

**Pattern
Instructions for Kansas—**

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

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

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21-3413.	Battery Against a Law Enforcement Officer
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PATTERN INSTRUCTIONS FOR KANSAS 3d

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

[Depending on the evidence, I may in my final instructions define one or more less serious crimes. If this becomes necessary, I will give you specific definitions at that time.]

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

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

Notes on Use

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

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

52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty.

Notes on Use

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

This instruction does not need to be repeated for separate offenses. *State v. Peoples*, 227 Kan. 127, 135, 605 P.2d 135 (1980). The State's burden, however, should be mentioned when a rebuttable presumption is utilized. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 706 (1983); *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

No separate instruction should be given relating to presumption of innocence and reasonable doubt. (See Committee's recommendations under PIK 3d 52.03 and 52.04.)

Comment

This instruction was designed to eliminate verbose and meaningless instructions commonly given about "presumption of innocence" and about "reasonable doubt". The only issues that have arisen relate to the semantics of "innocent" as contrasted to "not guilty" and "should" as contrasted to "must". See *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994) and *State v. McCloud*, 257 Kan. 1, 891 P.2d 324 (1995).

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The instruction complies with *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); and *State v. Maxwell*, 10 Kan. App. 2d 62, 69, 691 P.2d 1316, *rev. denied* 236 Kan. 876 (1984). See also, *State v. Dunn*, 249 Kan. 488, 492, 820 P.2d 412 (1991).

This instruction accurately reflects the law of this State and properly advises the jury of the burden of proof, the presumption of innocence and reasonable doubt. *State v. Pierce*, 260 Kan. 859, 870, 927 P.2d 929 (1996), and *State v. Clark*, 261 Kan. 460, 931 P.2d 664 (1997).

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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. See *State v. Alexander*, 24 Kan. 817, 953 P.2d 685 (1998), for discussion that compulsion does not include an emergency absent a third party threat.

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: An instrument which, from the manner in which it is used, is calculated or likely to produce death or serious injury. *State v. Guebara*, 24 Kan. App. 2d 260, 944 P.2d 164 (1997); *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989). When applied in an aggravated robbery case, this definition is applied subjectively, from the victim's point of view. In an aggravated battery case, the victim's perceptions of the instrument used are irrelevant. *Colbert*, 244 Kan. at 426.

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.

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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). A crime not specifically listed in K.S.A. 21-3110(8) but declared inherently dangerous in K.S.A. 21-3436 may be a forcible felony if the circumstances of the commission of the crime and the abstract elements of the crime indicate the threat or use of physical force or violence against a person. *State v. Mitchell*, 262 Kan. 687, 942 P.2d 1 (1997).

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).

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. 65-4003(10), and 65-5201(g) & (z). See also K.S.A. 21-3208 and PIK 3d 54.11 through 54.12-A-1.

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).

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

Necessitous Circumstances: PIK 3d 58.06 and 58.07.

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).

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). For definition of constructive
possession, see *State v. Galloway*, 16 Kan. App. 2d 54, 63, 817 P.2d 1124
(1991). 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).

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- Probable Cause*: Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the matter being sought to be proved. *State v. Starks*, 249 Kan. 516, 820 P.2d 1243 (1991).
- Property*: K.S.A. 21-3110 (16).
- Prosecution*: K.S.A. 21-3110 (17).
- Public Employee*: K.S.A. 21-3110 (18).
- Public Officer*: K.S.A. 21-3110 (19). A list of public officers is included under this section.
- Purposeful*: K.S.A. 21-3201 (b).
- Real Property or Real Estate*: K.S.A. 21-3110 (20).
- Reasonable Belief*: A belief based on circumstances that would lead a reasonable person to that belief. *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). See *Probable Cause*, above.
- Reasonable Doubt*: See PIK 3d 52.04, Reasonable Doubt.
- Reckless Conduct*: K.S.A. 21-3201 (c).
- Retailer*: See K.S.A. 21-4404(b)(1) pertaining to tie-in magazine sales.
- Sale*: K.S.A. 21-4403 (b) (3), as it relates to deceptive commercial practices. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.
- Scope of Authority*: The performance of services for which an employee has been employed or which are reasonably incidental to his or her employment. See PIK-Civil 3d 107.06, Agent - Issue as to Scope of Authority.
- Security Agreement*: K.S.A. 84-9-105 (l).
- Security Interest*: K.S.A. 84-1-201(37).
- Sell*: K.S.A. 21-4404 (b) (3) for tie-in magazine sales. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.
- Services*: K.S.A. 21-3704 (b).
- Sexual Intercourse*: K.S.A. 21-3501 (1).
- Solicit or Solicitation*: K.S.A. 21-3110 (21).
- Sports Contest, Participant and Official*: K.S.A. 21-4406.
- State*: K.S.A. 21-3110 (22).
- Stolen Property*: K.S.A. 21-3110 (23).
- Temporarily Deprive*: To take from the owner the possession, use, or benefit of his or her property with intent to deprive the owner of the temporary use thereof. See PIK 3d 59.04, Criminal Deprivation of Property.
- Terror and Terrorize*: The word "terror" means an extreme fear or fear that agitates body and mind; and "terrorize" means to reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
- Threat*: K.S.A. 21-3110 (24). See *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994), regarding differences between threat in robbery and threat in theft by threat.
- Unlawful Sexual Act*: K.S.A. 21-3501 (4).
- Wanton or Wantonness*: K.S.A. 21-3201 (c).

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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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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); *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997); *State v. Isley*, 262 Kan. 281, 293, 936 P.2d 275 (1997).

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."

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).

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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 contain 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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54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

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

Notes on Use

For authority, see K.S.A. 21-3205(1). For a crime not intended, see PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended.

Comment

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

One who watches at a distance to prevent surprise while others commit a crime is deemed in law to be a principal and punishable as such. *State v. Neil*, 203 Kan. 473, 474, 454 P.2d 136 (1969).

Mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green*, 237 Kan. 146, 697 P.2d 1305 (1985). This language from *Green*, however, may properly be refused as an additional instruction by the trial judge, since PIK 3d 54.05 clearly informs the jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting. *State v. Hunter*, 241 Kan. 629, 639, 740 P.2d 559 (1987); *State v. Scott*, 250 Kan. 350, 361, 827 P.2d 733 (1992); *State v. Ninci*, 262 Kan. 21, 46, 936 P.2d 1364 (1997).

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

Failure to specifically instruct the jury that it must find the elements of aiding and abetting beyond a reasonable doubt was not clearly erroneous where the jury was instructed that the reasonable doubt standard applied to all claims made by the state. *State v. Nash*, 261 Kan. 340, 932 P.2d 442 (1997).

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

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

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

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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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Where there was an overt act by the defendant but failure to complete the crime, a defense of voluntary abandonment was rejected by the Court of Appeals in *State v. Morfitt*, 25 Kan. App. 2d 8, 956 P.2d 719, rev. denied 265 Kan. ___ (June 9, 1998).

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). K.S.A. 22-3414(3) codifies the duty of the court to instruct on lesser included offenses; however, no party may assign as error the giving or failure to give an instruction, including a lesser included offense instruction, unless the party objects thereto or unless the instruction or failure to give an instruction is clearly erroneous.

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).

The general principles for determining whether charges are multiplicitous or duplicitous with attempted crimes have been discussed in several cases. In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), a charge of aggravated sexual battery was held not to be multiplicitous with charges of attempted aggravated sodomy or attempted rape. However, aggravated battery has been held to be multiplicitous with a charge of attempted murder. *State v. Cathey*, 241 Kan. 715, 741 P.2d 738 (1987); *State v. Turbeville*, 235 Kan. 993, 686 P.2d 138 (1984); and *State v. Garnes*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). In *State v. Cory*, supra, the Court held that possession of burglary tools is separate and distinct from the commission of an overt act in perpetration of a burglary. They are not duplicitous, and separate convictions for both offenses arising from the same conduct are proper. Burglary with the intent to commit rape is not duplicitous with the crime of an attempt to commit rape. *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973).

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).

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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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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. See also, *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

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. Webber*, 260 Kan. 263, 918 P.2d 609 (1996), *cert. denied* __ U.S. __, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998); *State v. Campbell*, 217 Kan. at 769; *State v. Rider, Edens & Lemons*, 229 Kan. 394, 625 P.2d 425 (1981).

Where there is one agreement to commit multiple crimes, a defendant may be convicted of only one count of conspiracy. *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

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.

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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).

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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).

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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 *Kansas Judicial Council Bulletin*, April 1968, p.46. *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. Daughtery*, 221 Kan. 612, 562 P.2d 42 (1977).

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

Where there is one agreement to commit multiple crimes, a defendant may be convicted of only one count of conspiracy. *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

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).

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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).

"Solicitation is a specific intent crime under Kansas law. A person is not guilty of solicitation unless he or she intentionally commits the actus reus of the offense, viz., he or she commands, encourages, or requests another person to commit a felony with the specific intent that the other commit the crime he or she solicited. The actus reus of the solicitation occurs under Kansas law if a person by words or actions invites, requests, commands, or encourages a second person to commit a crime. The crime is complete when the person communicates the solicitation to another with the requisite mens rea. No act in furtherance of the target crime needs to be performed by either person." *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995). See also, *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

The rule that two witnesses or one witness and corroborating circumstances are necessary to establish the fact of perjury is not applicable to prove the crime of solicitation to commit perjury. *State v. Ellis*, 25 Kan. App. 2d 61, 957 P.2d 520, *rev. denied* 265 Kan. ___ (June 9, 1998).

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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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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.

As yet there is no Kansas case law construing the capital murder statutes. PIK 3d 56.00-A through 56.00-H are offered by the Committee as a starting point for attorneys and trial judges in capital murder cases.

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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**56.00-C CAPITAL MURDER - DEATH SENTENCE -
AGGRAVATING CIRCUMSTANCES**

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself.

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

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

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

and/or

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

and/or

- 8. [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Notes on Use

For authority, see K.S.A. 21-4625. This instruction should be included in all cases involving the death sentence proceeding.

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

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

Comment

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L. Ed. 2d 372 (1988), an Oklahoma case, the United States Supreme Court held the terms "heinous", "atrocious" and "cruel" were unconstitutionally vague because they did not "on their face offer sufficient guidance to the jury to escape the strictures of [the court's] judgement in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972)." However, a later decision by the Court of Criminal Appeals of Oklahoma in *Foster v. State*, 779 P.2d 591 (Okl. Cr. 1989), noted the unconstitutionality problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; and 'cruel' means pitiless or

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designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others."

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

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

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

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

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

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

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**56.00-D CAPITAL MURDER - DEATH SENTENCE -
MITIGATING CIRCUMSTANCES**

Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case.

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

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

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requirements of law was substantially impaired.]
and/or

7. [The age of the defendant at the time of the crime.]
and/or
8. [At the time of the crime, the defendant was
suffering from post-traumatic stress syndrome
caused by violence or abuse by the victim.]
and/or
9. [Other _____.]

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance that you find to exist.

Notes on Use

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

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

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**56.00-E CAPITAL MURDER - DEATH SENTENCE -
BURDEN OF PROOF**

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances.

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.00-G CAPITAL MURDER - DEATH SENTENCE - REASONABLE DOUBT

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances, then you should so indicate on your verdict form, and defendant will not be sentenced to death but will be sentenced by the court as provided by law.

Notes on Use

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

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

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

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**56.00-H CAPITAL MURDER - DEATH SENTENCE -
SENTENCING RECOMMENDATION**

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

The verdict forms provide the following alternative verdicts:

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

OR

B. Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and the defendant should be sentenced by the Court as provided by law.

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.01 MURDER IN THE FIRST DEGREE

- A. (The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.)
- B. (If you do not agree that the defendant is guilty of capital murder, you should then consider the lesser included offense of murder in the first degree.)

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

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

Notes on Use

For authority, see K.S.A. 21-3401. Murder in the first degree is an off-grid person felony. For capital murder, see PIK 3d 56.00-A. For felony murder, see PIK 3d 56.02, Murder in the First Degree - Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment to PIK 3d 56.02, for authority to instruct on both theories.

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

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

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

Comment

"In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him." Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1968).

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, "At the common law, homicides

PATTERN INSTRUCTIONS FOR KANSAS 3d

were of two classes only, those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter." Effective July 1, 1993, however, the Legislature has deleted "malice" from the statutory definition of murder in the first degree.

The term "premeditation" is not defined in the code, but is to be given the meaning established by the decisions of the Supreme Court of Kansas. See PIK 3d 56.04(b).

The definition of "death" as set out in K.S.A. 77-202 (Repealed L. 1984, ch. 345, § 4) applies in criminal cases. *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977).

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

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

The instruction should be preceded by the applicable introductory and cautionary instructions as contained in PIK 3d 51.02, 51.04, 51.05, and 51.06.

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

Comment

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

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

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances.

Notes on Use

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

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

Comment

This instruction was quoted with approval in *State v. Follin*, 263 Kan. 28, 947 P.2d 8 (1997).

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

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

Notes on Use

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

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

Comment

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

This instruction was quoted with approval in *State v. Follin*, 263 Kan. 28, 947 P.2d 8 (1997).

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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. See also *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 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.

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

Comment

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

Intentional second degree murder requires proof of a specific intent to kill. *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503 (1996), *rev. denied* 261 Kan. 1086 (1997).

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56.03-A MURDER IN THE SECOND DEGREE - UNINTENTIONAL

- A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)
- B. (If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.)

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

1. That the defendant killed _____ unintentionally but recklessly under circumstances showing extreme indifference to the value of human life; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3402. Murder in the second degree is a severity level 2, person felony, if unintentional but reckless.

If the information charges murder in the second degree, omit paragraph B; but if the information charges murder in the first degree, omit paragraph A. See PIK 3d 68.01, Concluding Instruction, and 69.01, Murder in the First Degree with Lesser Included Offenses, for lead-in instructions on lesser included offenses.

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

Comment

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

In *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997), the Supreme Court examined the difference between unintentional second degree murder (depraved heart murder) and reckless involuntary manslaughter. Depraved heart second degree murder requires a conscious disregard of the risk, sufficient under the

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circumstances to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second degree murder, and less extreme recklessness is punished as manslaughter. Although indifference to the value of human life in general is often present in crimes prosecuted as depraved heart murder, extreme indifference to the value of one specific human life is enough to satisfy the elements of depraved heart second degree murder.

In *State v. Bailey*, 263 Kan. 685, 952 P.2d 1289 (1998), the Supreme Court affirmed a trial court's refusal to instruct the jury on reckless second degree murder and reckless involuntary manslaughter as lesser included offenses of first degree murder. The court reasoned that a defendant's actions in pointing a gun at an individual and pulling the trigger are intentional rather than reckless even if the defendant did not intend to kill the victim.

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56.05 VOLUNTARY MANSLAUGHTER

- A. The defendant is charged with the crime of voluntary manslaughter. 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 it was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

OR

- B. In determining whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. Voluntary manslaughter is an intentional killing 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]).

If you decide the defendant intentionally killed _____, but that it was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]), the defendant may be convicted of voluntary manslaughter only.

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Notes on Use

For authority, see K.S.A. 21-3403. Voluntary manslaughter is a severity level 3, person felony.

If the information charges voluntary manslaughter, use alternative A. When voluntary manslaughter is submitted to the jury as a lesser offense of the crime charged under K.S.A. 21-3107(2)(a), use alternative B. See PIK 3d 56.04, Homicide Definitions, for definition of "heat of passion."

Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, and *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977), on the duty of the trial judge to instruct on lesser included offenses in homicide cases.

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

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

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

The unreasonable but honest belief required under K.S.A. 21-3403(b) must be based on the reality of the circumstances surrounding the killing and not on a psychotic delusion. *State v. Ordway*, 261 Kan. 776, 934 P.2d 94 (1997).

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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 (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.

In *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997), the Supreme Court examined the difference between unintentional second degree murder (depraved heart murder) and reckless involuntary manslaughter. Depraved heart second degree murder requires a conscious disregard of the risk, sufficient under the circumstances to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second degree murder, and less extreme recklessness is punished as manslaughter. Although indifference to the value of human life in general is often present in crimes prosecuted as depraved heart murder, extreme indifference to the value of one specific human life is enough to satisfy the elements of depraved heart second degree murder.

In *State v. Bailey*, 263 Kan. 685, 952 P.2d 1289 (1998), the Supreme Court affirmed a trial court's refusal to instruct the jury on reckless second degree murder and reckless involuntary manslaughter as lesser included offenses of first degree murder. The court reasoned that a defendant's actions in pointing a gun at an individual and pulling the trigger are intentional rather than reckless even if the defendant did not intend to kill the victim.

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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 knowingly by force or duress caused another person to commit or attempt to commit suicide;]

or

[That the defendant with the intent and purpose of assisting another person to commit or attempt to commit suicide knowingly

a. provided the means by which another person committed or attempted to commit suicide;

or

b. participated in a physical act by which another person committed or attempted to commit suicide; and]

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

Notes on Use

For authority, see K.S.A. 21-3406 as amended in L. 1998, Ch. 142. Assisting suicide knowingly by force or duress is a severity level 3 person felony, and as otherwise described is a severity level 9 person felony.

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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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56.18 AGGRAVATED BATTERY

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

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

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;
or
 - (b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);
or
 - (c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);
or
 - (d) That the defendant recklessly caused (great bodily harm to) (disfigurement of) another person;
or
 - (e) That the defendant recklessly caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted); and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

[A “deadly weapon” is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.]

Notes on Use

For authority, see K.S.A. 21-3414. Aggravated battery as described in 1(a) is a severity level 4, person felony; as described in 1(b) or 1(c), a severity level 7,

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person felony; as described in 1(d), a severity level 5, person felony; and as described in 1(e), a severity level 8, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

The bracketed definition of "deadly weapon" may be used when appropriate. The elements of this crime were modified, effective July 1, 1993.

Comment

The crime of aggravated assault is not a lesser included offense of aggravated battery. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977).

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

Aggravated battery under K.S.A. 21-3414(a)(1)(c), intentionally causing physical contact with another person, incorporates the general intent required by K.S.A. 21-3201. Aggravated battery under this subsection is not a specific intent crime. *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123, *rev. denied* 260 Kan. 997 (1996).

The Supreme Court has frequently indicated the difference between bodily harm and great bodily harm. Bodily harm has been defined as any touching of the victim against the victim's will, with physical force, in an intentional hostile and aggravated manner. The word "great" distinguishes the bodily harm necessary to prove aggravated battery from slight, trivial, minor or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery. See *State v. Whitaker*, 260 Kan. 85, 917 P.2d 859 (1996).

In *State v. Valentine*, 260 Kan. 431, 921 P.2d 770 (1996), the Supreme Court contrasted level 4 aggravated battery (great bodily harm) and level 7 aggravated battery (bodily harm). The court determined that when an assailant shoots a victim, severing the spinal cord and causing paralysis, the resulting injury qualifies as level 4 "great bodily harm" as a matter of law. Similarly, a "through and through" bullet wound in the abdomen is great bodily harm as a matter of law. Thus, in these circumstances the district court did not err by failing to instruct the jury on level 7 aggravated battery as a lesser included offense of level 4 aggravated battery.

The fact that the defendant and his victim are married does not change the standards for probable cause to bind the defendant over on a charge of aggravated battery. *State v. Whittington*, 260 Kan. 873, 926 P.2d 237 (1996).

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57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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

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

1. That the defendant had sexual intercourse with _____;
2. That at the time of intercourse _____ was a child 14 or more years of age but less than 16 years of age; and

OR

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

or

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

or

That the defendant caused _____ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of _____, the defendant or another;

2. That at the time of the act _____ was a child 14 or more years of age but less than 16 years of age; and
3. That _____ did not consent to such fondling or touching; and

OR

1. That the defendant submitted to lewd fondling or touching of (his)(her) person by _____, with

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intent to arouse or satisfy the sexual desires of either _____ or the defendant, or both;

or

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

or

That the defendant solicited _____ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of _____, the defendant or another;

2. That at the time of the act _____ was a child under the age of 14; and

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

Notes on Use

For authority, see K.S.A. 21-3504. Aggravated indecent liberties with a child involving sexual intercourse is a severity level 3, person felony. Aggravated indecent liberties with a child under 14 years of age involving lewd fondling or touching is a severity level 3, person felony. Aggravated indecent liberties with a child between 14 and 16 years of age is a severity level 4, person felony.

If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

If the charge of aggravated indecent liberties involves sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Sexual intercourse with a child under age 14 is rape. See PIK 3d 57.01, Rape.

Comment

K.S.A. 21-3504 was amended in 1992 to delete the category of defendants who were guardians, proprietors, or employees of any foster homes, orphanages or other such institutions to whose charge a child was committed or entrusted by law.

The crime of aggravated indecent liberties with a child as defined in K.S.A. 21-3504 was amended in 1984 by deleting the category of defendants who were parents, adoptive parents, stepparents, or grandparents of the child. At the same

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time, the crime of incest as defined in K.S.A. 1984 Supp. 21-3602 was expanded to include additional biological relatives of the child and the crime of aggravated incest as defined in K.S.A. 1984 Supp. 21-3603 was substantially enlarged by including certain biological, step and adoptive relatives of the child.

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

An instruction virtually identical to PIK Crim. 3d 57.06 was approved by the Supreme Court in *State v. Isley*, 262 Kan. 281, 291, 936 P.2d 275 (1997). In *Isley* the court ruled that aggravated indecent liberties with a child as defined by K.S.A. 21-3504(a)(1) is a general intent crime. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor even though age is a material element of the crime. The State must only show that the defendant had sexual intercourse with the victim at a time when the victim was 14 or more years of age, but less than 16 years of age.

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**57.06-A AFFIRMATIVE DEFENSE TO AGGRAVATED
INDECENT LIBERTIES WITH A CHILD**

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

Notes on Use

For authority, see K.S.A. 21-3504(b). This instruction should be given only with respect to a prosecution of aggravated indecent liberties with a child in which the defendant is charged with:

- (a) sexual intercourse with a child;
- (b) fondling or touching a child in a lewd manner;
- (c) submitting to lewd fondling or touching by a child.

Pursuant to K.S.A. 21-3504(b), this defense is not applicable to prosecutions in which the defendant is charged with causing or soliciting the child to engage in any lewd fondling or touching of the person of another.

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57.09 ADULTERY

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

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

1. That the defendant (had sexual intercourse) (engaged in sodomy) with _____;
2. That the defendant was then married to a person other than _____; and
or
That the defendant was not then married and knew that _____ was married; 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. 21-3507. Adultery is a class C misdemeanor. If the charge is based on sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the charge is based on sodomy, the definition of sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

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, 519 P.2d 1097 (1974).

The Legislature amended K.S.A. 21-3507 in 1983 to include sodomy in the crime of adultery.

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57.10 LEWD AND LASCIVIOUS BEHAVIOR

The defendant is charged with the crime of lewd and lascivious behavior. The defendant pleads not guilty.

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

1. That the defendant publicly engaged in an otherwise lawful act of (sexual intercourse) (sodomy) with knowledge or reasonable anticipation that the participants were being viewed by others; and
or

That the defendant publicly exposed (his)(her) sex organ or exposed (his)(her) sex organ in the presence of a person not (his)(her) spouse and who had not consented thereto, with the intent to arouse or to gratify the sexual desires of the defendant or another; and

- [2.] That the defendant committed the act in the presence of _____, a person under 16 years of age at the time the act was committed; 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. 21-3508. Lewd and lascivious behavior if committed in the presence of a person 16 years or more of age is a class B, nonperson misdemeanor. Lewd and lascivious behavior if committed in the presence of a person under 16 years of age is a severity level 9, person felony. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18(d), Sex Offenses - Definitions, should be given.

Comment

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v.*

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Crawford, 223 Kan. 127, 573 P.2d 982 (1977); *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

The crime of lewd and lascivious behavior was enlarged in 1983 to include the exposure of the sex organ in a public place.

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

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57.11 ENTICEMENT OF A CHILD

The statute upon which this instruction was based (K.S.A. 21-3509) was repealed in 1992. L. 1992, ch. 298. See PIK 3d 57.12, Indecent Solicitation of a Child.

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57.12-A SEXUAL EXPLOITATION OF A CHILD

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

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

1. That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) insert name of child under the age of 18 years to engage in sexually explicit conduct for the purpose of promoting a performance; and

OR

1. That the defendant possessed a (film) (photograph) (negative) (slide) (book) (magazine) (other printed or visual medium) (audio tape recording) (photocopy) (video tape) (video laser disk) (computer hardware) (software) (floppy disk) (other computer related equipment) (computer generated image) that contains or incorporates in any manner any (film) (photograph) (negative) (photocopy) (video tape) (video laser disk) in which a visual depiction of a child under 18 years of age is shown or heard engaging in sexually explicit conduct; and
2. That the defendant did so with the intent to arouse and satisfy the sexual desires or appeal to the prurient interest of the defendant, the child, or another; and

OR

1. That the defendant is a (parent) (guardian) (other person having custody or control) of insert name of child under 18 years of age; and
2. That the defendant knowingly permitted insert name of child to engage in, or assist another in

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sexually explicit conduct (for the purpose of promoting any performance) (with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the defendant, the child, or another); and

OR

1. That the defendant promoted any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance; and
- [2.] or [3.] That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

These definitions apply to this instruction:

- a. "Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse for the purpose of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.
- b. "Promoting" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, dissemination, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising, for pecuniary profit or with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the defendant, the child or another.
- c. "Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk,

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computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk, or any play or other live presentation.

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

Notes on Use

For authority, see K.S.A. 21-3516. In 1998, the Legislature changed the age of children protected by this statute from 16 to 18. They also made contraband any visual depiction of a child under such circumstances, whether said image was real or digitally created. Sexual exploitation of a child is a severity level 5, person felony.

Comment

For a definition of the word “lewd,” see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

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

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57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

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59.67 - 59.69 RESERVED FOR FUTURE USE.

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59.70 VALUE IN ISSUE

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

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

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

Notes on Use

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

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

Comment

In *State v. Stephens*, 263 Kan. 658, 953 P.2d 1373 (1998), the court held that the degree of a theft crime is determined by the value of the property stolen. The value of what the victim received or the extent of the victim's loss is immaterial in making that determination. The value issue is discussed in great detail in the opinion. On this issue, see also *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985).

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60.05 PERJURY

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

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

- 1. That the defendant intentionally, knowingly and
falsely (swore) (testified) (affirmed) (declared)
(subscribed) to a material fact upon (his)(her) oath
or affirmation legally administered by a person
authorized to administer oaths; and
or
That the defendant intentionally, knowingly and
falsely subscribed as true and correct under
penalty of perjury a material matter in a
(declaration) (verification) (certificate) (statement);
and**
- 2. That this act occurred on or about the ____ day of
_____, 19____, in _____
County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3805. Perjury is a severity level 7, nonperson felony if the false statement is made upon the trial of a felony charge. Perjury is a severity level 9, nonperson felony if the false statement is made in a cause, matter or proceeding other than the trial of a felony charge or is made under penalty of perjury in any declaration, verification, certificate or statement as provided in K.S.A. 53-601 and K.S.A. 75-5743.

Comment

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

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607, 433 P.2d 462 (1967); *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973); *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

However, in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), the Court held the element of materiality in a perjury prosecution under 18 U.S.C. § 1001 must be resolved by a jury and the trial judge's refusal to submit the question of materiality to the jury was violative of the defendant's Fifth and Sixth Amendment rights. It was also noted in *Gaudin* that the parties agreed upon the following definition of "materiality":

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

In *State v. Rollins*, 264 Kan. 466, 957 P.2d 438 (1998), the court reiterated that the materiality of a false statement under K.S.A. 21-3805 is a question of law for the judge and not a question of fact for the jury. The court distinguished the holding in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), construing 18 U.S.C. § 1008 (1988).

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60.08 OBSTRUCTING LEGAL PROCESS

The defendant is charged with the crime of obstructing legal process. The defendant pleads not guilty.

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

1. That _____ was authorized by law to serve _____;
2. That the defendant knowingly and intentionally (obstructed) (resisted) (opposed) _____ in the (service) (execution) of the _____;
3. That at the time the defendant knew or should have known that _____ was authorized by law to _____; 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. 21-3808. This instruction should not be given if there is a uniformed and properly identified law enforcement officer. Instead, use PIK 3d 60.09.

In the second blank of Element Nos. 1 and 2, the Court should insert the name of the paper or instrument involved in the particular case such as writ, warrant, or summons.

In the second blank of Element No. 3, the Court should insert the particular act the person was authorized by law to perform.

Obstructing legal process 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 legal process 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. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the Court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

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

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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 _____;
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 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

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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.

In *State v. Hudson*, 261 Kan. 535, 931 P.2d 679 (1997), the court held that the classification of obstruction as a felony or misdemeanor depends upon the knowledge and intent of the officer as to whether a misdemeanor or felony arrest was being made.

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Comment

For extensive comment, see *Kansas Judicial Council Bulletin*, April 1968, p. 94.

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

Possession and control are discussed and defined. *State v. Bowman National Security Agency, Inc.*, 231 Kan. 631, 647 P.2d 1288 (1982).

A telephone company, having reasonable grounds to suspect its billing procedures are being bypassed by electronic device, may monitor any telephone from which it reasonably believes illegal calls are being placed. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976).

In *State v. Martin*, 232 Kan. 778, 658 P.2d 1024 (1983), on appeal from a trial court judgment of acquittal on the ground that the statute did not clearly proscribe defendant's actions, it was held that defendant's acts in inviting women to his attic studio to be photographed while modeling clothes and photographing them through a one-way mirror while they were changing clothes violated (1)(a) of the statute. Entry and observe are defined.

In *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984), defendant sought to suppress evidence obtained by a search warrant based on information received through use of a transmitting device concealed on the person of a police informant who entered defendant's home. It was held the use of the concealed transmitter did not violate K.S.A. 21-4001(1)(a) and (b) or 21-4002(1)(a) and (b). Any party to a private conversation may waive the right of privacy and a non-consenting party has no Fourth Amendment or statutory right to challenge that waiver. Interception of a private message requires the consent of either sender or receiver, not both.

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**62.02 EAVESDROPPING - DEFENSE OF PUBLIC UTILITY
EMPLOYEE**

It is a defense to the charge of eavesdropping that the defendant was (the operator of a switchboard) [(an officer) (an agent) (an employee) of a public utility providing telephone communication service] and that (he)(she) intercepted, disclosed, or used a communication in the performance of (his)(her) legitimate duties.

Notes on Use

For authority, see K.S.A. 21-4001(c). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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62.03 BREACH OF PRIVACY - INTERCEPTING MESSAGE

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

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

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

Notes on Use

For authority, see K.S.A. 21-4002(a)(1). Breach of privacy is a class A, nonperson misdemeanor.

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

Comment

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

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

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

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

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

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62.04 BREACH OF PRIVACY - DIVULGING MESSAGE

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

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

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

Notes on Use

For authority, see K.S.A. 21-4002(a)(2). Breach of privacy is a class A, nonperson misdemeanor.

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

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

Comment

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

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

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62.06 CRIMINAL DEFAMATION

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-4004(a).

Comment

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

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

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

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

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62.07 CRIMINAL DEFAMATION - TRUTH AS A DEFENSE

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

Notes on Use

For authority, see K.S.A. 21-4004(b). The elements of criminal defamation are set forth in PIK 3d 62.06, Criminal Defamation.

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62.08 CIRCULATING FALSE RUMORS CONCERNING FINANCIAL STATUS

The defendant is charged with the crime of maliciously circulating false rumors concerning financial status. The defendant pleads not guilty.

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

1. That the defendant (circulated) (caused to be circulated) (assisted in the circulation of) a false statement as follows: _____;
2. That the defendant did so maliciously and without reasonable grounds for believing the false statement;
3. That the defendant did so with the intent to injure the financial standing or reputation of _____; 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. 21-4005. Circulating false rumors concerning financial status is a class A, nonperson misdemeanor.

In the blank in Element No. 1, specify the alleged false statement. In Element No. 3, name the bank, financial or business institution, or individual alleged to be injured.

Comment

The Committee believes that the phrase "without reasonable grounds to believe" is synonymous with "without probable cause" and is more understandable to jurors. See *State v. Howland*, 153 Kan. 352, 110 P.2d 801 (1941).

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.09 EXPOSING A PAROLED OR DISCHARGED PERSON

The defendant is charged with the crime of exposing a paroled or discharged person. The defendant pleads not guilty.

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

1. That the defendant maliciously and intentionally (communicated) (threatened to communicate) to another an oral or written statement that _____ has been charged with or convicted of a felony;
2. That the defendant did so with the intent to interfere with the employment or business 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. 21-4006. Exposing a paroled or discharged person is a class B, nonperson misdemeanor.

This offense does not apply to a person or organization furnishing such information at the request of another person or organization.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

	PIK Number
Disorderly Conduct	63.01
Unlawful Assembly	63.02
Remaining At An Unlawful Assembly	63.03
Riot	63.04
Incitement To Riot	63.05
Maintaining A Public Nuisance	63.06
Permitting A Public Nuisance	63.07
Vagrancy	63.08
Public Intoxication	63.09
Giving A False Alarm	63.10
Criminal Desecration - Flags	63.11
Criminal Desecration - Monuments/Cemeteries/ Places of Worship	63.12
Criminal Desecration - Dead Bodies	63.13
Harassment By Telephone	63.14
Harassment Of Court By Telefacsimile	63.14-A
Desecration Of Flags	63.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.01 DISORDERLY CONDUCT

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

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

- 1. That the defendant:**
 - (a) engaged in brawling or fighting;**
or
 - (b) disturbed an assembly, meeting, procession, not unlawful in its character;**
or
 - (c) (used offensive, obscene or abusive language) (engaged in noisy conduct) of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others;**
- 2. That the defendant acted with knowledge or reasonable cause to believe that (his) (her) (conduct) (offensive, obscene or abusive language) would alarm, anger, or disturb others or provoke an assault or other breach of the peace; 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. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The first version should be used when the charged is based on acts of the defendant and the second when only speech is involved. Under the first version, claim no. 1 should be limited to the specific conduct alleged to constitute the offense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980), the Court found the statute as applied to conduct involving only speech was facially overbroad. It upheld the statute by authoritatively construing it to prohibit only speech amounting to "fighting words." In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942), the Court upheld a state statute which, as authoritatively construed by the state court, prohibited only words "plainly likely to cause a breach of the peace by the addressee." See also, *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983), disapproving former PIK 2d 63.01 as applied to speech.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.02 UNLAWFUL ASSEMBLY

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

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

1. That the defendant met in a group of not less than five persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot); and
or

That the defendant in a lawfully assembled group of not less than five persons agreed to engage in (disorderly conduct) (a riot); 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. 21-4102. Unlawful assembly is a class B, nonperson misdemeanor. A definition of disorderly conduct or riot must be given with this instruction. See PIK 3d 63.01, Disorderly Conduct or PIK 3d 63.04, Riot. For instruction involving conspiracy, see PIK 3d 55.03, Conspiracy.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.03 REMAINING AT AN UNLAWFUL ASSEMBLY

The defendant is charged with the crime of remaining at an unlawful assembly. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally failed to depart from the place of an unlawful assembly after being directed to leave by a law enforcement officer; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Unlawful assembly means a meeting of five or more persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot) or a meeting of five or more persons agreeing to engage in such conduct.

Notes on Use

For authority, see K.S.A. 21-4103. Remaining at an unlawful assembly is a class A, nonperson misdemeanor. See PIK 3d 63.01, Disorderly Conduct and PIK 3d 63.04, Riot, for definitions of those offenses.

Comment

See Comment to PIK 3d 63.02, Unlawful Assembly. This instruction applies not only to participants in the unlawful assembly but to bystanders.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.04 RIOT

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

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

- A. 1. That the defendant used force or violence which resulted in a breach of the public peace;
2. That the defendant acted in a group of five or more persons;
3. That the defendant acted without authority of law; and

OR

- B. 1. That the defendant threatened to use force or violence to produce a breach of the public peace against any person or property;
 2. That such threat was accompanied by power or apparent power of immediate execution;
 3. That the defendant acted in a group of five or more persons;
 4. That the defendant acted without authority of law; and
- [4] or [5]. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4104. Riot is a class A person misdemeanor. For definition of breach of the public peace, see Chapter 53.00, Definitions and Explanations of Terms.

Comment

PIK 3d 63.03 through 63.05 define crimes deemed inimical to the public peace. The distinction between riot and incitement to riot was noted in *State v. Dargatz*, 228 Kan. 322, 326-327, 614 P.2d 430 (1980), where the Court approved the substance of PIK 2d 63.04, Riot and 63.05, Incitement to Riot.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.05 INCITEMENT TO RIOT

The defendant is charged with the crime of incitement to riot. The defendant pleads not guilty.

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

1. That the defendant by words or conduct intentionally urged others to engage in a riot under circumstances which produced a clear and present danger of injury to persons or property or a breach of the public peace; and
2. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Riot is any use of force or violence which produces a breach of the public peace, or any threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution, by five or more persons acting together and without authority of law.

Notes on Use

For authority, see K.S.A. 21-4105. Incitement to riot is a severity level 8, person felony.

Comment

See Comment to PIK 3d 63.04, Riot. Incitement to riot is a specific intent crime. *State v. Dargatz*, 228 Kan. 322, 331, 614 P.2d 430 (1980). Hence, in a proper case, an instruction on voluntary intoxication may be appropriate. See PIK 3d 54.12, Intoxication.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.06 MAINTAINING A PUBLIC NUISANCE

The defendant is charged with the crime of maintaining a public nuisance. The defendant pleads not guilty.

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

- 1. That the defendant intentionally _____
_____;**
- 2. That this act or omission injured or endangered the public health, safety or welfare; 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. 21-4106. Maintaining a public nuisance is a class C misdemeanor.

Claim No. 1 should be completed by specifying the act or omission alleged to constitute the nuisance.

Comment

For examples of public nuisances, see *Kansas Judicial Council Bulletin*, April 1968, p.100.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.12 CRIMINAL DESECRATION - MONUMENTS/
CEMETERIES/PLACES OF WORSHIP**

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

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

1. That the defendant intentionally (damaged) (defaced) (destroyed) a (public monument or structure) [(tomb) (monument) (memorial) (marker) (grave) (vault) (crypt gate) (tree) (shrub) (plant) (other property) in a cemetery] (_____ , a place of worship);
2. That the property was damaged to the extent of (less than \$500) (at least \$500 but less than \$25,000) (\$25,000 or more); 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. 21-4111. Desecrating public monuments, property in a cemetery, and places of worship is a class A nonperson misdemeanor if damage is less than \$500; if at least \$500 but less than \$25,000 it is a severity level 9, nonperson felony; and if \$25,000 or more, a severity level 7, nonperson felony. 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. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration - Flags, and 63.13, Criminal Desecration - Dead Bodies.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.13 CRIMINAL DESECRATION - DEAD BODIES

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

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

- 1. That the defendant intentionally (obtained) (attempted to obtain) unauthorized control of (a dead body) (the remains of any human being) (a coffin, urn or other article containing a dead body or the remains of any human being); 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. 21-4111. Criminal desecration as described herein is a class A nonperson misdemeanor. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration - Flags, and PIK 3d 63.12, Criminal Desecration - Monuments/Cemeteries/Places of Worship.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 67.00
CONTROLLED SUBSTANCES

	PIK Number
REPEALED	67.01 - 67.12
Narcotic Drugs And Certain Stimulants - Possession . . .	67.13
Controlled Substances - Sale Defined	67.13-A
Narcotic Drugs And Certain Stimulants - Sale, Etc. . . .	67.13-B
Narcotic Drugs And Certain Stimulants - Possession Or Offer To Sell With Intent To Sell	67.13-C
Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Possession Or Offer To Sell With Intent To Sell	67.14
Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Sale, Etc.	67.15
Stimulants, Depressants, Hallucinogenic Drugs Or Anabolic Steroids - Possession	67.16
Simulated Controlled Substances And Drug Paraphernalia - Use Or Possession With Intent To Use	67.17
Possession Or Manufacture Of Simulated Controlled Substance	67.18
Possession Or Manufacture Of Drug Paraphernalia	67.18-A
Promotion Of Simulated Controlled Substances Or Drug Paraphernalia	67.19
Representation That A Noncontrolled Substance Is A Controlled Substance	67.20
Unlawfully Manufacturing A Controlled Substance	67.21
Unlawful Use Of Communication Facility To Facilitate Felony Drug Transaction	67.22
Substances Designated Under K.S.A. 65-4113 Selling, Offering To Sell, Possessing With Intent To Sell Or Dispensing To Person Under 18 Years Of Age	67.23
Possession By Dealer - No Tax Stamp Affixed	67.24
Receiving Or Acquiring Proceeds Derived From A Violation Of The Uniform Controlled Substances Act	67.25
Controlled Substance Analog - Possession, Sale, Etc.	67.26

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS - POSSESSION

The defendant is charged with the crime of unlawfully (possessing) (controlling) [insert name of narcotic drug or stimulant]. 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) [insert name of narcotic drug or stimulant];
2. That the defendant did so intentionally; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4160 which was enacted in 1994. The previous statute, K.S.A. 65-4127a(a), was repealed. 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. There will be occasions when a court should include the definition of the specific drug(s) involved, either in the same or additional instructions.

A first conviction under K.S.A. 65-4160 is a drug severity level 4 felony. Upon conviction for a second offense, such person shall be guilty of a drug severity level 2 felony and upon conviction for a third or subsequent offense, such person shall be guilty of a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

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

If a definition of "possession" is necessary, see PIK 3d Chapter 53.00.

Comment

Sale of narcotic drugs was included in PIK 3d 67.13 because it was a part of the same statute, K.S.A. 65-4127a, now repealed. Sale of narcotic drugs is now covered by K.S.A. 65-4161, a new statute. See PIK 3d 67.13-B for the instruction on sale of narcotic drugs.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

Presence of a controlled substance in an accused's blood is not possession or control of the substance within K.S.A. 65-4127a. *State v. Flinchpaugh*, 232 Kan. 831, 835, 659 P.2d 208 (1983).

K.S.A. 65-4160 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a provision, K.S.A. 65-4116, under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be lawfully possessed.

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

In *State v. Tucker*, 253 Kan. 38, 43, 853 P.2d 17 (1993), it was held that possession and intent to sell are separate elements of the crime of possession with intent to sell cocaine. A finding of guilty of possession with the intent to sell requires proof of possession. Conversely, proof of possession without proof of intent to sell is still sufficient proof of a crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

The defendant is charged with the crime of unlawfully (selling) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) insert name of narcotic drug or stimulant. 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) insert name of narcotic drug or stimulant;
 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. 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. There will be occasions when a court should include the definition of the specific drug(s) or stimulant(s) involved, either in the same or in additional instructions.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

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

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

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

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); *State v. Penny*, 22 Kan. App. 2d 212, 914 P.2d 962 (1996).

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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 unlawfully (possessing) (offering to sell) [insert name of narcotic drug or stimulant] with intent to (sell) (deliver) (distribute). 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) [insert name of narcotic drug or stimulant];
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 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 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. 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. There will be occasions when a court should include the definition of the specific drug(s) or stimulant(s) involved, either in the same or in additional instructions.

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.

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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.

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).

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).

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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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, *rev. den.* 257 Kan. 1095 (1995); *State v. Penny*, 22 Kan. App. 2d 212, 914 P.2d 962 (1996).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 unlawfully (possessing) (offering to sell) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid] with intent to (sell) (sell, deliver or distribute) it. 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) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
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 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 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. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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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. Pursuant to K.S.A. 65-4163(b), 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 K.S.A. 65-4163(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). Possession with intent to sell requires proof of possession and an intent to sell. *State v. Heiskell*, 21 Kan. App. 2d 105, 896 P.2d 1106 (1995) (citing PIK 67.14).

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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, *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 unlawfully (selling) (cultivating) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid]. 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) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
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 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. There will be occasions when a court should include the definition

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of the specific substance involved, either in the same or in additional instructions.

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, *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 unlawfully (possessing) (controlling) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid]. 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) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
2. That the defendant did so intentionally; and
3. That this act occurred on or about the ____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4162 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. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

A violation of K.S.A. 65-4162 is a class A, nonperson misdemeanor. If a person has a prior conviction under 65-4162, a conviction for a substantially similar offense from another jurisdiction, or a conviction of a violation of an ordinance of any city or resolution of any county for a substantially similar offense if the substance involved was marijuana or tetrahydrocannabinol as designated in subsection (d) of K.S.A. 65-4105 and amendments thereto, the person is guilty of a drug severity level 4 felony. "Prior conviction of possession of narcotics is not

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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 unlawfully (using) (possessing with intent to use) [insert name of simulated controlled substance or drug paraphernalia]. The defendant pleads not guilty.

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

1. That the defendant knowingly (used) (possessed with the intent to use)
 - (a) [insert name of controlled substance]; and
or
 - (b) drug paraphernalia to (use, store, contain, conceal [insert name of controlled substance]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance] into the human body); and
or
 - (c) drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute [insert name of controlled substance]; 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. 65-4152. A violation based on option 1(a) or 1(b) is a class A nonperson misdemeanor. A violation based on option 1(c) is a drug severity level 4 felony, except that a violation which involves the possession of drug paraphernalia for the "planting, propagation, growing or harvesting or less than five marijuana plants" is a class A nonperson misdemeanor. K.S.A. 65-4152(d).

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.

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

Inapplicable words should be stricken when either element 1(b) or 1(c) is given. When element 1(b) or 1(c) is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known by the defendant must be named.

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.

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

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

1. That the defendant knowingly (delivered a simulated controlled substance) (possessed a simulated controlled substance with the intent to deliver it) (manufactured a simulated controlled substance with the intent to deliver it) (caused a simulated controlled substance to be delivered) within the State of Kansas; and
2. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Simulated controlled substance means any product which identifies itself by a common name or slang term associated with a controlled substance and which indicates on its label or accompanying promotional material that the product simulates the effect of a controlled substance.

Notes on Use

For authority, see K.S.A. 65-4153(a)(1) and 65-4150(e). A violation of K.S.A. 65-4153(a)(1) is a nondrug severity level 9, nonperson felony.

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67.18-A POSSESSION OR MANUFACTURE OF DRUG PARAPHERNALIA

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

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

1. That the defendant knowingly (delivered drug paraphernalia to insert name of person to whom drug paraphernalia was delivered) (possessed drug paraphernalia with the intent to deliver it to insert name of person to whom drug paraphernalia was delivered) (manufactured drug paraphernalia with the intent to deliver it to insert name of person to whom drug paraphernalia was delivered) (caused drug paraphernalia to be delivered to insert name of person to whom drug paraphernalia was delivered) within the State of Kansas;
2. (a) That defendant knew or reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute insert name of controlled substance;
or
(b) That defendant knew or reasonably should have known that the drug paraphernalia would be used to (use, store, contain, conceal insert name of controlled substance specified under K.S.A. 65-4162) (inject, ingest, inhale, or otherwise introduce insert name of controlled substance specified under K.S.A. 65-4162) into the human body);
or
(c) That defendant knew or reasonably should have

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known that the drug paraphernalia would be used to (use, store, contain, conceal [insert name of controlled substance other than those specified under K.S.A. 65-4162]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance other than those specified under K.S.A. 65-4162] into the human body);

[3. That [insert name of person to whom drug paraphernalia was delivered or intended to be delivered] was under 18 years of age;] and

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

Notes on Use

For authority, see K.S.A. 65-4153(a)(2), (3) and (4). A violation based on option 2(a) is a drug severity level 4 felony. K.S.A. 65-4153(e). A violation based on option 2(b) that involves a controlled substance under K.S.A. 65-4162 is a class A nonperson misdemeanor, except that any person who delivers drug paraphernalia or causes drug paraphernalia to be delivered within the state of Kansas for such use to a person under 18 years of age is guilty of a nondrug severity level 9, nonperson felony. K.S.A. 65-4153(c). A violation based on option 2(c) that involves a controlled substance other than those included in K.S.A. 65-4162 is a nondrug severity level 9, nonperson felony, except that any person who delivers drug paraphernalia or causes drug paraphernalia for such use to be delivered within the state of Kansas to a person under 18 years of age is guilty of a drug severity level 4 felony. K.S.A. 65-4153(d).

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 65-4150, "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. The appropriate controlled substance should be inserted in the instruction.

An instruction defining "drug paraphernalia" (see K.S.A. 65-4150(c)) and setting forth factors to be considered in determining whether an object is drug paraphernalia (see K.S.A. 65-4151) should be given. Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in this instruction.

This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

Inapplicable words should be stricken from paragraph 2.

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Bracketed Element 3 should be given only when option 2(b) or 2(c) is used and the defendant is charged with delivery or causing delivery to a person under 18 years of age.

Comment

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 [insert name of 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 [insert name of person to whom substance was delivered] a substance which was not [insert name of controlled substance];
2. (a) That the defendant made an express representation that the substance delivered was [insert name of controlled substance];
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 [insert name of controlled substance];
or
(c) That the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was [insert name of controlled substance];
3. That the defendant was 18 or more years of age;
4. That [insert 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 [insert name of person to whom substance was delivered]]; and
3. or 6. That this act occurred on or about the ____ day of _____, 19__, in _____ County, Kansas.

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Notes on Use

For authority, see K.S.A. 65-4155. Violation of K.S.A. 65-4155 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this State of Kansas a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the delivery is made is guilty of a nondrug severity level 9, nonperson felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 65-4155(b), that delivery of a substance under the following circumstances would give a reasonable person reason to believe that a substance is a controlled substance:

- (1) the substance was packaged in a manner normally used for the illegal delivery of controlled substances.
- (2) the delivery of the substance included an exchange of or demand for money or other consideration for delivery of the substance, and the amount of the consideration was substantially in excess of the reasonable value of the substance.
- (3) the physical appearance of the capsule or other material containing the substance was substantially identical to a specific controlled substance.

Comment

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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67.21 UNLAWFULLY MANUFACTURING A CONTROLLED SUBSTANCE

The defendant is charged with the crime of unlawfully manufacturing a controlled substance. The defendant pleads not guilty.

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

1. That the defendant manufactured a controlled substance known as [include here a controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113];
 2. That the defendant did so intentionally;
 3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
 4. That the defendant was 18 years of age or over;] and
- [3.] or [5.] That 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. 65-4159. A first offense of K.S.A. 65-4159 is a drug severity level 2 felony. For a second or subsequent offense it is a drug severity level 1 and the sentence shall not be subject to statutory provisions for suspended sentence, community work service or probation. A more severe penalty is imposed where the defendant is 18 or more years of age and the offense occurred within 1,000 feet of school property.

If the defendant is charged with selling the controlled substance on or within 1,000 feet of school property, the bracketed elements of the instruction and the definition of "school" should be included in the instruction.

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

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Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

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**67.22 UNLAWFUL USE OF COMMUNICATION FACILITY
TO FACILITATE FELONY DRUG TRANSACTION**

The defendant is charged with the crime of unlawful use of a communication facility (in committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) the felony of _____. The defendant pleads not guilty.

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

1. That the defendant intentionally used a [insert type of communication facility] in (committing) (causing the actual commission of) (facilitating the actual commission of) [insert the appropriate felony violation]; and

or

That the defendant intentionally used a [insert type of communication facility] in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of [insert the appropriate felony violation]; and

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

(Conspiracy means an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all the facts and circumstances.)

(Solicitation means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.)

(Facilitate means to aid, assist, or make easier fulfillment of a goal.)

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The elements of insert the appropriate felony violation are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 65-4141. A violation of K.S.A. 65-4141 is a nondrug severity level 8 nonperson felony.

K.S.A. 65-4141(b) defines "communication facility" to mean any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers and all other means of communication.

The appropriate felony violations under K.S.A. 65-4127a, 65-4127b, 65-4159, and 65-4160 through 65-4164 should be inserted in the second blank of Element No. 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

Comment

In *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993), the Court held that in a prosecution under K.S.A. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 65-4127a and K.S.A. 65-4127b, the State is required to prove the actual commission of the underlying felony violation. Proof of the actual commission of the underlying felony is not required in a prosecution under K.S.A. 65-4141 based upon conspiracy or solicitation. *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993).

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67.23 SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113 -
SELLING, OFFERING TO SELL, POSSESSING WITH
INTENT TO SELL OR DISPENSING TO PERSON
UNDER 18 YEARS OF AGE

The defendant is charged with the crime of unlawfully (possessing) (controlling) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) (selling) (offering for sale) (possessing with intent to sell) a (material) (compound) (mixture) (preparation) containing [insert name of narcotic drug or stimulant]. The defendant pleads not guilty.

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

1. That the defendant intentionally (possessed) (controlled) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) (sold) (offered for sale) (possessed with intent to sell) a (material) (compound) (mixture) (preparation) containing [insert name of narcotic drug or stimulant];
or
 - [1. That the defendant intentionally (prescribed) (administered) (delivered) (distributed) (dispensed) (sold) (offered for sale) (possessed with intent to sell) a (material) (compound) (mixture) (preparation) containing [insert name of narcotic drug or stimulant] (for) (to) [insert name of person for whom substance was intended];
 2. That [insert name of person for whom substance was intended] was a person under 18 years of age; and]
- [2.] or [3.] That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

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Notes on Use

For authority, see K.S.A. 65-4164 which was enacted in 1994. The previous statute, K.S.A. 65-4127b(c) was repealed. K.S.A. 65-4164 covers unlawful acts relating to medicinals with a lower potential for abuse designated in K.S.A. 65-4113.

A violation of K.S.A. 65-4164 is a class A nonperson misdemeanor, except that if the substance was prescribed for or administered, delivered, distributed, dispensed, sold, offered for sale or possessed with intent to sell to a child under 18 years of age, it is a drug severity level 4 felony.

K.S.A. 21-3202(2) states, "Proof of criminal intent does not require proof that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which he is charged."

Comment

K.S.A. 65-4164 qualifies the acts specified as unlawful with the premise, "except as authorized by the Uniform Controlled Substances Act." The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs and controlled substances (defined in K.S.A. 65-4101(e)) may be lawfully possessed, 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).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**67.24 POSSESSION BY DEALER - NO TAX STAMP
AFFIXED**

The defendant is charged with the crime of possession of (insert name of controlled substance) (marijuana), without Kansas tax stamps affixed. The defendant pleads not guilty.

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

1. That the defendant knowingly possessed more than _____ (grams) (dosage units) of (insert name of controlled substance) (marijuana) without affixing official Kansas tax stamps or other labels showing that the tax has been paid; 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. 79-5201 *et seq.* Pursuant to K.S.A. 79-5208, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, label or other indicia is guilty of a severity level 10 felony.

Comment

In order to sustain a conviction for possession of a controlled substance that is sold by weight without a tax stamp, the accused must have more than 1 gram of the controlled substance in his or her possession. *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997).

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67.25 RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM A VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT

The defendant is charged with the crime of (receiving) (acquiring) (engaging in a transaction involving) proceeds derived from a violation of the Uniform Controlled Substances Act. The defendant pleads not guilty.

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

1. That the defendant (received or acquired proceeds) (engaged in a transaction involving proceeds) known to be derived from _____, a violation of the Controlled Substances Act;

or

That the defendant (gave) (sold) (transferred) (traded) (invested) (concealed) (transported) (maintained an interest in) (made available) _____, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of _____, a violation of the Controlled Substances Act;

or

That the defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from _____, a violation of the Controlled Substances Act;

or

That the defendant conducted a financial transaction involving the proceeds derived from _____, a violation of the Controlled Substances Act which was designed (to conceal or disguise the [nature] [location] [source] [ownership] [control]) of the proceeds (known to be derived from _____, a violation of the Controlled Substances Act) (to avoid _____, a

PATTERN INSTRUCTIONS FOR KANSAS 3d

transaction reporting requirement under [state]
[federal] law);

2. That the defendant did so knowingly or intentionally;
3. That the value of the proceeds was (less than \$5,000)
(at least \$5,000 but less than \$100,000) (at least
\$100,000 but less than \$500,000) (\$500,000 or more);
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. 65-4142. The severity level for a violation of K.S.A. 65-4142 varies depending on the value of the proceeds involved:

Less than \$5,000=drug severity level 4 felony

At least \$5,000 but less than \$100,000=drug severity level 3 felony

At least \$100,000 but less than \$500,000=drug severity level 2 felony

\$500,000 or more=drug severity level 1 felony

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.26 CONTROLLED SUBSTANCE ANALOG -
POSSESSION, SALE, ETC.

The defendant is charged with the crime of insert applicable introductory charge from PIK 3d 67.13, 67.13-B, 67.13-C, 67.14, 67.15, 67.16 or 67.21 as it pertains to a controlled substance analog known as _____. The defendant pleads not guilty.

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

1. [Here insert appropriate elements from PIK 3d 67.13, 67.13-B, 67.13-C, 67.14, 67.15, 67.16 or 67.21, substituting the name of the analog in place of the narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid.]
 - (.) That the chemical structure of (name of analog) is substantially similar to the chemical structure of insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
 - (.) That (name of analog) has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
or
That the defendant (represented) (intended) that (name of analog) (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
 - (.) That the defendant did so with the intent that (name of analog) be used for human consumption; and
 - (.) That this act occurred on or about the _____ day of

PATTERN INSTRUCTIONS FOR KANSAS 3d

_____, 19____, in _____ County,
Kansas.

Notes on Use

For authority, see K.S.A. 65-4159(a) and (b), 65-4101(bb), 65-4160(e), 65-4161(f), 65-4162(c) and 65-4163(d). These subsections state that the prohibitions contained in their respective sections apply to controlled substance analogs as defined in K.S.A. 65-4101(bb). To be a controlled substance analog, a substance must have a chemical structure and an effect, or intended effect, on the central nervous system substantially similar to a controlled substance contained in the schedules in K.S.A. 65-4105 or 65-4107. The name of the controlled substance to be inserted in the appropriate blanks in element nos. 1 and 2 must be a substance contained in K.S.A. 65-4105 or 65-4107.

Depending on the prohibited act involved, the appropriate elements from PIK 3d 67.13, 67.13-B, 67.14, 67.15, 67.16 or 67.21 should be added following Element No. 2 of this instruction.

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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. If, however, a defendant is charged in the alternative, use PIK 3d 68.09-A.

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

Comment

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

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405-6, 769 P.2d 621, cert. denied 493 U.S. 842 (1989), overruled on other grounds *State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996). 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).

The trial court's failure to give PIK Crim. 3d 68.07 was not clearly erroneous where there was no real possibility that the jury would have reached a different result had the instruction been given. *State v. Kelly*, 262 Kan. 755, 765, 942 P.2d 579 (1997). See also, *State v. Mitchell*, 262 Kan. 687, 696-7, 942 P.2d 1 (1997).

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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, substantially amended under 1998 Senate Bill 449, chapter 185, 1998 Kansas Session Laws. Under the amendments, the information/evidence test as enunciated in *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), has been eliminated.

This instruction should not be used when the crime is first degree murder under the alternative theories of premeditated murder and felony murder. Instead, use PIK 3d 68.15 and 68.16.

Comment

(cases before 1998 S.B. 449)

The trial court has a statutory duty to instruct the jury on lesser included offenses under K.S.A. 21-3107(3). This duty arises regardless of whether a party requests the giving of any lesser included instructions. *State v. Moncla*, 262 Kan. 58, 73-74, 936 P.2d 727 (1997). However, in *State v. Coffman*, 260 Kan. 811, 813, 925 P.2d 419 (1996), the Supreme Court noted that under K.S.A. 21-3107(3) a defendant who objects to the giving of a lesser included instruction waives any objection to the failure to instruct.

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In *State v. Fike*, 243 Kan. 365, 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 information and the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an included crime upon which the jury must be instructed.

"[A defendant] has a right to an instruction on all lesser included offenses supported by the evidence at trial so long as (1) the evidence when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with the defendant's theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense." *State v. Harris*, 259 Kan. 689, 702, 915 P.2d 758 (1996).

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). However, in *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987), the Supreme Court held it was not reversible error to fail to give such an instruction.

Conspiracy is not a lesser included offense of a completed or attempted crime under the statutory test of *Fike* because a conspiracy requires an agreement between two or more persons. See *State v. Antwine*, 4 Kan. App. 2d 389, 397-98, 607 P.2d 519 (1980).

Solicitation was not held to be a lesser included offense of aiding and abetting first degree murder. *State v. DePriest*, 258 Kan. 596, 604, 907 P.2d 868 (1995). See also, *State v. Webber*, 260 Kan. 263, 280-2, 918 P.2d 609 (1996), *cert. denied* ___ U.S. ___, 136 L.Ed 2d 711, 117 S.Ct. 764 (1997), holding no error by the trial court in failing to instruct on criminal solicitation as a lesser included offense of either conspiracy to commit first degree murder or aiding and abetting first degree murder.

Examples of lesser included offenses are:

1. **Premeditated Murder** - The Court's duty to instruct on the lesser offenses of second degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second degree murder is included where the issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses. Reckless second degree murder, also called depraved heart murder, is a lesser included crime

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.15 MURDER IN THE FIRST DEGREE - PREMEDITATED
MURDER AND FELONY MURDER IN THE
ALTERNATIVE - VERDICT INSTRUCTION**

The defendant is charged with one offense of murder in the first degree. This verdict instruction will guide you on the verdicts you shall consider.

You may find the defendant guilty of murder in the first degree; or murder in the second degree; or voluntary manslaughter; or involuntary manslaughter; or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only. Your Presiding Juror will sign the verdict form upon which you agree. The other verdict forms are to be left unsigned.

First, you shall consider whether the defendant is guilty of murder in the first degree. If you find defendant is guilty of murder in the first degree, the Presiding Juror shall sign the applicable verdict form and, in addition, you shall then determine the alternative theory or theories contained in "Theory 1(a)", "Theory 1(b)", or "Theory 1(c)". The Presiding Juror shall sign the applicable alternative theory verdict form(s).

Second, if you do not find the defendant guilty of murder in the first degree, you should then consider the lesser offense of murder in the second degree as defined in Instruction No. ____.

Third, in considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter as defined in Instruction No. ____.

Fourth, if you do not find the defendant guilty of voluntary manslaughter, you should then consider the lesser offense of involuntary manslaughter as defined in Instruction No. ____.

Fifth, if you do not find the defendant guilty of involuntary manslaughter, you shall find defendant not guilty.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976). The pattern should be given along with PIK 3d 68.16, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder.

The instruction should be used instead of an instruction under PIK 3d 68.07, Multiple Counts - Verdict Instruction and PIK 3d 68.08, Multiple Counts - Verdict Forms. In addition, the applicable lesser included offenses should be selected.

Comment

The basic purpose of the felony murder rule is to relieve the State of the burden of proving premeditation and malice when the death of the victim is caused by the defendant in the commission of a felony. *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

As felony murder is a method of proof to support a verdict of first degree murder, the Court in *Wilson*, held that when an accused is charged in one count of an information with both premeditated murder and felony murder it ". . . matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose. In such case the verdict is unanimous and guilty of murder in the first degree has been satisfactorily established. If a verdict of first degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another." *State v. Wilson*, 220 Kan. at 345.

The holding in *Wilson* has consistently been followed by the Supreme Court. See *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991); *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Wise*, 237 Kan. 117, 697 P.2d 1295 (1985); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

The enactment of the mandatory minimum 40 year sentence in premeditated murder, effective July 1, 1990, requires, however, an instruction to determine whether the jury unanimously found the defendant guilty of premeditated murder. See K.S.A. 21-4624. The purpose of this pattern and PIK 3d 68.16, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Form, is to provide a verdict form for the jury to determine whether the defendant

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is guilty of first degree murder under the alternative theories of premeditated murder or felony murder. As to a charge of first degree murder committed on or after July 1, 1990, and prior to July 1, 1994, if the jury finds unanimously that the defendant is guilty of premeditated murder, the State having been given the required notice, the matter proceeds to a sentencing hearing before the trial jury to determine whether the mandatory minimum sentence of 40 years should be imposed. On the other hand, if the jury unanimously finds the defendant guilty of murder in the first degree from a combination of premeditated murder and felony murder, the matter does not proceed to the "Hard 40" sentencing hearing.

With the enactment of the crime of capital murder (L. 1994, ch. 252, § 1), the legislature eliminated the procedure for a jury determination of application of the minimum 40-year sentence upon findings of aggravating and mitigating factors. That procedure is now used in cases of capital murder if the death sentence is requested. K.S.A. 21-4622 to 21-4624, as amended L. 1994, ch 252, § 4. If the defendant is convicted of first degree murder, rather than capital murder, upon a finding of premeditation, the court may impose the mandatory minimum 40-year sentence. L. 1994, ch. 252, § 10. The finding of premeditation remains a jury function, and the foregoing instruction must be given where the State introduces evidence upon theories of premeditation and felony murder.

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**68.16 MURDER IN THE FIRST DEGREE - PREMEDITATED
MURDER AND FELONY MURDER IN THE
ALTERNATIVE - VERDICT FORM**

VERDICT FORM

- 1. We, the jury, unanimously find the defendant guilty of murder in the first degree.**

Presiding Juror

Theory 1(a) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of premeditated murder.

Presiding Juror

Theory 1(b) We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of felony murder.

Presiding Juror

Theory 1(c) We, the jury, unable to agree under Theory 1(a) or 1(b), do unanimously find the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder.

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Presiding Juror

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

Presiding Juror

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

Presiding Juror

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

Presiding Juror

5. We, the jury, unanimously find the defendant not guilty.

Presiding Juror

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840

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P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

The instruction should be given with PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

The prosecuting attorney may only then ask for the "Hard 40" under the provisions of K.S.A. 21-4624, if the jury returns a unanimous verdict of guilty of first degree murder under the theory of premeditated murder. As to the crime of murder in the first degree committed on or after July 1, 1994, there is no procedure for a separate sentencing hearing to determine if the defendant should be required to serve a mandatory minimum term of imprisonment of 40 years. The Court may impose the mandatory minimum 40-year sentence upon a finding of premeditation, so, as explained in the Comment to PIK 3d 68.15, this verdict form will continue to be used where the State introduces evidence on the theories of premeditation and felony murder.

If the evidence of the underlying felony for felony murder is weak or if there is evidence to support the lesser included offenses, the applicable lesser offenses should be submitted to the jury.

Comment

See Comment to PIK 3d 68.15, Murder in the First Degree - Premeditated Murder and Felony Murder in the Alternative - Verdict Instruction.

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CHAPTER 69.00

ILLUSTRATIVE SETS OF INSTRUCTIONS

	PIK Number
Murder In The First Degree With Lesser Included Offenses	69.01
Theft With Two Participants	69.02
Possession Of Marijuana With Intent To Sell - Entrapment As An Affirmative Defense	69.03
Capital Murder -- Guilt and Penalty Phases	69.04

PATTERN INSTRUCTIONS FOR KANSAS 3d

69.01 MURDER IN THE FIRST DEGREE WITH LESSER INCLUDED OFFENSES

Summary of the Facts and Issues

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions, Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of July 5, 1998, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Other witnesses testified that immediately prior to the shooting Smith and Green were having a heated argument and threatening one another. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun.

An Outline of Suggested Instructions in Sequence Follows:

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

- Instruction 2. PIK 3d 56.01, Murder in the First Degree.**

- Instruction 3. PIK 3d 68.09, Lesser Included Offenses.**

- Instruction 4. PIK 3d 56.03, Murder in the Second Degree.**

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- Instruction 5.** PIK 3d 56.05, Voluntary Manslaughter.
- Instruction 6.** PIK 3d 56.06, Involuntary Manslaughter.
- Instruction 7.** PIK 3d 56.04, Homicide Definitions.
- Instruction 8.** PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.
- Instruction 9.** PIK 3d 54.01, Presumption of Intent.
- Instruction 10.** PIK 3d 51.05, Rulings of the Court.
- Instruction 11.** PIK 3d 51.06, Statements and Arguments of Counsel.
- Instruction 12.** PIK 3d 52.09, Credibility of Witnesses.
- Instruction 13.** PIK 3d 68.01, Concluding Instruction.
- Verdict Forms.** PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

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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Instruction No. 2.

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

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

1. That the defendant intentionally killed John Green;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 5th day of July, 1998, in Douglas County, Kansas.

(PIK 3d 56.01)

Instruction No. 3.

The offense of murder in the first degree with which the defendant is charged includes the lesser offenses of murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

You may find the defendant guilty of murder in the first degree, or murder in the second degree or voluntary manslaughter or involuntary manslaughter or not guilty.

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

Your Presiding Juror should then sign the appropriate verdict form. The other verdict forms are to be left unsigned. (PIK 3d 68.09)

Instruction No. 4.

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:

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1. That the defendant intentionally killed John Green; and
 2. That this act occurred on or about the 5th day of July, 1998, in Douglas County, Kansas.
- (PIK 3d 56.03)

Instruction No. 5.

In determining whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. Voluntary manslaughter is an intentional killing done in the heat of passion.

If you decide the defendant intentionally killed John Green, but that it was done in the heat of passion, the defendant may be convicted of voluntary manslaughter only.

(PIK 3d 56.05)

Instruction No. 6.

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

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

1. That the defendant unintentionally killed John Green;
2. That it was done recklessly; and
3. That this act occurred on or about the 5th day of July, 1998, in Douglas County, Kansas.

(PIK 3d 56.06)

Instruction No. 7.

As used in these instructions, the following words and phrases are defined as indicated:

Premeditation means to have thought over the matter beforehand.

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

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

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."

(PIK 3d 56.04)

Instruction No. 8.

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

Instruction No. 9.

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

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criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 3d 54.01)

Instruction No. 10.

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)

Instruction No. 11.

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)

Instruction No. 12.

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 No. 13.

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

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for the jury in Court, and will sign the verdict upon which you agree.

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

Your agreement upon a verdict must be unanimous.

District Judge

_____, 19____.

(PIK 3d 68.01)

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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 unlawfully possessing marijuana with intent to sell it. The defendant pleads not guilty.

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

1. That the defendant possessed marijuana;
2. That the defendant did so with the intent to sell it;
3. That this act occurred 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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69.04 CAPITAL MURDER--GUILT AND PENALTY PHASES

Summary of the Facts and Issues

Nineteen-year-old Phil Brown was an inmate at the El Dorado Correctional Facility serving a sentence for a voluntary manslaughter conviction. Brown had a slight build and was often harassed by other inmates. On a number of occasions, another inmate, Joe Jones, had been seen verbally and physically abusing Brown. On July 5, 1998, after a particularly loud argument and scuffle witnessed by several inmates, Brown killed Jones by stabbing him in the throat with a sharpened spoon he had stolen from the prison cafeteria. Some inmates testified they had heard Brown say that he was going to kill Jones and they had seen Brown sharpening his spoon. Other inmates testified that they had seen the two men arguing and that Jones never hit Brown before Jones was stabbed.

Brown testified that Jones, who was much larger than Brown, had attacked him and begun beating him for no apparent reason. Brown stated that he had suffered severe and systematic abuse at the hands of Jones, and that he armed himself with the sharpened spoon out of fear of further abuse by Jones. Brown stated that he killed Jones in self-defense. Psychologist Tracy Smith testified that Brown was suffering from post-traumatic stress disorder at the time of the killing. A doctor who examined Brown after the incident testified that Brown had cuts, bruises, and scars consistent with having been beaten.

Outline of Suggested Instructions in Sequence - Guilt Phase:

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 56.00-A, Capital Murder.

Instruction 3. PIK 3d 68.09, Lesser Included Offenses.

Instruction 4. PIK 3d 56.03, Murder in the Second Degree.

Instruction 5. PIK 3d 56.05, Voluntary Manslaughter.

Instruction 6. PIK 3d 56.06, Involuntary Manslaughter.

Instruction 7. PIK 3d 56.04, Homicide Definitions.

Instruction 8. PIK 3d 54.17, Use of Force in Defense of Person.

Instruction 9. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Instruction 10. PIK 3d 52.08, Affirmative Defenses - Burden of Proof.

Instruction 11. PIK 3d 54.01, Presumption of Intent.

Instruction 12. PIK 3d 51.10 (modified), Penalty not to be Considered by Jury.

Instruction 13. PIK 3d 68.01, Concluding Instructions.

Verdict Forms. PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

TEXT OF SUGGESTED INSTRUCTIONS - GUILT PHASE

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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 must decide the case by applying these instructions to the facts as you find them.

(PIK 3d 51.02)

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

(PIK 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 No. 2.

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 Joe Jones.
2. That such killing was done with premeditation.
3. That the defendant was an inmate or prisoner confined in a state correctional institution; and

PATTERN INSTRUCTIONS FOR KANSAS 3d

4. That this act occurred on or about the 5th day of July, 1998, in Butler County, Kansas.
(PIK 3d 56.00-A)

Instruction No. 3.

The offense of capital murder with which defendant is charged includes the lesser offenses of second degree murder, voluntary manslaughter and involuntary manslaughter.

You may find the defendant guilty of capital murder, second degree murder, voluntary manslaughter, involuntary manslaughter or not guilty.

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he 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.
(PIK 3d 68.09)

Instruction No. 4.

If you do not agree that the defendant is guilty of capital murder, you should then consider the lesser included offense of murder in the second degree.

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

1. That the defendant intentionally killed Joe Jones; and
2. That this act occurred on or about the 5th day of July, 1998, in Butler County, Kansas.

(PIK 3d 56.03)

Instruction No. 5.

In determining whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. Voluntary manslaughter is an intentional killing done upon a sudden quarrel or upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person.

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If you decide the defendant intentionally killed Joe Jones, but that it was done upon a sudden quarrel or upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person, the defendant may be convicted of voluntary manslaughter only. (PIK 3d 56.05)

Instruction No. 6.

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 Joe Jones;
2. That it was done during the commission of a lawful act in an unlawful manner; and
3. That this act occurred on or about the 5th day of July, 1998, in Butler County, Kansas.

(PIK 3d 56.06)

Instruction No. 7.

As used in these instructions, the following words and phrases are defined as indicated:

Premeditation means to have thought over the matter beforehand.

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

(PIK 3d 56.04)

Instruction No. 8.

The defendant has claimed his conduct was justified as self-defense.

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend

PATTERN INSTRUCTIONS FOR KANSAS 3d

himself 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.
(PIK 3d 54.17)

Instruction No. 9.

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 required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 10.

The defendant raises self-defense 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.
(PIK 3d 52.08)

Instruction No. 11.

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)

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Instruction No. 12.

**Your only concern, at this time, is determining if the defendant is guilty or not guilty.
(PIK 3d 51.10, modified)**

Instruction No. 13.

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.

_____, 19____

District Judge

(PIK 3d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

We, the jury, find the defendant guilty of capital murder.

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 3d 68.10)

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Outline of Suggested Instructions in Sequence - Penalty Phase:

- Instruction 1. PIK 3d 56.00-B, Capital Murder-Death Sentence-Sentencing Proceeding.**
- Instruction 2. PIK 3d 51.04, Consideration of Evidence, Revised.**
- Instruction 3. PIK 3d 51.05, Rulings of the Court.**
- Instruction 4. PIK 3d 51.06, Statements and Arguments of Counsel.**
- Instruction 5. PIK 3d 52.09, Credibility of Witnesses.**
- Instruction 6. PIK3d 56.00-C, Capital Murder-Aggravating Circumstances.**
- Instruction 7. PIK 3d 56.00-D, Capital Murder-Mitigating Circumstances.**
- Instruction 8. PIK 3d 56.00-E, Capital Murder-Burden of Proof.**
- Instruction 9. PIK 3d 56.00-F, Capital Murder-Aggravating and Mitigating Circumstances-Theory of Comparison.**
- Instruction 10. PIK 3d 56.00-G, Capital Murder-Reasonable Doubt.**
- Instruction 11. PIK 3d 56.00-H, Capital Murder-Sentencing Recommendation.**
- Instruction 12. PIK 3d 68.01-A, Concluding Instruction-Capital Murder-Sentencing Proceeding.**

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Verdict Forms. PIK 3d 68.14-B-1, Capital Murder-Verdict Form for Sentence of Death (Alternative Verdict)

PIK 3d 68.17, Capital Murder-Sentence of Death-Verdict Form for Sentence as Provided by Law

TEXT OF SUGGESTED INSTRUCTIONS - PENALTY PHASE

Instruction No. 1.

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.

(PIK 3d 56.00-B)

Instruction No. 2.

In your determination of sentence, you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

(PIK 3d 51.04, Revised)

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Instruction No. 3

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)

Instruction No. 4

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)

Instruction No. 5

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 No. 6

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself.

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

1. That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another; and

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2. That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction. (PIK 3d 56.00-C)

Instruction No. 7

Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case.

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

1. The age of the defendant at the time of the crime; and
2. At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance that you find to exist.

(PIK 3d 56.00-D)

Instruction No. 8

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances.

(PIK 3d 56.00-E)

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Instruction No. 9

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.
(PIK 3d 56.00-F)

Instruction No. 10

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances, then you should so indicate on your verdict form, and defendant will not be sentenced to death but will be sentenced by the court as provided by law.
(PIK 3d 56.00-G)

Instruction No. 11

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

The verdict forms provide the following alternative verdicts:

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

OR

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- B. Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and the defendant should be sentenced by the Court as provided by law.**

(PIK 3d 56.00-H)

Instruction No. 12

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.

District Judge

_____, 19____

(PIK 3d 68.01-A)

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VERDICT FORMS

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.
- That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

and so, therefore, unanimously sentence the defendant to death.

_____, 19____. _____
Presiding Juror

OR

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously determine that a sentence as provided by law be imposed by the Court.

_____, 19____. _____
Presiding Juror

PATTERN INSTRUCTIONS FOR KANSAS 3d

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PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

	PIK Number
Traffic Offense - Driving Under The Influence Of Alcohol Or Drugs	70.01
Traffic Offense - Alcohol Concentration Of .08 Or More B.A.T. .08 Or More Or DUI Charged In The Alternative	70.01-A 70.01-B
Driving Under The Influence - If Chemical Test Used . .	70.02
Transporting An Alcoholic Beverage In An Opened Container	70.03
Reckless Driving	70.04
Violation Of City Ordinance	70.05
Operating An Aircraft While Under The Influence Of Intoxicating Liquor Or Drugs	70.06
Operating An Aircraft While Under The Influence - If Chemical Test Is Used	70.07
Ignition Interlock Device Violation	70.08
Fleeing or Attempting to Elude A Police Officer	70.09
Misdemeanor Driving While License Is Canceled, Suspended or Revoked	70.10
Felony Driving While Privileges Canceled, Suspended, Revoked, or While Habitual Violator	70.11

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70.01 TRAFFIC OFFENSE - DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

The defendant is charged with the crime of (operating) (attempting to operate) a vehicle while under the influence of (alcohol) (drugs) (a combination of alcohol and drugs). The defendant pleads not guilty.

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

1. That the defendant (drove) (attempted to drive) a vehicle;
2. That the defendant, while (driving) (attempting to drive), was under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and any drug[s]) to a degree that rendered (him) (her) incapable of safely driving a vehicle; and
3. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 8-1567(a)(3), (4), and (5), and K.S.A. 8-1005. If the evidence is limited to either alcohol, a drug, a combination of drugs or a combination of alcohol and any drugs, reference to the inapplicable category or categories should be deleted from the instruction.

For the definition of attempt, see PIK 3d 55.01.

Comment

As to what is a vehicle under similar statutes, see 66 A.L.R. 2d 1146.

It is no defense to this charge that the defendant is or has been entitled to use the drug involved and, when applicable, the jury should be so instructed. K.S.A. 8-1567(c).

The word "operate" as used in K.S.A. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980).

Reckless driving is not a lesser included offense of DUI. *State v. Mourning*, 233 Kan. 678, 682, 664 P.2d 857 (1983).

The phrase "driving under the influence" is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.09 FLEEING OR ATTEMPTING TO ELUDE A POLICE OFFICER

The defendant is charged with the crime of fleeing or attempting to elude a police officer. The defendant pleads not guilty.

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

1. That the defendant was driving a motor vehicle; and
2. That the defendant was given a visual or audible signal by a police officer to bring the motor vehicle to a stop; and
3. That the defendant intentionally failed or refused to bring the motor vehicle to a stop, or otherwise fled or attempted to elude a pursuing police (vehicle) (bicycle); and
4. That the police officer giving such a signal was in uniform, prominently displaying such officer's badge of office; and
5. That the police officer's (vehicle) (bicycle) was appropriately marked showing it to be an official police (vehicle) (bicycle); and
- [6. That the defendant (failed to stop at a police road block) (drove around a fire deflating device placed by a police officer) (engaged in reckless driving) (was involved in a motor vehicle accident) (intentionally caused damage to property) (committed five or more moving violations) (attempted to elude capture for any felony)]

[6.] or [7.] That this act occurred on or about the _____ day of _____, in _____ County, Kansas.

[The elements of _____ are (set forth in instruction no. ____) (as follows: _____).]

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority see K.S.A. 8-1568. A first conviction of subsection (a) is a class B non-person misdemeanor. A second conviction of subsection (a) is a class A non-person misdemeanor. A third or subsequent conviction of subsection (a) is a severity level 9, person felony. A conviction of subsection (b) is a severity level 9, person felony.

Under circumstances where “reckless driving” should be defined see K.S.A. 8-1566.

Where necessary the intended felony should be referred to or set forth in the concluding portion of the instruction.

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70.10 MISDEMEANOR DRIVING WHILE LICENSE IS CANCELED, SUSPENDED OR REVOKED

The defendant is charged with driving a motor vehicle while the defendant's driving privileges were (canceled) (suspended) (revoked). The defendant pleads not guilty.

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

1. That the defendant (drove) (attempted to drive) a motor vehicle;
2. That the defendant's driving privileges were (canceled) (suspended) (revoked) by the division of motor vehicles;
3. That the division of motor vehicles mailed a copy of the notice of (cancellation) (suspension) (revocation) to the defendant at the last known address shown by the division's records;
4. That when the defendant (drove) (attempted to drive) a reasonable time to deliver the notice of (cancellation) (suspension) (revocation) by mail had passed; and
5. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

You are further instructed that the law of Kansas does not require actual receipt of notice of (cancellation) (suspension) (revocation). When written notice has been mailed, and a reasonable time for mail delivery has expired, receipt by a licensee is conclusively presumed.

[It is an affirmative defense if at the time of arrest the defendant was (entitled to the return of his or her driver's license) (eligible for a new license to operate a motor vehicle).]

Notes on Use

For authority, see K.S.A. 8-262 et seq. and *State v. Jones*, 231 Kan. 366, 644 P.2d 464 (1984), and *State v. Mountjoy*, 257 Kan. 163, 891 P.2d 376 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

A first conviction of driving while privileges are canceled, suspended or revoked is a class B nonperson misdemeanor. A second conviction of driving while privileges are canceled, suspended or revoked is a class A nonperson misdemeanor. A third or subsequent conviction of driving while privileges are canceled, suspended or revoked is a severity level 9, nonperson felony. (See PIK 3d 70.11 for felony violations.) See *State v. Lewis*, 263 Kan. 843, 953 P.2d 1016 (1998), for a lengthy discussion of the distinction between the conclusive presumption of receipt of the notice in a misdemeanor or traffic infraction case, and the State's burden of proving knowledge in a felony case.

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70.11 FELONY DRIVING WHILE PRIVILEGES CANCELED, SUSPENDED, REVOKED, OR WHILE HABITUAL VIOLATOR

The defendant is charged with driving a motor vehicle while the defendant's driving privileges were (canceled) (suspended) (revoked). The defendant pleads not guilty.

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

1. That the defendant (drove) (attempted to drive) a motor vehicle;
- [2. That the defendant knew (his) (her) driving privileges had been (canceled) (suspended) (revoked) by the division of motor vehicles;]
- [2. That the defendant knew (his) (her) driving privileges had been revoked as an habitual violator by the division of motor vehicles which had determined (him) (her) to be an habitual violator and revoked (his) (her) driving privileges;]
3. That the division of motor vehicles sent a copy of such notice to the defendant at the last known address as shown by the division's records; and
4. That this act occurred on or about the ____ day of _____, 19____, in _____ County, Kansas.

Proof of defendant's knowledge may be by evidence of actual knowledge or by circumstantial evidence indicating a deliberate ignorance on the part of defendant. Deliberate ignorance exists where a person believes that it is probable that something is a fact but deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth. It requires a conscious purpose to avoid enlightenment; a showing of mere negligence or mistake is not sufficient.

Also, such knowledge may be, but is not required to be, inferred from the fact that notification of defendant's status was mailed to defendant at defendant's last known official address.

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Notes on Use

For authority (driving while canceled, suspended or revoked), see K.S.A. 8-262 et seq. and *State v. Lewis*, 263 Kan. 843, 953 P.2d 1016 (1998). A third or subsequent conviction of driving while license is canceled, suspended or revoked is a severity level 9, nonperson felony. (See PIK 3d 70.10 for misdemeanor violations.)

For authority (driving while habitual violator), see K.S.A. 8-285 et seq. and *State v. Lewis*, 263 Kan. 843, 953 P.2d 1016 (1998). Driving while an habitual violator is a severity level 9, nonperson felony.

See *State v. Lewis*, 263 Kan. 843, 953 P.2d 1016 (1998), for a lengthy discussion of the distinction between the conclusive presumption of receipt of the notice in a misdemeanor or traffic infraction case and the State's burden of proving knowledge in a felony case.

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