____ was a school employee;

3. That _____ was ((in)[on] any school property or grounds upon which is located a building or structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12)(at any regularly scheduled school sponsored activity or event);

4. That _____ was engaged in the performance of such employee's duty; and

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

“School employee” means any employee of a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

Notes on Use

For authority, see K.S.A. 21-3443. Battery against a school employee is a class A, person misdemeanor.

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56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

1. That the defendant (intentionally) (recklessly) caused bodily harm to _____;

or

That the defendant intentionally caused physical contact with _____ in a rude, insulting or angry manner; and

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

or

That _____ was a state correctional officer or employee and defendant was a person in the custody of the Secretary of Corrections;

or

That _____ was a juvenile correctional facility officer or employee and defendant was a person confined in such juvenile correctional facility;

or

That _____ was a juvenile detention facility officer or employee and defendant was a person confined in such juvenile detention facility;

or

That _____ was a (city)(county) correctional officer or employee and defendant was a person confined in a (city holding facility)(county jail facility);

and

3. That _____ was engaged in the performance of (his)(her) duty; and

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

Notes on Use

For authority, see K.S.A. 21-3413. Battery against a state, county or city law enforcement officer is a class A, person misdemeanor. Battery against a state, city or county correctional officer or employee, a juvenile correctional facility officer or employee, or a juvenile detention facility officer or employee is a severity level 7, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The statute defines "state correctional officer or employee" as "any officer or employee of the Kansas Department of Corrections, or any independent contractor, or any employee of such contractor, working at a correctional institution." "Juvenile correctional facility officer or employee" means any officer or employee of the juvenile justice authority or any independent contractor, or any employee of such contractor, working at a juvenile correctional facility. "Juvenile detention facility officer or employee" means any officer or employee of a juvenile detention facility. "City or county correctional officer or employee" means any correctional officer or employee of the city or county or any independent contractor, or any employee of such contractor, working at a city holding facility or county jail facility.

The elements of this crime were modified, effective July 1, 1996.

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56.23 CRIMINAL THREAT

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

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

1. That the defendant threatened to commit violence;
2. That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]); and

or

That such threat was communicated in reckless disregard of the risk of causing (terror to _____) (the evacuation of a [building] [place of assembly] [facility of transportation]); and

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

[Under this instruction, a statement that defendant has already committed violence is the same as a threat to commit violence.]

Notes on Use

For authority, see K.S.A. 21-3419. Criminal threat is a severity level 9, person felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

The above instruction, less the last paragraph, was approved in *State v. Knight*, 219 Kan. 863, 867, 549 P.2d 1397 (1976), when the defendant himself did the threatening and communicated the threat. However, if the threat to commit violence is allegedly made by another person and the defendant communicates the threat with the intent to terrorize, the instruction needs to be modified to so state

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as it is not essential to prove the crime that the defendant threatened to do the acts mentioned in the communication itself. It is sufficient if the defendant communicates the threat made by another person if he does so with the specific intent to terrorize the victim.

For definitions of "threat" and "terrorize," see *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

The 1984 amendment also added a proscription against threatening to adulterate or contaminate food or drink. Since this new crime requires no specific intent, a separate instruction was deemed necessary. See PIK 3d 56.23-A, Criminal Threat - Adulteration or Contamination of Food or Drink.

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some significant bearing on making the commission of the crime easier. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

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

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56.25 AGGRAVATED KIDNAPPING

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

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

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

Notes on Use

For authority, see K.S.A. 21-3421. Aggravated kidnapping is a severity level 1, person felony. Kidnapping as defined by K.S.A. 21-3420 is a lesser included offense and where the evidence warrants it, PIK 3d 56.24, Kidnapping, should be given.

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

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

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426, 819 P.2d 628 (1991).

Rape is an act of violence unnecessary to and not a part of the kidnapping itself. *State v. Barry*, 216 Kan. 609, 533 P.2d 1308 (1974). Throwing the victim into a swollen stream was sufficient to comply with the requirement of “bodily harm.” *State v. Taylor*, *supra*.

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

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56.26 INTERFERENCE WITH PARENTAL CUSTODY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3422. Interference with parental custody is a class A, person misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order. Interference with parental custody is a severity level 10, person felony in all other cases.

Comment

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

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

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

56.28 CRIMINAL RESTRAINT

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

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

1. That the defendant knowingly and without legal authority restrained _____ so as to interfere substantially with (his)(her) liberty; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

(A merchant, [his][her] agent or employee, who has probable cause to believe that a person [has actual possession of] [has wrongfully taken] [is about to wrongfully take] merchandise from [his][her] mercantile establishment, may detain such person [on the premises] [in the immediate vicinity thereof] in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession.)

Notes on Use

For authority, see K.S.A. 21-3424. Criminal restraint is a class A, person misdemeanor.

The parenthetical material should be used only in those cases where evidence has been introduced to support the merchant's defense.

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56.29 MISTREATMENT OF A CONFINED PERSON

The defendant is charged with the crime of mistreatment of a confined person. The defendant pleads not guilty.

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

1. That the defendant was (a law enforcement officer) (a person in charge of or employed by the owner or operator of a [correctional institution] [hospital] [nursing home]);
2. That the defendant (intentionally abused) (neglected) (ill-treated) _____;
3. That _____ was (physically disabled) (mentally ill) (detained or confined involuntarily); 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. 21-3425. Mistreatment of a confined person is a class A, person misdemeanor.

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56.30 ROBBERY

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

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

1. That the defendant intentionally took property from the (person) (presence) of _____;
2. That the taking was by (threat of bodily harm to _____) (force); 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. 21-3426. Robbery is a severity level 5, person felony.

Comment

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

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

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

In *State v. Lucas*, 221 Kan. 88, 557 P.2d 1296 (1976), the trial court failed to instruct on the intent requirement. In refusing to hold error, the Court found that

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the defendant's use of a deadly weapon established clear proof of intent.

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

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

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

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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).

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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.

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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 for offenses between July 1, 1993 and June 30, 1994. The 1994 statute was declared unconstitutional in *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

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".

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57.01 RAPE

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

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

1. That the defendant had sexual intercourse with _____;
2. That the act of sexual intercourse was committed without the consent of _____ under circumstances when:
 - (a) (she)(he) was overcome by (force) (fear); and
or
 - (b) (she)(he) was unconscious or physically powerless; and
or
 - (c) (she)(he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and
or
 - (d) (she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and
or
2. That _____ was under 14 years of age when the act of sexual intercourse occurred; and
or
2. That _____ consented to sexual intercourse but (his) (her) consent was obtained by the defendant knowingly misrepresenting that the sexual intercourse was a (medically) (therapeutically) necessary procedure; and
or
2. That _____ consented to sexual intercourse but (his) (her) consent was obtained by the defendant

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knowingly misrepresenting that the sexual intercourse was a legally required procedure within the scope of the defendant's authority; and

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

Notes on Use

For authority, see K.S.A. 21-3502. Rape is a severity level 1, person felony unless the intercourse was consensual and the consent was obtained by a knowing misrepresentation made by the defendant that the intercourse was medically, therapeutically, or legally necessary procedure, then rape is a severity level 2, person felony.

The appropriate category for paragraph two of the instruction should be selected as required by the facts.

In addition, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

In 1996, the Legislature amended K.S.A. 21-3502 to include as rape, consensual sexual intercourse when the consent was obtained by a knowing misrepresentation of medical, therapeutic or legal necessity.

Whether a victim is overcome by fear, for purposes of K.S.A. 21-3502(a)(1)(A), is a question to be resolved by the fact finder. 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).

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

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

For a discussion about some fundamental changes made by the Kansas Legislature to the rape statute see 52 J.B.A.K. 99, 104 (1983).

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. Schriener*, 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).

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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).

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

57.18 SEX OFFENSES - DEFINITIONS

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

B. Unlawful sexual acts are defined as follows:

(a) Rape.

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

Rape is also defined as sexual intercourse with a child who is under 14 years of age.

Rape is also defined as sexual intercourse with a person who does consent to the intercourse, but the consent was obtained by a knowing misrepresentation that the intercourse was either (1) medically; or (2) therapeutically needed; or by a knowing misrepresentation that the intercourse was a legally required procedure and the misrepresentation was made within the scope of the defendant's authority.

(b) Indecent liberties with a child.

Indecent liberties with a child means engaging in either of the following acts with a child who is 14 or more years of age but less than 16 years of age: (1) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child

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or the offender or both; (2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another.

(c) Aggravated indecent liberties with a child.

Aggravated indecent liberties with a child means: (1) sexual intercourse with a child 14 or more years of age but under 16 years of age; or (2) engaging in any of the following acts with a child 14 or more years of age but under 16 years of age who does not consent thereto: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or (b) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another; or (3) engaging in any of the following acts with a child who is under 14 years of age: (a) any lewd fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; (b) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, offender or another.

(d) Sodomy.

Sodomy means: (1) oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; (2) oral or anal sexual relations between a person and an animal; (3) sexual intercourse with an animal; or (4) anal penetration, however slight, of a male or female by any body part or object. Sodomy does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search conducted in accordance with the law.

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(e) Criminal sodomy.

Criminal sodomy means: (1) sodomy between persons who are 16 or more years of age and who are members of the same sex or between a person and an animal; or (2) sodomy with a child who is 14 or more years of age but under 16 years of age; or (3) causing a child 14 or more years of age but under 16 years of age to engage in sodomy with any person or animal.

(f) Aggravated criminal sodomy.

Aggravated criminal sodomy means: (1) sodomy with a child who is under 14 years of age; (2) causing a child under 14 years of age to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease, which was known by the offender or was reasonably apparent to the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

(g) Lewd and lascivious behavior.

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

(h) Sexual battery.

Sexual battery means the intentional touching of the person of another who is 16 or more years of age, who is

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not the spouse of the offender and who does not consent to the touching, with the intent to arouse or to satisfy the sexual desires of the offender or another.

(i) Aggravated sexual battery.

Aggravated sexual battery means the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or to satisfy the sexual desires of the offender or another under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by or was reasonably apparent to the offender; (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

Notes on Use

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

In defining the term "spouse", only the applicable language should be used. The Committee emphasizes this definition is only applicable to PIK 3d Chapter 57.00-Sex Offenses.

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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 necessities 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 Appeals 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. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *In Re Fowles*, 89 Kan. 430, 131 Pac. 598 (1913).

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*, supra; *State v. Knetzer*, 3 Kan. App. 2d 673, 600 P.2d 160 (1979).

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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 approval in *State v. Knetzer*, supra. Compare with *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995).

In *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995), the Court of Appeals held that proof beyond a reasonable doubt that the child be in "necessitous circumstances" is required and that a conviction may not be supported solely by proving that a parent has failed to pay court-ordered support. Here, the trial court refused to permit the defendant to offer evidence that the child had independent means through a trust. The Court held that such refusal required reversal since such evidence was relevant to the issue of whether the failure to pay court-ordered support caused the child to be in "necessitous circumstances."

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58.13 AGGRAVATED JUVENILE DELINQUENCY

The statute on which this instruction was based (K.S.A. 21-3611) was repealed effective July 1, 1996. L. 1996, Ch. 185, § 5.

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58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION

The defendant is charged with the crime of contributing to a child's (misconduct) (deprivation). The defendant pleads not guilty.

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

1. That _____ was a child under 18 years of age;
2. That the defendant intentionally:
 - (a) (caused) (encouraged) _____ to become or remain a child in need of care; and
or
 - (b) (caused) (encouraged) _____ to commit a traffic infraction; and
or
 - (c) (caused) (encouraged) _____ to commit an act which if committed by an adult would be a (felony) (misdemeanor); and
or
 - (d) (caused) (encouraged) _____ to purchase (a parimutuel ticket) (an interest in a parimutuel ticket); and
or
 - (e) (caused) (encouraged) _____ to illegally (purchase) (obtain) (attempt to purchase) (attempt to obtain) alcoholic liquor from any person; and
or
 - (f) failed to reveal upon inquiry by a uniformed or properly identified law enforcement officer engaged in the performance of such officer's duty, information the defendant had regarding a runaway, with intent to aid the runaway in avoiding detection or apprehension; and

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CHAPTER 59.00

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59.01 THEFT

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

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

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

Notes on Use

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

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59.13 MAKING A FALSE INFORMATION

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

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

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

Notes on Use

For authority, see K.S.A. 21-3711. Making a false information is a severity level 8, nonperson felony. K.S.A. 21-3711 was amended in 1996 to change the crime from making a false writing to making a false information. "Generating" and "distributing" were additional acts added.

The term "false information" was expanded to include electronic data in addition to a written instrument or an entry in a book of account.

Comment

See Judicial Council comment to K.S.A. 21-3710.

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

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

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

Knowledge is an essential element of the offense of making a false writing under K.S.A. 21-3711. Knowledge means actual information that the writing falsely states or represents to some material matter and is intended to defraud or induce some official action. Information is considered material under K.S.A. 21-3711 if a reasonable person would attach importance to the information in choosing a course of action in the transaction in question. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

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

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59.18 AGGRAVATED BURGLARY

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

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

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

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

Notes on Use

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

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

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

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Comment

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

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

In *State v. Walters*, 8 Kan. App. 2d 237, 655 P.2d 947 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

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

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

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

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

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994) and *State v. Richmond*, 258 Kan. 449, 904 P.2d 981 (1995).

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).

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59.19 POSSESSION OF BURGLARY TOOLS

The statute upon which this instruction was based (K.S.A. 21-3717) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

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59.20 ARSON

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

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosion);

or

That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (an explosion);

2. That the defendant did so without the consent of _____; and
3. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(a)(1). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This instruction should not be used for crimes charged under K.S.A. 21-3718(a)(2). If the amount of damages is in issue, include PIK 3d 59.70 in the jury instructions and use PIK 3d 68.11, Verdict Form.

Comment

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

Under K.S.A. 21-3718(a)(1), the State must prove that the defendant knowingly damaged a building and that another person had some interest in that building. The State is not required to prove the defendant knew who owned the building. *State v.*

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Powell, 9 Kan. App. 2d 748, 687 P.2d 1375 (1984).

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

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

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59.21 ARSON - DEFRAUD AN INSURER OR LIENHOLDER

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

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

1. That the defendant intentionally damaged _____ by means of (fire) (an explosion);
2. That _____ was an insurer of the (building) (property); or
That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____; and
4. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); 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. 21-3718(a)(2). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This section should not be used for K.S.A. 21-3718(a)(1).

If the amount of damage is in issue, include PIK 3d 59.70 in the jury instructions, and use PIK 3d 68.11, Verdict Form.

Comment

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

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

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59.22 AGGRAVATED ARSON

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

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosion);

or

That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (explosion);

2. That the defendant did so without the consent of _____;

OR

1. That the defendant intentionally damaged _____ by means of (fire) (an explosion);
2. That _____ was an insurer of the (building) (property);

or

That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;

3. That the defendant did so with the intent to (injure) (defraud) _____;
- (3.) or (4.) That at the time there was a human being in the (building) (property); and
- (4.) or (5.) That the [(fire) (explosion)] [(resulted) (did not result)] in a substantial risk of bodily harm; and
- (5.) or (6.) That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3719. Aggravated arson resulting in a substantial risk of bodily harm is a severity level 3, person felony. Aggravated arson not

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resulting in substantial risk of bodily harm is a severity level 6, person felony.

When defendant has been charged with aggravated arson resulting in a substantial risk of bodily harm and there is an issue as to the seriousness of the risk, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

Comment

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

A dead person is not a "human being" within the meaning of K.S.A. 21-3719. *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993).

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

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

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59.23 CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT

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

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

1. That _____ (was the owner of property described as _____) (had an interest as a _____ in property described as _____);
2. That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosion;
3. That the defendant did so without the consent of _____;
4. That the property was damaged to the extent of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(a)(1). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$500 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$500 or is of the value of \$500 or more and is damaged to the extent of less than \$500.

Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

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

Comment

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

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than \$50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

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

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

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

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

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

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word “explosive” as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean “explosion.”

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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.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

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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 other than railroad property. Criminal trespass on railroad property is a separate offense covered by K.S.A. 21-3761 and PIK 3d 59.25-B, Criminal Trespass on Railroad Property.

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

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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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59.25-A CRIMINAL TRESPASS - HEALTH CARE FACILITY

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

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

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

Notes on Use

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

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

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

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59.25-B CRIMINAL TRESPASS ON RAILROAD PROPERTY

The defendant is charged with criminal trespass on railroad property. The defendant pleads not guilty.

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

1. That the defendant without the consent of the owner or its agent intentionally (entered) (remained) on railroad property;
2. That defendant knew the property was railroad property; and
3. That this act occurred on or about the _____ day of _____, 19__, in _____ County, Kansas.]

As used in this instruction, “railroad property” includes any (train) (locomotive) (railroad car) (caboose) (rail mounted work equipment) (rolling stock) (safety device) (switch) (electronic signal) (microwave communication equipment) (connection) (railroad track) (rail) (bridge) (trestle) (right of way) (property owned, leased or possessed by a railroad company).

or

1. That the defendant caused a derailment of a (train) (railroad car) (rail mounted work equipment);
 2. That the defendant did so (maliciously) (wantonly);
- 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. 21-3761.

Violation of this section is a class A nonperson misdemeanor, except that, if the violation results in damage or loss in excess of \$1,500, the offense is a severity level 8, nonperson felony.

Subsection (c) of the statute provides that the statute shall not interfere with the lawful use of a private or public crossing.

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Subsection (d) provides that nothing in the statute shall be construed as limiting a representative or member of a labor organization which represents or is seeking to represent the employees of the railroad, from conducting such business as provided under the railway labor act (45 U.S.C. 151, et sec.) and under other federal labor laws.

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59.26 LITTERING - PUBLIC

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

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

1. That the defendant intentionally or recklessly (deposited) (caused to be deposited) _____ (on) (in) a public _____;
2. That the defendant was acting without the permission of any public officer or public employee who had authority to grant such permission; 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. 21-3722(a). Littering is class C misdemeanor.

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**59.51 POSSESSION OF TOOLS FOR OPENING,
DAMAGING OR REMOVING COIN-OPERATED
MACHINES**

The statute upon which this instruction was based (K.S.A. 21-3741) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

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**59.52 CASTING AN OBJECT ONTO A STREET OR ROAD -
DAMAGE TO VEHICLE, RESULTING IN BODILY
INJURY**

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

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

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]);
2. That (a vehicle) (an engine) (a car) (a train) (a locomotive) (a railroad car) (a caboose) (rail-mounted work equipment) (rolling stock) was damaged;
3. That _____ was injured as a result of the (cast or thrown object) (damage to the vehicle in which [he] [she] was a passenger); 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. 21-3742(d). Casting an object causing damage to a vehicle which results in bodily injury is a severity level 6, person felony.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

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**59.53 CASTING AN OBJECT ONTO A STREET OR ROAD -
BODILY INJURY**

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

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

1. That the defendant intentionally cast [(an object) (objects)] from a bridge or overpass (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]);
2. That _____ was on the (street) (road) (highway) (railroad right-of-way);
3. That _____ was injured as a result of the cast or thrown object; 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. 21-3742(c). Casting an object causing bodily injury is a severity level 7, nonperson felony.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

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**59.54 CASTING AN OBJECT ONTO A STREET OR ROAD -
VEHICLE DAMAGE**

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

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

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]);
2. That (a vehicle) (an engine) (a car) (a train) (a locomotive) (a railroad car) (a caboose) (rail-mounted work equipment) (rolling stock) on the (street) (highway) (railroad right-of-way) was damaged by the thrown or cast object; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(b). Casting an object causing damage to a vehicle, railroad car or other equipment is a class A, nonperson misdemeanor.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

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59.55 CASTING AN OBJECT ONTO A STREET OR ROAD - NO DAMAGE

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

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

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]); 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. 21-3742(a). Casting an object without injury to a person or vehicle is a class B, nonperson misdemeanor.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

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59.56 SALE OF RECUT TIRES

The defendant is charged with the crime of (selling) (offering to sell) recut or regrooved tires intended for use on a passenger vehicle or of (selling) (offering to sell) a passenger vehicle equipped with recut or regrooved tires. The defendant pleads not guilty.

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

1. That the defendant intentionally (sold) (offered for sale) recut or regrooved tires for a passenger vehicle;

or

That the defendant intentionally (sold) (offered for sale) a passenger vehicle equipped with recut or regrooved tires; and

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

Recut or regrooved tires are unretreaded or unrecapped tires into which new grooves have been cut or burned.

Passenger vehicle means any vehicle which is designed primarily to carry 10 or fewer passengers, and which is not used as a truck.

Notes on Use

For authority, see K.S.A. 21-3743 and 21-3744. Sale of recut tires is a class B, nonperson misdemeanor.

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60.09 OBSTRUCTING OFFICIAL DUTY

The defendant is charged with the crime of obstructing official duty. The defendant pleads not guilty.

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

1. That _____ was authorized by law to _____;
2. That the defendant knowingly and willfully (obstructed) (resisted) (opposed) _____ in the _____ which was the official duty of _____;
3. That the act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty;
4. That at the time the defendant knew or should have known that _____ was a law enforcement officer; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3808.

In the second blank of Element No. 1, the Court should insert the act or acts the person named in the first blank was authorized to perform.

In the second blank of Element No. 2, the Court should insert the act or acts the defendant obstructed, resisted or opposed.

Obstructing official duty in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony.

Obstructing official duty in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A, nonperson misdemeanor.

Comment

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977), it is held that a defendant who runs from a federal officer assisting state law enforcement officials

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in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, it is necessary that the State prove the defendant had reasonable knowledge that the person he or she opposed was a law enforcement official.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), it was held that K.S.A. 21-3808 encompasses illegal obstruction by any means including oral statements.

Whether underlying charge is denominated obstruction of duty or obstruction of process, if there is a uniformed and properly identified law enforcement officer, PIK 3d 60.09 should be given, not PIK 3d 60.08. *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

In *State v. Dalton*, 21 Kan. App. 2d 50, 895 P.2d 204 (1995), the defendant opposed arrest under a warrant issued for violation of a felony diversion agreement. It was held defendant's conviction for Obstructing Legal Process or Official Duty was proper.

60.10 ESCAPE FROM CUSTODY

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

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

1. That the defendant was being held in custody (on a written charge of a misdemeanor) (following defendant's conviction of a misdemeanor) (on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a misdemeanor) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a misdemeanor offense);

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

or

That the defendant intentionally failed to return to custody (following temporary leave lawfully granted) (following a court order authorizing temporary leave); and

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

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a misdemeanor offense) (here insert any other detention for law enforcement purposes).

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Notes On Use

For authority, see K.S.A. 21-3809. Escape from custody is a class A, nonperson misdemeanor.

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

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1969), the Court discusses and defines "escape" and states what constitutes "escape." The Court, in this case, also stated when a person is in "lawful custody."

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the Court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes K.S.A. 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the State is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The Court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

60.11 AGGRAVATED ESCAPE FROM CUSTODY

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

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

A. 1. That the defendant was being held in custody (on a written charge of a felony) (following conviction of a felony) (on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect 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 from _____; 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) (on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect) (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

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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.

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

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

60.12 AIDING ESCAPE

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

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

A. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

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

OR

B. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

2. That the defendant supplied to _____, an object or thing adapted or designed for _____'s use in making an escape;

3. That the defendant did so with intent to assist _____ in making an escape; and

OR

C. 1. That _____ was confined in an institution (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

2. That the defendant (brought) (introduced) into the institution an object or thing adapted or designed for _____'s use in making an escape;

3. That the defendant did so with intent to assist _____ in making an escape; and

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

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Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect) (here insert any other detention for law enforcement purposes).

Notes On Use

For authority, see K.S.A. 21-3811 and 21-3809. Aiding escape is a severity level 8, nonperson felony.

K.S.A. 21-3809(b)(1), "lawful custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. Lawful custody is initially a question of law for the Court to determine.

For a definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

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60.17 INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE

The defendant is charged with the crime of interference with the administration of justice. The defendant pleads not guilty.

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

1. That the defendant knew _____ was a (judicial officer)(prosecuting attorney);
2. That the defendant (communicated a threat of violence to _____) (harassed _____ by repeated abusive and defamatory communication) (picketed, paraded or demonstrated in or near a building housing _____) (picketed, paraded or demonstrated in or near the residence or place of abode of _____);
3. That such act was done with intent to influence, impede or obstruct the findings, decision, ruling, order, judgment or decree of _____ on any matter then pending before (him)(her); 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. 21-3816. Interference with the administration of justice is a class A, nonperson misdemeanor.

Comment

Nothing in K.S.A. 21-3816 shall limit or prevent the exercise by any court in this state of its power to punish for contempt.

Judicial officer is defined in K.S.A. 21-3110(19)(c). Prosecuting attorney is defined in K.S.A. 22-2202.

The Committee believes that the words "defamatory" and "abusive" are more understandable to a jury than "vituperative" as used in this statute.

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60.18 CORRUPT CONDUCT BY JUROR

The defendant is charged with the crime of corrupt conduct by a juror. The defendant pleads not guilty.

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

1. That the defendant had been (summoned) (sworn) as a juror;
2. (a) That the defendant intentionally promised or agreed to give a verdict for or against a party in a (civil) (criminal) proceeding; and

OR

2. (a) That the defendant without authority of the court or officer received evidence or information relative to a case defendant (was) (would be) sworn to try;
- (b) That the defendant did not immediately disclose the evidence or information to the (court) (officer); 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. 21-3817. Corrupt conduct by a juror is a severity level 9, nonperson felony.

Comment

See K.S.A. 22-3413, Juror's knowledge of material fact.

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CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

	PIK Number
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Criminal Use Of Weapons - Misdemeanor	64.02
Criminal Discharge Of A Firearm - Misdemeanor	64.02-A
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64.01 CRIMINAL USE OF WEAPONS - FELONY

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

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

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

That the defendant knowingly (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight;

or

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

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

Notes on Use

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

Comment

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

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

Notes on Use

For authority, see K.S.A. 21-4201(a)(1) through (5) and (a)(9). The instruction presents several alternative situations and only the appropriate one should be used.

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

Likewise, under subsection (a)(2), an ordinary pocket knife with no blade more than 4 inches in length shall not be construed to be a dangerous knife, weapon or instrument. If applicable, this exclusionary definition should be included after the numbered paragraphs of the instruction.

It should also be noted under this statute, possession of a shotgun with a barrel less than 18 inches in length is a felony. See PIK 3d 64.01, Criminal Use of Weapons - Felony.

See also, PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defenses, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

Comment

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

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

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(a)(4) is not a lesser included offense of unlawful possession of a firearm under 21-4204(a)(2). PIK 64.02 is cited.

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

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

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

In *State v. Doile*, 7 Kan. App. 2d 722, 648 P.2d 262 (1982), the constitutionality of subsection (a)(4) was upheld as not an unreasonable exercise of police power or overbroad.

The constitutionality of K.S.A. 21-4201(a)(1) was upheld in *State v. Neighbors*, 21 Kan. App. 2d 824, 908 P.2d 649 (1995), wherein the court found the statute to be neither vague nor overbroad.

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

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64.02-A CRIMINAL DISCHARGE OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

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

1. That the defendant intentionally discharged a firearm;
2. That the act occurred upon (land) (a nonnavigable body of water) of another;

or

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

3. That the defendant did not have the permission of the owner or person in possession of such land to discharge a firearm; and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

Authority for this instruction is K.S.A. 21-4217, a class C misdemeanor.

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

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64.02-A-1 CRIMINAL DISCHARGE OF A FIREARM - FELONY

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

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

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

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

2. That the act resulted in (bodily harm)(great bodily harm) to a person; 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. 21-4219. The provisions of K.S.A. 21-4219 were enacted to address the so-called "drive by shootings" and presumably fill a perceived need not provided under K.S.A. 21-3410 and 21-3414.

Criminal discharge of a firearm at an unoccupied dwelling is a severity level 8, person felony. Criminal discharge of a firearm at an occupied building or vehicle is a severity level 7, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in bodily harm to a person during the commission of

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the act is a severity level 5, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in great bodily harm to a person during the commission of the act is a severity level 3, person felony.

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

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

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**64.02-B CRIMINAL DISCHARGE OF A FIREARM -
AFFIRMATIVE DEFENSE**

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

Notes on Use

For authority, see K.S.A. 21-4217(b). Insert in the blank space the applicable description of an exempt person under the applicable statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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

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64.03 AGGRAVATED WEAPONS VIOLATION

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

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

1. That the defendant (allege any of the violations listed in PIK 3d 64.01 and 64.02);
2. That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) within five years prior to the commission of such act; and
or
That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) prior to the commission of such act; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4202. This statute has been amended to include convictions from other jurisdictions which are substantially the same as a Kansas person felony. Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201.

If the prior conviction was a nonperson felony, the first alternative in element 2 should be used; if the prior conviction was a person felony, the second alternative should be used.

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the Court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

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

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of unlawful possession of a firearm under K.S.A. 21-4204(a)(2).

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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

Notes on Use

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

Alternative C concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within five years of the act charged. For the purposes of this alternative, the specified felony conviction is defined as any felony except a felony as defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b, or K.S.A. 65-4160 through 65-4165, or a crime under the law of another jurisdiction which is substantially the same as such felony. It is important to note that there is no longer any barrel length specification.

Alternative D concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony with 10 years of the act. The specified felony conviction for this alternative is any felony defined by K.S.A. 3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b; L. 1996 Ch. 158, § 1, involuntary manslaughter while driving under the influence; or K.S.A. 65-4160 through 65-4165, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

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

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

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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<u>Alternative</u>	<u>Time Limit</u>	<u>Type Prior Crime</u>	<u>Prior Possession Of Firearm During Prior Crime</u>
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.

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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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.

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

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

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64.07-B CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE

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

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

1. That the defendant knowingly possessed a firearm with a barrel less than 12 inches long;
2. That at the time of the act the defendant was less than 18 years of age; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4204a. Criminal possession of a firearm by a juvenile is a class A, nonperson misdemeanor.

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

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

Notes on Use

For authority, including the specific affirmative defenses, see K.S.A. 21-4204a. Insert in the blank space the applicable defense as specified by statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses-Burden of Proof, should be given.

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64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

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

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

1. That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a firearm; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4205. Defacing identification marks of a firearm is a class B nonperson misdemeanor.

Comment

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

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64.10-A EXPLOSIVE - DEFINITION

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

Notes on Use

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

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64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

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

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

1. That the defendant knowingly ([sold] [gave] [transferred]) ([an explosive substance] [a detonating substance]) to _____;
2. That _____ was a person under 21 years of age; and

or

That the defendant knew _____ was (a person who was both addicted to and an unlawful user of a controlled substance, _____) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been released from imprisonment for a felony); and

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

Notes on Use

For authority, see K.S.A. 21-4209. Criminal disposal of explosives is a severity level 10, person felony. The applicable bracketed reference in each parentheses mentioned in element nos. 1 and 2 should be selected. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor. See K.S.A. 21-3202.

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

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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64.11-A CRIMINAL POSSESSION OF EXPLOSIVES

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

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

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

Notes on Use

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

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

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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**64.11-B CRIMINAL POSSESSION OF EXPLOSIVES -
DEFENSE**

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

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CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

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65.06 GAMBLING

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

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

1. That the defendant (made a bet) (entered or remained in a gambling place with intent to [make a bet] [participate in a lottery] [play 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. 21-4303. Gambling is a class B, nonperson misdemeanor. PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

Comment

The above instruction was approved in *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

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65.06-A ILLEGAL BINGO OPERATION

The defendant is charged with the crime of illegal bingo operation. The defendant pleads not guilty.

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

1. That the defendant (managed) (operated) (conducted) a game of bingo;
2. That the defendant did so in violation of a (statute) (regulation) which provides as follows: (list the specific statute or regulation with which the State contends the defendant failed to comply); and
3. That the act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Bingo means a game in which each participant must pay a charge and a prize or prizes are awarded to the winner or winners in which each participant receives one or more cards each of which is marked off into 25 squares arranged in five horizontal rows of five squares each, and five vertical rows of five squares each, with each square being designated by number, letter or combination of numbers and letters, and only the center square designated with the word "free" with no 2 cards being identical, with the players covering squares as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters, or combinations of numbers and letters corresponding to the system used for designating the squares, with the winner of each game being the player or players first properly covering a predetermined and announced pattern of squares upon the card being used by such player or players.

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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

"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

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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.

"Tribal gaming" means any gaming conducted pursuant to a tribal-state gaming compact.

"Tribal-state gaming compact" means a compact entered into between the State of Kansas and certain native American tribes with respect to the tribe's authority to engage in gaming on the tribe's reservation property in the State of Kansas.

"Tribal gaming commission" means a commission created by a native American tribe in accordance with a tribal-state gaming compact.

Notes on Use

For authority, see K.S.A. 21-4302 and K.S.A. 74-9801 to 74-9809. 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), (6) and (7) 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

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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; 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; or sums of money paid by or for a person to participate in tribal gaming. 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 and gaming 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; 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; or any machine, mechanical device, electronic device or other contrivance used in tribal gaming.

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).

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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).

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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. 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.

Comment

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.

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65.16 CRUELTY TO ANIMALS - DEFENSE

It is a defense to the charge of cruelty to animals that (list here any relevant exceptions contained in K.S.A. 21-4310).

Notes on Use

K.S.A. 21-4310(b) provides eight specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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65.17 UNLAWFUL DISPOSITION OF ANIMALS

The defendant is charged with the crime of unlawful disposition of animals. The defendant pleads not guilty.

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

1. That the defendant (raffled) (gave as a prize or premium) (used as an advertising device or promotional display) living (rabbits) (chickens) (ducklings) (goslings); and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Unlawful disposition of animals does not include the giving of the described animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

Notes on Use

For authority, see K.S.A. 21-4312. Unlawful disposition of animals is a class C misdemeanor. In each case, the appropriate act and animal should be selected depending on the facts. The exception is contained in the statute and, if applicable, should be included in the instruction.

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65.30 CONFLICTS OF INTEREST - COMMISSION MEMBER OR EMPLOYEE

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

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

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

or

That the defendant (accepted) (agreed to accept) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year from a person knowing that such person contracts or seeks to contract with the State to supply (gaming equipment) (materials) (tickets) (consulting services) for use in the lottery or is a lottery retailer or an applicant for lottery retailer; 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. 74-8716(a). Conflicts of interest is a class A, nonperson misdemeanor.

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Comment

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

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65.31 CONFLICTS OF INTEREST - RETAILER OR CONTRACTOR

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

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

1. That the defendant is (a lottery retailer) (an applicant for lottery retailer) (a person who contracts or seeks to contract with the State to supply [gaming equipment] [materials] [tickets] [consulting services] for use in the lottery);
2. That the defendant (offered) (paid) (gave) (made) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year to a person knowing such person is (the executive director) (a member of the commission) (an employee) of the Kansas Lottery (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery; 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. 74-8716(b). Conflicts of interest is a class A, nonperson misdemeanor.

Comment

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

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65.32 FORGERY OF A LOTTERY TICKET

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

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

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

Notes on Use

For authority, see K.S.A. 74-8717. Forgery of a lottery ticket is a severity level 8, nonperson felony.

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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.

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65.35 LOTTERY DEFINITIONS

"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.

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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).

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65.36 VIOLATIONS OF THE TRIBAL GAMING LAW

The defendant is charged with the crime of violation of the Tribal Gaming Act. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

- [1.] That the defendant (status of the defendant, if applicable);**
[1.] or [2.] That the defendant (describe the prohibited act);
[2.] or [3.] That this act occurred on or about the ____ day of _____, 19__ in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-9801 et seq., which covers a multitude of violations which involve the Tribal Gaming Oversight Act.

K.S.A. 74-9809(a), (b) and (c) describe conflicts of interest violations pertaining to the executive director or an employee or relative of an employee of the state gaming agency. These offenses are class A, nonperson misdemeanors. Subsections (b)(3) and (c)(2) provide for certain affirmative defenses to these violations.

K.S.A. 74-9809(d) prohibits the holder of a license issued pursuant to a tribal-state gaming compact from allowing persons between the ages of 18 and 21 to participate in tribal gaming. This offense is a class A, nonperson misdemeanor. Subsection (g) forbids a person between 18 and 21 from tribal gaming. This is a class A, nonperson misdemeanor. Persons under 18 are adjudicated as juvenile offenders. Subsection (f).

K.S.A. 74-9809 (e), (h), (j), (k), (l) and (m) describe various felony crimes connected with tribal gaming. These crimes are all level 8, nonperson felonies. However, the act described in subsection (h)(3) is a class A, nonperson misdemeanor if the value involved is less than \$100.

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65.37 - 65.50 RESERVED FOR FUTURE USE

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**CHAPTER 67.00
CONTROLLED SUBSTANCES**

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67.01 - 67.12

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

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67.13-A CONTROLLED SUBSTANCES - SALE DEFINED

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

Notes on Use

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

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67.13-B NARCOTIC DRUGS AND CERTAIN STIMULANTS - SALE, ETC.

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

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

1. That the defendant (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) a (narcotic drug) (stimulant) known as _____;
2. That the defendant did so intentionally;
- [3. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;
4. That the defendant was 18 years of age or over;] and [3.] or [5.] That this act occurred on or about the ___ day of _____, 19___, in _____ County, Kansas.

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

Notes on Use

For authority, see K.S.A. 65-4161 which was enacted in 1994. The previous statute, K.S.A. 65-4127a(b), was repealed. A first conviction under K.S.A. 65-4161 is a drug severity level 3 felony. Upon conviction for a second offense, such person shall be guilty of a drug severity level 2 felony, and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

Upon conviction of a first offense, the defendant is guilty of a drug severity level 2 felony if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

If a controlled substance analog is involved, see PIK 3d 67.26.

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

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

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

Comment

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

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

K.S.A. 65-4161 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *pet. rev. den.* 257 Kan. 1095 (1995).

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**67.13-C NARCOTIC DRUGS AND CERTAIN STIMULANTS -
POSSESSION OR OFFER TO SELL WITH INTENT TO
SELL**

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

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

1. That the defendant (possessed) (offered to sell) a (narcotic drug) (stimulant) known as _____;
2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;
- [3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
4. That the defendant was 18 years of age or over;] and
[3.] or [5.] That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

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

Notes on Use

For authority, see K.S.A. 65-4161 which was enacted in 1994. The previous statute, K.S.A. 65-4127a(b), was repealed. A first conviction under K.S.A. 65-4161 is a drug severity level 3 felony. Upon conviction for a second offense, such person shall be guilty of a drug severity level 2 felony, and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

Upon conviction of a first offense, the defendant is guilty of a drug severity level 2 felony if the defendant was 18 years of age or over and the substances involved were possessed with intent to sell, deliver or distribute or offered for sale in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

If a controlled substance analog is involved, see PIK 3d 67.26.

K.S.A. 65-4101 defines the terms "deliver" or "delivery" in paragraph (g) and "distribute" in paragraph (j).

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

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

Comment

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

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

K.S.A. 65-4161 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

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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).

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *pet. rev. den.* 257 Kan. 1095 (1995).

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67.14 STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - POSSESSION OR OFFER TO SELL WITH INTENT TO SELL

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

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

1. That the defendant [(possessed) (offered to sell)] [(a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid)] known as _____ ;
2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;
3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
4. That the defendant was 18 years of age or over;] and [3.] or [5.] That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

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

Notes on Use

For authority, see K.S.A. 65-4163 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(b) was repealed. K.S.A. 65-4163 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and Element No. 1

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of the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

Generally, a violation of K.S.A. 65-4163 is a drug severity level 3 felony. If the defendant was 18 years of age or over and the substances involved were possessed or offered for sale with intent to sell within 1,000 feet of school property upon which was located a school structure, the violation is a drug severity level 2 felony. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

The Committee notes that possession with intent to deliver or distribute is not included in the more serious offense of subsection (b).

Comment

Possession of a drug prohibited by K.S.A. 65-4163 is a lesser included offense of possession with intent to sell and when the evidence warrants it, PIK 3d 67.16 should be given. The accused cannot be convicted of both possession and possession with intent to sell when the sale is of the possessed, controlled substance. K.S.A. 21-3107; *State v. Hagan*, 3 Kan. App. 2d 558, 598 P.2d 550 (1979). Possession with intent to sell would appear to be a lesser included offense of possession with intent to sell within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

The Committee notes that the only substance incorporated under K.S.A. 65-4163 that is defined in the "definitions" section of the Uniform Act is "marijuana." See K.S.A. 65-4101(o), where marijuana is defined in terms of the plant *cannabis*.

K.S.A. 65-4163 qualifies the acts specified as unlawful with the premise, "[e]xcept as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-4101(e)) may be lawfully manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

Defendant has the burden of introducing evidence as a matter of defense that brings defendant within an exception or exemption in the statute creating the offense if such exception or exemption is not part of the description of the offense. *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

A definition of "intent to sell" is not necessary, as the phrase "was not used in any technical sense nor in any way different from its ordinary use in common parlance." *State v. Guillen*, 218 Kan. 272, Syl. ¶ 1, 543 P.2d 934 (1975).

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).

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When a defendant is in nonexclusive possession of the premises upon which drugs are found, it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991).

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *pet. rev. den.* 257 Kan. 1095 (1995).

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67.15 STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - SALE, ETC.

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

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

1. That the defendant [(sold) (cultivated) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded)] [(a stimulant) (a depressant) (an hallucinogenic drug) (a controlled substance) (an anabolic steroid)] known as _____;
2. That the defendant did so intentionally;
3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
4. That the defendant was 18 years of age or over;] and [3.] or [5.] That the defendant did so on or about the _____ day of _____, 19____, in _____ County, Kansas.

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

Notes on Use

For authority, see K.S.A. 65-4163 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(b), was repealed. K.S.A. 65-4163 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are involved. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. When the violation involves such a substance, the alternative "a controlled substance" should be used in the introductory paragraph and Element No. 1 of the instruction.

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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 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 or Offer to Sell 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).

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).

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *pet. rev. den.* 257 Kan. 1095 (1995).

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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

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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).

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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 knowingly; 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 K.S.A. 21-4710.

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 overbroad, or vague, or an infringement on the right of commercial speech. The Court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged.

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

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Possession of cocaine and possession of drug paraphernalia are two independent crimes. Where the only cocaine possessed is the residue on the drug paraphernalia, both crimes may be charged. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991).

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67.18 POSSESSION OR MANUFACTURE OF SIMULATED CONTROLLED SUBSTANCE

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

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

1. That the defendant knowingly (delivered to _____) (possessed with the intent to deliver) (manufactured with the intent to deliver) (caused to be delivered to _____ within the State of Kansas) a simulated controlled substance;
 - [2. That _____ was under 18 years of age;]
and
- [2.] or [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. 65-4153. A violation of K.S.A. 65-4153 is a class A nonperson misdemeanor, except that "any person who violates this section by delivering or causing to be delivered within this State of Kansas drug paraphernalia or a simulated controlled substance to a person under 18 years of age is guilty of a nondrug severity level 9, nonperson felony." K.S.A. 65-4153(c).

Bracketed element 2 should be given if the defendant is charged with delivery or causing delivery to a person under 18 years of age.

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

Comment

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

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67.18-A POSSESSION OR MANUFACTURE OF DRUG PARAPHERNALIA

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

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

1. That the defendant knowingly (delivered to _____) (possessed with the intent to deliver) (manufactured with the intent to deliver) (caused to be delivered to _____ within the State of Kansas):

(a) drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute a controlled substance in violation of the uniform controlled substances act;

or

(b) drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to use, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance known as _____;

[2. That _____ was under 18 years of age;]

and

[2.] or [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. 65-4153(a)(2), (b) and (c).

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

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paraphernalia" should be included in this 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.

Inapplicable words should be stricken when either element 1(a) or 1(b) is given.

When Element No. 1(b) is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by evidence) known or foreseeable by the defendant must be named. If the evidence will support a finding of controlled substances under K.S.A. 65-4162 as well as substances elsewhere identified in the uniform controlled substances act, the jury must be asked to identify the substance or substances on which the finding is based.

Bracketed Element 2 should be given if the defendant is charged with delivery or causing delivery to a person under 18 years of age.

Comment

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

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

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

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**67.19 PROMOTION OF SIMULATED CONTROLLED
SUBSTANCES OR DRUG PARAPHERNALIA**

The statute upon which this instruction was based (K.S.A. 65-4154) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

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**67.20 REPRESENTATION THAT A NONCONTROLLED
SUBSTANCE IS A CONTROLLED SUBSTANCE**

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

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

1. That the defendant knowingly delivered or caused to be delivered to _____ a substance which was not (name the controlled substance); and
2. (a) That the defendant made an express representation that the substance delivered was (name the controlled substance); and
or
(b) That the defendant made an express representation that the substance delivered was of such nature or appearance that the recipient would be able to distribute it as (name the controlled substance); and
or
(c) That the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was (name the controlled substance); and
- [3. That the defendant was 18 or more years of age;
4. That (name of person to whom substance was delivered) was under 18 years of age;
5. That the defendant was at least three years older than (name of person to whom substance was delivered);]
3. or 6. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4155. Violation of K.S.A. 65-4155 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this State of Kansas a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to

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whom the delivery is made is guilty of a nondrug severity level 9, nonperson felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

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

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

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

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

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**CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS**

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68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19____

Comment

For authority, see K.S.A. 22-3421. Absent special circumstances, this concluding instruction should be used in every criminal trial.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.01-A CONCLUDING INSTRUCTION - CAPITAL MURDER -
SENTENCING PROCEEDING**

Your Presiding Juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.

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

Your agreement upon a verdict must be unanimous.

_____, 19_____
District Judge

Notes on Use

For authority, see K.S.A. 21-4624(b) which provides in part that ". . . The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable."

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68.02 GUILTY VERDICT - GENERAL FORM

We, the jury, find the defendant guilty of _____.

Presiding Juror

Notes on Use

The form should be completed by the Court by specifying the particular offense with which defendant is charged. If two or more defendants are tried jointly, separate verdict forms must be provided by adding the name of each defendant to the form. For forms for separate counts, see PIK 3d 68.08, Multiple Counts - Verdict Forms. For forms for lesser included offenses, see PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

K.S.A. 22-3421 provides that the verdict shall be written, signed by the presiding juror, and read by the clerk, and inquiry made as to whether it is their verdict. If the verdict is defective in form only, it may be corrected by the Court with the assent of the jury.

Comment

A typewritten verdict form which merely requires that it be signed and dated by the presiding juror must conform to the evidence and the offense charged. *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961).

If a verdict is not in proper form when returned by the jury, the Court may direct the jury to correct the verdict and may send them back to the jury room for that purpose. *State v. Carrithers*, 79 Kan. 401, 99 Pac. 614 (1909).

In *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973), the Supreme Court considered the question of whether or not special questions could be submitted to the jury in a criminal case. The Court held that in view of the differences in our civil and criminal statutes relating to verdicts, it is apparent that the Legislature intended to preserve the power of a jury to return a verdict in a criminal prosecution in the teeth of the law and the facts. The case held that special questions may not be submitted to the jury in a criminal prosecution. The only proper verdicts are "guilty" or "not guilty" of the charges.

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, 64, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with

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68.04 PUNISHMENT - CLASS A FELONY

Comment

The jury choice of a sentence of death or life imprisonment in a class A felony under K.S.A. 21-4501(a) is no longer constitutionally permissible. *State v. Randol*, 212 Kan. 461, 513 P.2d 248 (1973).

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68.05 VERDICTS - CLASS A FELONY

Comment

See PIK 3d 68.14, 68.14-A, 68.14-B, 68.15 and 68.16 for verdict forms that are applicable when the mandatory minimum 40 year sentence is sought for premeditated murder occurring before July 1, 1994.

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68.06 NOT GUILTY BECAUSE OF MENTAL DISEASE OR DEFECT

We, the jury, find the defendant not guilty solely because the defendant, at the time of the crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the intent required as an element of the crime.

Presiding Juror

Notes on Use

For authority, see K.S.A. 22-3221.

Comment

Mental competency at the time of the commission of an offense -- if raised -- is to be determined by the trier of facts upon a trial. Mental competency to stand trial -- if raised -- is another matter and is to be determined by the Court under K.S.A. 22-3302. *Nall v. State*, 204 Kan. 636, 638, 465 P.2d 957 (1970).

A jury instruction on diminished capacity is not required. See *State v. Wilburn*, 249 Kan. 678, 822 P.2d 609 (1991).

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68.07 MULTIPLE COUNTS - VERDICT INSTRUCTION

Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror.

Notes on Use

This instruction should be given when separate offenses are charged in more than one count and defendant can be convicted of any one or all.

See PIK 3d 68.08, Multiple Counts - Verdict Forms.

Cited with approval in *State v. Cameron & Bentley*, 216 Kan. 644, 533 P.2d 1255 (1975).

Comment

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405, 406, 769 P.2d 621 (1989). However, the failure was not reversible error under the circumstances of the case because it did not prejudicially affect the substantial rights of the defendant.

In *Macomber*, the Court stated that "[a] trial court does not have the time to give the thought and do the research which has been put into the preparation of the pattern Criminal Jury Instructions by the Advisory Committee on Criminal Jury Instructions to the Kansas Judicial Council. Therefore, where 'pattern jury instructions are appropriate, a trial court should use them unless there is some compelling and articulable reason not to do so.'" *State v. Macomber*, 244 Kan. at 405. See also, *State v. Wilson*, 240 Kan. 606, 610, 731 P.2d 306 (1987).

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68.09 LESSER INCLUDED OFFENSES

The offense of (principal offense charged) with which defendant is charged includes the lesser offense(s) of (lesser included offense or offenses).

You may find the defendant guilty of (principal offense charged) (first lesser included offense) (second lesser included offense) or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only.

Your Presiding Juror should sign the appropriate verdict form. The other verdict forms are to be left unsigned.

Notes on Use

For authority, see K.S.A. 21-3107(2), (3) and 21-3109.

This instruction should be given when the evidence presents circumstances from which a lesser included offense or offenses may be inferred. The instruction should be completed by specifying the principal offense and each lesser included offense. See PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

Some deviation from this form may be used as a lead-in for the elements instruction for the lesser included offenses. For example, see PIK 3d 69.01, Illustrative Sets of Instructions, Element Nos. 3, 4, and 5.

This instruction should not be used when the crime is Murder In The First Degree under the theory of premeditated murder or felony murder in the alternative. Instead, use PIK 3d 68.15, Murder In The First Degree -Premeditated Murder and Felony Murder In The Alternative - Verdict Instruction, and PIK 3d 68.16, Murder In The First Degree - Premeditated Murder and Felony Murder In The Alternative - Verdict Form.

Comment

Failure to instruct the jury on some lesser degree of the crime charged is not ground for reversal if the evidence at the trial excludes a theory of guilt on a lesser offense. *State v. Lott*, 207 Kan. 602, Syl. ¶ 1, 485 P.2d 1314 (1971).

The trial court has an affirmative duty to instruct on lesser included offenses where required by the evidence even in the absence of a request by counsel. The evidence requires such instruction under circumstances where the accused might reasonably have been convicted of a lesser offense if the instruction had been

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given. *State v. Mason*, 208 Kan. 39, 490 P.2d 418 (1971); *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972); *State v. Deavers*, 252 Kan. 149, 843 P.2d 695 (1992); *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). *State v. Gibbon*, 256 Kan. 951, 889 P.2d 772 (1995); and *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995). An instruction on battery as a lesser offense of aggravated battery may or may not be necessary depending on whether the evidence is such that the defendant might reasonably have been convicted of the lesser offense or the evidence excludes a theory of guilt on the lesser offense. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Deggs*, 251 Kan. 342, 834 P.2d 376 (1992). However, the possession of marijuana is not a lesser included offense in a prosecution for the unlawful sale of marijuana. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974).

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

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

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

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

In *State v. Fike*, 243 Kan. 365, 367, 368, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107(2)(d). The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the indictment, complaint, or information as well as the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an "included crime" under the definition in K.S.A. 21-3107(2)(d).

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

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

The general principles of multiplicity and lesser included offenses are reviewed and the relationship and distinction between the two concepts as recognized in the Kansas case law are examined in *State v. Warren*, 252 Kan. 169, 843 P.2d 224 (1992). Under the second prong of the *Fike* test, aggravated battery was held to be a lesser included offense of aggravated robbery. The necessary elements of proof for aggravated robbery also established the necessary elements of proof for aggravated battery. The crimes were multiplicitous under the facts in *Warren* because the same act of violence provided the basis for each conviction.

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

Under K.S.A. 21-3107(2)(d), the offense of driving under the influence of alcohol is a lesser included offense of involuntary manslaughter when: (1) the underlying misdemeanor to the involuntary manslaughter complaint is the driving under the influence of alcohol, and (2) all of the elements of the DUI are required to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 858 (1987).

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

The offenses of attempted second-degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first-degree murder. The trial court erred in failing to instruct the jury on the lesser included offense of attempted murder in the second degree. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).

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

Examples of lesser included offenses are:

1. **First Degree Murder** - The Court's duty to instruct on the lesser offenses of second degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second degree murder is included where the

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issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses.

2. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
3. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987).
4. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), cert. denied 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986). *State v. Arteaya*, 257 Kan. 874, 896 P.2d 1035 (1995).
5. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
6. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
7. **Aggravated Robbery** - Robbery is a lesser included offense only where there is an issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required.

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68.14 MURDER IN THE FIRST DEGREE - MANDATORY 40 YEAR SENTENCE - VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS be imposed by the Court.

Presiding Juror

_____, 19 ____.

Notes on Use

For authority, see K.S.A. 21-4624(e) for premeditated murder occurring before July 1, 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.14-A MURDER IN THE FIRST DEGREE - MANDATORY 40 YEAR SENTENCE - VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist: [The jury shall set forth here in legible print each such aggravating circumstance.]

and so, therefore, unanimously determine that a sentence of **LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS** be imposed by the Court.

Presiding Juror

_____, 19____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and 21-4628 for premeditated murder occurring before July 1, 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.14-B MURDER IN THE FIRST DEGREE -
MANDATORY MINIMUM 40 YEAR SENTENCE -
VERDICT FORM FOR LIFE IMPRISONMENT
WITH PAROLE ELIGIBILITY AFTER 40 YEARS
(Alternative Sentencing Verdict)**

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]
- [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
- [That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
- [That the defendant authorized or employed another person to commit the crime.]
- [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]

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- [That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]
- [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]
- [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]

and so, therefore, unanimously determine that a sentence of **LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS** be imposed by the Court.

Presiding Juror

_____, 19____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and 21-4628 for premeditated murder occurring before July 1, 1994.

The applicable bracketed clauses should be included in the verdict form.

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

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

Five hundred dollars (\$500) or more

Less than Five hundred dollars (\$500)

(Place an X in the appropriate square.)

Presiding Juror

(PIK 3d 68.11)

We, the jury find the defendant not guilty of

_____.

Presiding Juror

(PIK 3d 68.03)

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**69.03 POSSESSION OF MARIJUANA WITH INTENT TO SELL -
ENTRAPMENT AS AN AFFIRMATIVE DEFENSE**

Summary of the Facts and Issues

On July 3, 1996, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware, talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted on October 4, 1996. A price was negotiated and a meeting was set up for October 5, 1996, to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

An Outline of Suggested Instructions in Sequence Follows:

**Instruction 1. PIK 3d 51.02, Consideration and Binding
Application of Instructions.**

PIK 3d 51.05, Rulings of the Court.

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PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

Instruction 2. PIK 3d 67.14, Stimulants, Depressants and Hallucinogenic Drugs Or Anabolic Steroids - Possession With Intent to Sell.

Instruction 3. PIK 3d 52.08, Affirmative Defenses - Burden of Proof.

Instruction 4. PIK 3d 54.14, Entrapment.

Instruction 5. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Instruction 6. PIK 3d 54.01, Presumption of Intent.

Instruction 7. PIK 3d 68.01, Concluding Instruction.

**Verdict Forms. PIK 3d 68.02, Guilty Verdict - General Form.
PIK 3d 68.03, Not Guilty Verdict - General Form.**

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

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

(PIK 3d 51.02)

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

(PIK 3d 51.05)

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

(PIK 3d 51.06)

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

(PIK 3d 52.09)

Instruction 2.

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

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

- 1. That the defendant possessed an hallucinogenic drug known as marijuana;**
- 2. That the defendant did so with the intent to sell it;**
- 3. That the defendant did so on or about the 5th day of October, 1996, in Sedgwick County, Kansas.**

(PIK 3d 67.14)

Instruction 3.

The defendant claims as a defense that he was entrapped. Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving

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that the defendant is guilty. The State's burden of proof does not shift to the defendant.
(PIK 3d 52.08)

Instruction 4.

Entrapment is a defense if the defendant is induced to commit a crime which the defendant had no previous disposition to commit. It is not a defense if the defendant originated the plan to commit the crime or when he had shown a predisposition for committing the crime or when he had shown predisposition for committing the crime and was merely afforded an opportunity to consummate the crime and was assisted by law enforcement officers.

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

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the marijuana by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the marijuana by defendant.
(PIK 3d 54.14)

Instruction No. 5.

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt

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as to the truth of any of the claims made by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 6

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 3d 54.01)

Instruction No. 7.

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

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

Your agreement upon a verdict must be unanimous.
(PIK 3D 68.01)

District Judge

_____, 19____

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VERDICT FORMS

We, the jury, find the defendant guilty of possession of marijuana with intent to sell.

Presiding Juror

(PIK 3d 68.02)

We, the jury, find the defendant not guilty of possession of marijuana with intent to sell.

Presiding Juror

_____, 19____

(PIK 3d 68.03)

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PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.03 TRANSPORTING AN ALCOHOLIC
BEVERAGE IN AN OPENED CONTAINER**

The defendant is charged with the crime of transporting an alcoholic beverage in an opened container. The defendant pleads not guilty.

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

1. That the defendant transported a container of alcoholic beverage in a vehicle upon a highway or street;
2. That the container had been opened;
3. That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;
4. That the defendant knew or had reasonable cause to know (he)(she) was transporting an opened container of alcoholic beverage; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 8-1599. The 1994 amendment broadened the application of the statute to cover any cereal malt beverage. A person convicted of this offense shall be punished by a fine of not more than \$200, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition to fine and/or imprisonment, the Court must suspend the defendant's driving privileges. K.S.A. 8-1599(g).

Alcoholic beverage is defined in K.S.A. 8-1599(a) to mean any alcoholic liquor, as defined by K.S.A. 41-102 or any cereal malt beverage, as defined in K.S.A. 41-2701.

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

Comment

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

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Former K.S.A. 41-2719 (now 8-1599), which prohibits transportation of an open container of cereal malt beverage in a vehicle on the highway or street, applies to passengers as well as to the driver of the vehicle. *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982).

In *State v. Bishop*, 14 Kan. App. 2d 223, 227, 786 P.2d 1152 (1990), it was held that transporting open containers of alcoholic liquor in violation of K.S.A. 41-804 applies to passengers as well as drivers. It further held that to sustain a conviction of transporting an open container, the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported, and that the doctrine of constructive possession does not extend to unknowing passengers who are accused of transporting an open container.

K.S.A. 8-1599(h) provides it shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic liquor.

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