

**Pattern
Instructions for Kansas—**

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

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

© 2000

KANSAS JUDICIAL COUNCIL

ALL RIGHTS RESERVED

KANSAS JUDICIAL COUNCIL

| | |
|---------------------------------------|---------------|
| Tyler C. Lockett, Chair | Topeka |
| Justice of the Supreme Court | |
| J. Patrick Brazil | Topeka |
| Chief Judge of the Court of Appeals | |
| Marla J. Luckert | Topeka |
| Judge, Third Judicial District | |
| C. Fred Lorentz | Fredonia |
| Judge, Thirty-first Judicial District | |
| Senator Tim Emert | Independence |
| Chair, Senate Judiciary Committee | |
| Representative Michael R. O'Neal | Hutchinson |
| Chair, House Judiciary Committee | |
| J. Nick Badgerow | Overland Park |
| Gerald L. Goodell | Topeka |
| Phillip Mellor | Wichita |
| Marvin E. Thompson | Russell |

KANSAS JUDICIAL COUNCIL ADVISORY COMMITTEE ON CRIMINAL JURY INSTRUCTIONS

| | |
|------------------------------|-------------|
| Hon. David S. Knudson, Chair | Topeka |
| Hon. Thomas H. Bornholdt | Olathe |
| Hon. Stephen D. Hill | Paola |
| Hon. David W. Kennedy | Wichita |
| Hon. Thomas E. Malone | Wichita |
| Hon. Nancy E. Parrish | Topeka |
| Hon. David Prager | Topeka |
| Professor Raymond L. Spring | Topeka |
| Hon. Philip C. Vieux | Garden City |
| Hon. John W. White | Iola |

(THIS PAGE BLANK)

**INSTRUCTIONS FOR
PIK-CRIMINAL 3^d 1999 SUPPLEMENT**

**THE 1999 SUPPLEMENT TO *PIK-CRIMINAL 3^d*
REPLACES THE ENTIRE CONTENTS OF THE
PRESENT *PIK-CRIMINAL 3^d***

The Judicial Council PIK-Criminal Advisory Committee has prepared the enclosed 1999 supplement for *PIK-Criminal 3^d*. The 1999 supplement includes statutory changes made by the 1999 Legislature; Supreme Court decisions through Vol. 267, No. 4; and Court of Appeals decisions through Vol. 26, No. 5.

The 1999 supplement is unique because, in addition to including the usual changes necessitated by legislation and court decisions, the Committee amended all references to the year "19__." This Y2K related change required the reprinting of so many pages of the book that the most workable option was to reprint the entire contents of the book. In addition, the pages have been renumbered.

The 1999 supplement will be easy to insert because it replaces the entire contents of the binder. Once the 1999 supplement is placed in the binder, you can be certain your *PIK-Criminal 3^d* is completely up-to-date.

The pages in the supplement on which any change was made (other than renumbering the page) are designated "(1999 Supp.)" Pages which remain unchanged from an earlier publication retain the date of that publication.

FOREWORD

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

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

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

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

The Committee is indebted to many others who have made it possible to prepare this publication. We are appreciative of those judges and lawyers who have made suggestions for revisions, many of which we have adopted. We gratefully acknowledge the consistent support of the Kansas Judicial Council. To the staff of the Council that gave unflinchingly of their time and energies to insure a quality product, our special thanks. Its Research Director, Randy M. Hearrell, and Research Associate, Matthew B. Lynch,

provided Committee members with not only technical assistance but valuable substantive contributions. Many long hours were spent getting the manuscript into final, publishable form by Janelle Williams and Lisa R. North.

With that, we rest our case.

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

TABLE OF CONTENTS

| | |
|---|--|
| Detailed Table of Contents | 9 |
| Cross Reference Table | 29 |
| CHAPTER 51.00 | Introductory and Cautionary Instructions |
| CHAPTER 52.00 | Evidence and Guides for Its Consideration |
| CHAPTER 53.00 | Definitions and Explanations of Terms |
| CHAPTER 54.00 | Principles of Criminal Liability |
| CHAPTER 55.00 | Anticipatory Crimes |
| CHAPTER 56.00 | Crimes Against Persons |
| CHAPTER 57.00 | Sex Offenses |
| CHAPTER 58.00 | Crimes Affecting Family Relationships and Children |
| CHAPTER 59.00 | Crimes Against Property |
| CHAPTER 60.00 | Crimes Affecting Governmental Functions |
| CHAPTER 61.00 | Crimes Affecting Public Trusts |
| CHAPTER 62.00 | Crimes Involving Violations of Personal Rights |
| CHAPTER 63.00 | Crimes Against the Public Peace |
| CHAPTER 64.00 | Crimes Against Public Safety |
| CHAPTER 65.00 | Crimes Against the Public Morals |
| CHAPTER 66.00 | Crimes Affecting Business |
| CHAPTER 67.00 | Controlled Substances |
| CHAPTER 68.00 | Concluding Instructions and Verdict Forms |
| CHAPTER 69.00 | Illustrative Sets of Instructions |
| CHAPTER 70.00 | Traffic and Miscellaneous Crimes |
| Index | 841 |

(THIS PAGE BLANK)

Detailed Table of Contents

CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

| | PIK Number |
|--|---------------|
| Instructions Before Introduction Of Evidence | 51.01 |
| Note Taking By Jurors | 51.01-A |
| Consideration And Binding Application Of Instructions . . . | 51.02 |
| Consideration And Guiding Application Of Instructions . . . | 51.03 |
| Consideration Of Evidence | 51.04 |
| Rulings Of The Court | 51.05 |
| Statements And Arguments Of Counsel | 51.06 |
| Sympathy Or Prejudice For Or Against A Party | 51.07 |
| Form Of Pronoun - Singular And Plural | 51.08 |
| If Jury Receives Instructions Before Close Of Case | 51.09 |
| Penalty Not To Be Considered By Jury | 51.10 |
| Cameras In The Courtroom | 51.11 |

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS CONSIDERATION

| | PIK Number |
|--|---------------|
| Information - Indictment | 52.01 |
| Burden Of Proof, Presumption Of Innocence, Reasonable Doubt | 52.02 |
| Presumption Of Innocence | 52.03 |
| Reasonable Doubt | 52.04 |
| Stipulations And Admissions | 52.05 |
| Proof Of Other Crime - Limited Admissibility Of Evidence | 52.06 |
| More Than One Defendant - Limited Admissibility Of Evidence | 52.07 |
| Affirmative Defenses - Burden Of Proof | 52.08 |
| Credibility Of Witnesses | 52.09 |

| | |
|--|---------|
| Defendant As A Witness | 52.10 |
| Number Of Witnesses | 52.11 |
| Testimony Taken Before Trial | 52.12 |
| Defendant's Failure To Testify | 52.13 |
| Expert Witness | 52.14 |
| Impeachment | 52.15 |
| Circumstantial Evidence | 52.16 |
| Confession | 52.17 |
| Testimony Of An Accomplice | 52.18 |
| Testimony Of An Informant - For Benefits | 52.18-A |
| Alibi | 52.19 |
| Eyewitness Identification | 52.20 |
| Child's Hearsay Evidence | 52.21 |

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

| | PIK Number |
|--|---------------|
| Presumption Of Intent | 54.01 |
| General Criminal Intent | 54.01-A |
| Statutory Presumption Of Intent To Deprive | 54.01-B |
| Criminal Intent - Ignorance Of Statute Or Age Of Minor Is Not A Defense | 54.02 |
| Ignorance Or Mistake Of Fact | 54.03 |
| Ignorance Or Mistake Of Law - Reasonable Belief | 54.04 |
| Responsibility For Crimes Of Another | 54.05 |
| Responsibility For Crimes Of Another - Crime Not Intended | 54.06 |
| Responsibility For Crime Of Another - Actor Not Prosecuted | 54.07 |
| Corporations - Criminal Responsibility For Acts Of Agents | 54.08 |
| Individual Responsibility For Corporation Crime | 54.09 |

| | |
|---|-----------|
| Mental Disease Or Defect (For Crimes Committed January 1, 1996 or Thereafter) | 54.10 |
| Mental Disease Or Defect - Commitment (For Crimes Committed Prior to January 1, 1996) | 54.10-A |
| Mental Disease Or Defect - Commitment (For Crimes Committed January 1, 1996 Or Thereafter) | 54.10-A |
| Intoxication - Involuntary | 54.11 |
| Voluntary Intoxication - General Intent Crime | 54.12 |
| Voluntary Intoxication - Specific Intent Crime | 54.12-A |
| Voluntary Intoxication-Particular State Of Mind | 54.12-A-1 |
| Diminished Mental Capacity | 54.12-B |
| Compulsion | 54.13 |
| Entrapment | 54.14 |
| Procuring Agent | 54.14-A |
| Condonation | 54.15 |
| Restitution | 54.16 |
| Use Of Force In Defense Of A Person | 54.17 |
| No Duty to Retreat | 54.17-A |
| Use Of Force In Defense Of A Dwelling | 54.18 |
| Use of Force In Defense Of Property Other Than A Dwelling | 54.19 |
| Forcible Felon Not Entitled To Use Force | 54.20 |
| Provocation Of First Force As Excuse For Retaliation | 54.21 |
| Initial Aggressor's Use Of Force | 54.22 |
| Law Enforcement Officer Or Private Person Summoned To Assist - Use Of Force In Making Arrest | 54.23 |
| Private Person's Use Of Force In Making Arrest - Not Summoned By Law Enforcement Officer | 54.24 |
| Use Of Force In Resisting Arrest | 54.25 |

CHAPTER 55.00

ANTICIPATORY CRIMES

| | PIK Number |
|---|---------------|
| Attempt | 55.01 |
| Attempt - Impossibility Of Committing Offense - No Defense | 55.02 |

| | |
|---|-------|
| Conspiracy | 55.03 |
| Conspiracy - Withdrawal As A Defense | 55.04 |
| Conspiracy - Defined | 55.05 |
| Conspiracy - Act In Furtherance Defined | 55.06 |
| Conspiracy - Declarations | 55.07 |
| Conspiracy - Subsequent Entry | 55.08 |
| Criminal Solicitation | 55.09 |
| Criminal Solicitation - Defense | 55.10 |

CHAPTER 56.00

CRIMES AGAINST PERSONS

| | PIK Number |
|---|---------------|
| Capital Murder | 56.00-A |
| Capital Murder - Death Sentence -Sentencing Proceeding .. | 56.00-B |
| Capital Murder - Death Sentence -Aggravating Circumstances | 56.00-C |
| Capital Murder - Death Sentence -Mitigating Circumstances | 56.00-D |
| Capital Murder - Death Sentence -Burden of Proof | 56.00-E |
| Capital Murder - Death Sentence -Aggravating And Mitigating Circumstances - Theory Of Comparison | 56.00-F |
| Capital Murder - Death Sentence -Reasonable Doubt | 56.00-G |
| Capital Murder - Death Sentence - Sentencing Recommendation | 56.00-H |
| Murder In The First Degree | 56.01 |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Sentence Proceeding | 56.01-A |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating Circumstances | 56.01-B |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Mitigating Circumstances | 56.01-C |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence -Burden Of Proof | 56.01-D |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating And Mitigating Circumstances - Theory of Comparison | 56.01-E |

| | |
|--|---------|
| Murder In The First Degree - Mandatory Minimum 40 | |
| Year Sentence - Reasonable Doubt | 56.01-F |
| Murder In The First Degree - Mandatory Minimum 40 | |
| Year Sentence - Sentencing Recommendation | 56.01-G |
| Murder In The First Degree - Felony Murder | 56.02 |
| Murder In The First Degree And Felony Murder - | |
| Alternatives | 56.02-A |
| Murder In The Second Degree | 56.03 |
| Murder In The Second Degree - Unintentional | 56.03-A |
| Homicide Definitions | 56.04 |
| Voluntary Manslaughter | 56.05 |
| Involuntary Manslaughter | 56.06 |
| Involuntary Manslaughter - Driving Under The Influence | 56.06-A |
| Vehicular Homicide | 56.07 |
| Aggravated Vehicular Homicide | 56.07-A |
| Vehicular Battery | 56.07-B |
| Assisting Suicide | 56.08 |
| Unintended Victim - Transferred Intent | 56.09 |
| Criminal Abortion | 56.10 |
| Criminal Abortion - Justification | 56.11 |
| Assault | 56.12 |
| Assault Of A Law Enforcement Officer | 56.13 |
| Aggravated Assault | 56.14 |
| Aggravated Assault Of A Law Enforcement Officer | 56.15 |
| Battery | 56.16 |
| Domestic Battery | 56.16-A |
| Battery Against A School Employee | 56.16-B |
| Battery Against A Law Enforcement Officer | 56.17 |
| Aggravated Battery | 56.18 |
| Criminal Injury To Person | 56.18-A |
| Aggravated Battery Against A Law Enforcement Officer | 56.19 |
| Unlawful Interference With A Firefighter | 56.20 |
| Attempted Poisoning | 56.21 |
| Permitting Dangerous Animal To Be At Large | 56.22 |
| Criminal Threat | 56.23 |
| Criminal Threat - Adulteration Or Contamination Of | |
| Food Or Drink | 56.23-A |
| Aggravated Criminal Threat | 56.23-B |
| Kidnapping | 56.24 |

| | |
|---|---------|
| Aggravated Kidnapping | 56.25 |
| Interference With Parental Custody | 56.26 |
| Aggravated Interference With Parental Custody By Parent's Hiring Another | 56.26-A |
| Aggravated Interference With Parental Custody By Hiree . | 56.26-B |
| Aggravated Interference With Parental Custody - Other Circumstances | 56.26-C |
| Interference With The Custody Of A Committed Person .. | 56.27 |
| Criminal Restraint | 56.28 |
| Mistreatment Of A Confined Person | 56.29 |
| Robbery | 56.30 |
| Aggravated Robbery | 56.31 |
| Blackmail | 56.32 |
| Disclosing Information Obtained In Preparing Tax Returns | 56.33 |
| Defense To Disclosing Information Obtained In Preparing Tax Returns | 56.34 |
| Aircraft Piracy | 56.35 |
| Hazing | 56.36 |
| Mistreatment Of A Dependent Adult | 56.37 |
| Affirmative Defense To Mistreatment Of A Dependent Adult | 56.38 |
| Stalking | 56.39 |
| Unlawfully Exposing Another To A Communicable Disease | 56.40 |
| Injuring A Pregnant Woman | 56.41 |
| Injury To A Pregnant Woman By Vehicle | 56.42 |

CHAPTER 57.00

SEX OFFENSES

| | PIK Number |
|---|---------------|
| Rape | 57.01 |
| Rape - Defense Of Marriage | 57.01-A |
| Sexual Intercourse - Definition | 57.02 |
| Rape, Credibility Of Prosecutrix's Testimony | 57.03 |
| Rape, Corroboration Of Prosecutrix's Testimony Unnecessary | 57.04 |

| | |
|--|---------------|
| Indecent Liberties With A Child | 57.05 |
| Indecent Liberties With A Child - Sodomy | 57.05-A |
| Affirmative Defense To Indecent Liberties With A Child .. | 57.05-B |
| Aggravated Indecent Liberties With A Child | 57.06 |
| Affirmative Defense To Aggravated Indecent Liberties With A Child | 57.06-A |
| Criminal Sodomy | 57.07 |
| Affirmative Defense To Criminal Sodomy | 57.07-A |
| Aggravated Criminal Sodomy - Nonmarital Child Under 14 | 57.08 |
| Aggravated Criminal Sodomy - Causing Child Under Fourteen To Engage In Sodomy With A Person Or An Animal | 57.08-A |
| Aggravated Criminal Sodomy - No Consent | 57.08-B |
| Affirmative Defense To Aggravated Criminal Sodomy ... | 57.08-C |
| Adultery | 57.09 |
| Lewd And Lascivious Behavior | 57.10 |
| Enticement Of A Child | 57.11 |
| Indecent Solicitation Of A Child | 57.12 |
| Sexual Exploitation Of A Child | 57.12-A |
| Promoting Sexual Performance By A Minor | 57.12-B |
| Aggravated Indecent Solicitation Of A Child | 57.13 |
| Prostitution | 57.14 |
| Promoting Prostitution | 57.15 |
| Promoting Prostitution - Child Under 16 | 57.15-A |
| Habitually Promoting Prostitution | 57.16 |
| Patronizing A Prostitute | 57.17 |
| Sex Offenses - Definitions | 57.18 |
| Sexual Battery | 57.19 |
| Aggravated Sexual Battery - Force Or Fear | 57.20 |
| Aggravated Sexual Battery - Child Under 16 | 57.21 |
| Aggravated Sexual Battery - Dwelling | 57.22 |
| Aggravated Sexual Battery - Victim Unconscious Or Physically Powerless | 57.23 |
| Aggravated Sexual Battery - Mental Deficiency Of Victim | 57.24 |
| Aggravated Sexual Battery - Intoxication | 57.25 |
| Unlawful Sexual Relations With Inmates, Etc. | 57.26 |
| Unlawful Voluntary Sexual Relations | 57.27 |
| RESERVED FOR FUTURE USE | 57.28 - 57.39 |

| | |
|---|-------|
| Sexual Predator/Civil Commitment | 57.40 |
| Sexual Predator/Civil Commitment- Definitions | 57.41 |
| Sexual Predator/Civil Commitment - Burden Of Proof | 57.42 |

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

| | PIK Number |
|---|---------------|
| Bigamy | 58.01 |
| Affirmative Defense To Bigamy | 58.02 |
| Incest | 58.03 |
| Aggravated Incest | 58.04 |
| Abandonment Of A Child | 58.05 |
| Aggravated Abandonment Of A Child | 58.05-A |
| Nonsupport Of A Child | 58.06 |
| Nonsupport Of A Spouse | 58.07 |
| Criminal Desertion | 58.08 |
| Encouraging Juvenile Misconduct | 58.09 |
| Endangering A Child | 58.10 |
| Affirmative Defense To Endangering A Child | 58.10-A |
| Abuse Of A Child | 58.11 |
| Furnishing Alcoholic Liquor To A Minor | 58.12 |
| Furnishing Cereal Malt Beverage To A Minor | 58.12-A |
| Furnishing Alcoholic Beverages To A Minor For Illicit Purposes | 58.12-B |
| Furnishing Alcoholic Liquor To A Minor - Defense | 58.12-C |
| Furnishing Cereal Malt Beverage To A Minor - Defense .. | 58.12-D |
| Aggravated Juvenile Delinquency | 58.13 |
| Contributing To A Child's Misconduct Or Deprivation | 58.14 |

CHAPTER 59.00

CRIMES AGAINST PROPERTY

| | PIK Number |
|--|---------------|
| Theft | 59.01 |
| Theft - Knowledge Property Stolen | 59.01-A |
| Theft - Welfare Fraud | 59.01-B |
| Theft Of Lost Or Mislaid Property | 59.02 |
| Theft Of Services | 59.03 |
| Criminal Deprivation Of Property | 59.04 |
| Fraudulently Obtaining Execution Of A Document | 59.05 |
| Worthless Check | 59.06 |
| Statutory Presumption Of Intent To Defraud - Knowledge Of Insufficient Funds | 59.06-A |
| Worthless Check - Defenses | 59.07 |
| Habitually Giving A Worthless Check Within Two Years | 59.08 |
| Habitually Giving Worthless Checks - On Same Day | 59.09 |
| Causing An Unlawful Prosecution For Worthless Check | 59.10 |
| Forgery - Making Or Issuing A Forged Instrument | 59.11 |
| Forgery - Possessing A Forged Instrument | 59.12 |
| Making False Information | 59.13 |
| Destroying A Written Instrument | 59.14 |
| Altering A Legislative Document | 59.15 |
| Possession Of Forgery Devices | 59.16 |
| Burglary | 59.17 |
| Aggravated Burglary | 59.18 |
| Possession Of Burglary Tools | 59.19 |
| Arson | 59.20 |
| Arson - Defraud An Insurer Or Lienholder | 59.21 |
| Aggravated Arson | 59.22 |
| Criminal Damage To Property - Without Consent | 59.23 |
| Criminal Damage To Property - With Intent To Defraud An Insurer Or Lienholder | 59.24 |
| Criminal Trespass | 59.25 |
| Criminal Trespass - Health Care Facility | 59.25-A |
| Criminal Trespass On Railroad Property | 59.25-B |

| | |
|---|---------|
| Littering - Public | 59.26 |
| Littering - Private Property | 59.27 |
| Tampering With A Landmark | 59.28 |
| Tampering With A Landmark - Highway Sign Or Marker .. | 59.29 |
| Tampering With A Traffic Signal | 59.30 |
| Aggravated Tampering With A Traffic Signal | 59.31 |
| Injury To A Domestic Animal | 59.32 |
| Criminal Hunting | 59.33 |
| Unlawful Hunting - Posted Land | 59.33-A |
| Criminal Hunting - Defense | 59.33-B |
| Criminal Use Of Financial Card of Another | 59.34 |
| Criminal Use Of Financial Card - Cancelled | 59.35 |
| Criminal Use Of Financial Card - Altered Or Nonexistent .. | 59.36 |
| Unlawful Manufacture Or Disposal Of False Tokens | 59.37 |
| Criminal Use Of Explosives | 59.38 |
| Possession Or Transportation Of Incendiary Or Explosive Device | 59.39 |
| Criminal Use Of Noxious Matter | 59.40 |
| Impairing A Security Interest - Concealment Or Destruction | 59.41 |
| Impairing A Security Interest - Sale Or Exchange | 59.42 |
| Impairing A Security Interest - Failure To Account | 59.43 |
| Fraudulent Release Of A Security Agreement | 59.44 |
| Warehouse Receipt Fraud - Original Receipt | 59.45 |
| Warehouse Receipt Fraud - Duplicate Or Additional Receipt | 59.46 |
| Unauthorized Delivery Of Stored Goods | 59.47 |
| Automobile Master Key Violation | 59.48 |
| Posting Of Political Pictures Or Advertisements | 59.49 |
| Opening, Damaging Or Removing Coin-Operated Machines | 59.50 |
| Possession Of Tools For Opening, Damaging Or Removing Coin-Operated Machines | 59.51 |
| Castling An Object Onto A Street Or Road - Damage To Vehicle, Resulting In Bodily Injury | 59.52 |
| Castling An Object Onto A Street Or Road - Bodily Injury | 59.53 |
| Castling An Object Onto A Street Or Road - Vehicle Damage | 59.54 |

| | |
|---|-------------|
| Casting An Object Onto A Street Or Road - No Damage . . . | 59.55 |
| Sale Of Recut Tires | 59.56 |
| Theft Of Cable Television Services | 59.57 |
| Piracy Of Recordings | 59.58 |
| Dealing In Pirated Recordings | 59.58-A |
| Piracy of Recordings - Defenses | 59.59 |
| Non-Disclosure Of Source Of Recordings | 59.60 |
| Defrauding An Innkeeper | 59.61 |
| Grain Embezzlement | 59.62 |
| Making False Public Warehouse Records And Statements . . | 59.63 |
| Making False Public Warehouse Reports | 59.63-A |
| Adding Dockage Or Foreign Material To Grain | 59.63-B |
| Computer Crime | 59.64 |
| Computer Crime - Defense | 59.64-A |
| Computer Trespass | 59.64-B |
| Violation Of The Kansas Odometer Act - Tampering, Etc. . . | 59.65-A |
| Violation Of The Kansas Odometer Act - Conspiring | 59.65-B |
| Violation Of The Kansas Odometer Act - Operating A Vehicle | 59.65-C |
| Violation Of The Kansas Odometer Act - Unlawful Device | 59.65-D |
| Violation Of The Kansas Odometer Act - Unlawful Sale . . . | 59.65-E |
| Violation Of The Kansas Odometer Act - Unlawful Service, Repair Or Replacement | 59.65-F |
| Promoting a Pyramid Promotional Scheme | 59.66 |
| RESERVED FOR FUTURE USE | 59.67-59.69 |
| Value In Issue | 59.70 |

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

| | PIK Number |
|--|---------------|
| Treason | 60.01 |
| Sedition | 60.02 |
| Practicing Criminal Syndicalism | 60.03 |
| Permitting Premises To Be Used For Criminal Syndicalism | 60.04 |

| | |
|--|---------|
| Perjury | 60.05 |
| Corruptly Influencing A Witness | 60.06 |
| Intimidation Of A Witness Or Victim | 60.06-A |
| Aggravated Intimidation Of A Witness Or Victim | 60.06-B |
| Unlawful Disclosure Of Authorized Interception Of Communications | 60.06-C |
| Compounding A Crime | 60.07 |
| Obstructing Legal Process | 60.08 |
| Obstructing Official Duty | 60.09 |
| Escape From Custody | 60.10 |
| Aggravated Escape From Custody | 60.11 |
| Aiding Escape | 60.12 |
| Aiding A Felon Or Person Charged As A Felon | 60.13 |
| Aiding A Person Convicted Of Or Charged With Committing A Misdemeanor | 60.14 |
| Failure To Appear Or Aggravated Failure To Appear | 60.15 |
| Attempting To Influence A Judicial Officer | 60.16 |
| Interference With The Administration Of Justice | 60.17 |
| Corrupt Conduct By Juror | 60.18 |
| Falsely Reporting A Crime | 60.19 |
| Performance Of An Unauthorized Official Act | 60.20 |
| Simulating Legal Process | 60.21 |
| Tampering With A Public Record | 60.22 |
| Tampering With Public Notice | 60.23 |
| False Signing Of A Petition | 60.24 |
| False Impersonation | 60.25 |
| Aggravated False Impersonation | 60.26 |
| Traffic In Contraband In A Correctional Institution | 60.27 |
| Criminal Disclosure Of A Warrant | 60.28 |
| Interference With The Conduct Of Public Business In A Public Building | 60.29 |
| Dealing In False Identification Documents | 60.30 |
| Harassment Of Court By Telefacsimile | 60.31 |
| Aircraft Registration | 60.32 |
| Fraudulent Registration Of Aircraft | 60.33 |
| Fraudulent Aircraft Registration - Supplying False Information | 60.34 |
| Aircraft Identification - Fraudulent Acts | 60.35 |

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

| | PIK Number |
|---|---------------|
| Bribery | 61.01 |
| Official Misconduct | 61.02 |
| Compensation For Past Official Acts | 61.03 |
| Compensation For Past Official Acts - Defense | 61.04 |
| Presenting A False Claim | 61.05 |
| Permitting A False Claim | 61.06 |
| Discounting A Public Claim | 61.07 |
| Unlawful Interest In Insurance Contract | 61.08 |
| Unlawful Procurement Of Insurance Contract | 61.09 |
| Unlawful Collection By A Judicial Officer | 61.10 |
| Misuse Of Public Funds | 61.11 |
| Unlawful Use Of State Postage | 61.12 |

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

| | PIK Number |
|---|---------------|
| Eavesdropping | 62.01 |
| Eavesdropping - Defense Of Public Utility Employee | 62.02 |
| Breach Of Privacy - Intercepting Message | 62.03 |
| Breach Of Privacy - Divulging Message | 62.04 |
| Denial Of Civil Rights | 62.05 |
| Criminal Defamation | 62.06 |
| Criminal Defamation - Truth As A Defense | 62.07 |
| Circulating False Rumors Concerning Financial Status | 62.08 |
| Exposing A Paroled Or Discharged Person | 62.09 |
| Hypnotic Exhibition | 62.10 |
| Unlawfully Smoking In A Public Place | 62.11 |
| Failure To Post Smoking Prohibited And Designated Smoking Area Signs | 62.11-A |

| | |
|---|-------|
| Unlawful Smoking - Defense Of Smoking In Designated Smoking Area | 62.12 |
| Identity Theft | 62.13 |

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 |

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

| | PIK Number |
|---|---------------|
| Criminal Use Of Weapons - Felony | 64.01 |
| Criminal Use Of Weapons - Misdemeanor | 64.02 |
| Criminal Discharge Of A Firearm - Misdemeanor | 64.02-A |
| Criminal Discharge Of A Firearm - Felony | 64.02-A-1 |

| | |
|---|---------|
| Criminal Discharge Of A Firearm - Affirmative Defense . . . | 64.02-B |
| Aggravated Weapons Violation | 64.03 |
| Criminal Use Of Weapons - Affirmative Defense | 64.04 |
| Criminal Disposal Of Firearms | 64.05 |
| Criminal Possession Of A Firearm - Felony | 64.06 |
| Criminal Possession Of A Firearm - Misdemeanor | 64.07 |
| Possession Of A Firearm (In)(On The Grounds Of) | |
| A State Building Or In A County Courthouse | 64.07-A |
| Criminal Possession Of A Firearm By A Juvenile | 64.07-B |
| Criminal Possession Of A Firearm By A Juvenile - | |
| Affirmative Defenses | 64.07-C |
| Defacing Identification Marks Of A Firearm | 64.08 |
| Failure To Register Sale Of Explosives | 64.09 |
| Failure To Register Receipt Of Explosives | 64.10 |
| Explosive - Definition | 64.10-A |
| Criminal Disposal Of Explosives | 64.11 |
| Criminal Possession Of Explosives | 64.11-A |
| Criminal Possession Of Explosives - Defense | 64.11-B |
| Carrying Concealed Explosives | 64.12 |
| Refusal To Yield A Telephone Party Line | 64.13 |
| Creating A Hazard | 64.14 |
| Unlawful Failure To Report A Wound | 64.15 |
| Unlawfully Obtaining Prescription-Only Drug | 64.16 |
| Unlawfully Obtaining Prescription-Only Drug | |
| For Resale | 64.17 |
| Selling Beverage Containers With Detachable Tabs | 64.18 |
| Unlawfully Exposing Another To A Communicable | |
| Disease | 64.19 |

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

| | |
|---|--------|
| | PIK |
| | Number |
| Promoting Obscenity | 65.01 |
| Promoting Obscenity To A Minor | 65.02 |
| Promoting Obscenity - Definitions | 65.03 |

| | |
|--|---------------|
| Promoting Obscenity - Presumption Of Knowledge | |
| And Recklessness From Promotion | 65.04 |
| Promoting Obscenity - Affirmative Defenses | 65.05 |
| Promoting Obscenity To A Minor - Affirmative Defenses | 65.05-A |
| Gambling | 65.06 |
| Illegal Bingo Operation | 65.06-A |
| Gambling - Definitions | 65.07 |
| Commercial Gambling | 65.08 |
| Permitting Premises To Be Used For Commercial Gambling | 65.09 |
| Dealing In Gambling Devices | 65.10 |
| Dealing In Gambling Devices - Defense | 65.10-A |
| Dealing In Gambling Devices - Presumption From | |
| Possession | 65.11 |
| Possession Of A Gambling Device | 65.12 |
| Possession Of A Gambling Device - Defense | 65.12-A |
| Installing Communication Facilities For Gamblers | 65.13 |
| False Membership Claim | 65.14 |
| Cruelty To Animals | 65.15 |
| Cruelty To Animals - Defense | 65.16 |
| Unlawful Disposition Of Animals | 65.17 |
| Unlawful Conduct Of Dog Fighting | 65.18 |
| Attending An Unlawful Dog Fight | 65.19 |
| Illegal Ownership Or Keeping Of A Dog | 65.20 |
| RESERVED FOR FUTURE USE | 65.21 - 65.29 |
| Conflicts Of Interest - Commission Member Or Employee | 65.30 |
| Conflicts Of Interest - Retailer Or Contractor | 65.31 |
| Forgery Of A Lottery Ticket | 65.32 |
| Unlawful Sale Of A Lottery Ticket | 65.33 |
| Unlawful Purchase Of A Lottery Ticket | 65.34 |
| Lottery - Definitions | 65.35 |
| Violations Of The Tribal Gaming Law | 65.36 |
| RESERVED FOR FUTURE USE | 65.37 - 65.50 |
| Violation Of The Kansas Parimutuel Racing Act | 65.51 |
| Parimutuel Racing Act - Definitions | 65.52 |

CHAPTER 66.00

CRIMES AFFECTING BUSINESS

| | PIK Number |
|--|---------------|
| Racketeering | 66.01 |
| Debt Adjusting | 66.02 |
| Deceptive Commercial Practices | 66.03 |
| Tie-In Magazine Sale | 66.04 |
| Commercial Bribery | 66.05 |
| Sports Bribery | 66.06 |
| Receiving A Sports Bribe | 66.07 |
| Tampering With A Sports Contest | 66.08 |
| Knowingly Employing An Alien Illegally Within The United States | 66.09 |
| Equity Skimming | 66.10 |

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, Drug Paraphernalia, And Anhydrous Ammonia - 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 (After July 1, 1999) | 67.21 |
| Unlawfully Manufacturing A Controlled Substance (Before July 1, 1999) | 67.21-A |
| 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 |
| Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Possession | 67.27 |
| Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Marketing, Sale, Etc. | 67.28 |

CHAPTER 68.00

CONCLUDING INSTRUCTIONS AND VERDICT FORMS

| | PIK Number |
|--|---------------|
| Concluding Instruction | 68.01 |
| Concluding Instruction - Capital Murder - Sentencing Proceeding | 68.01-A |
| Guilty Verdict - General Form | 68.02 |
| Not Guilty Verdict - General Form | 68.03 |

| | |
|---|-----------|
| Punishment - Class A Felony | 68.04 |
| Verdicts - Class A Felony | 68.05 |
| Not Guilty Because Of Mental Disease Or Defect | 68.06 |
| Multiple Counts - Verdict Instruction | 68.07 |
| Multiple Counts - Verdict Forms | 68.08 |
| Lesser Included Offenses | 68.09 |
| Alternative Charges | 68.09-A |
| Multiple Acts | 68.09-B |
| Lesser Included Offenses - Verdict Forms | 68.10 |
| Verdict Form - Value In Issue | 68.11 |
| Deadlocked Jury | 68.12 |
| Post-Trial Communication With Jurors | 68.13 |
| Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 15 Years | 68.14 |
| Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 40 Years | 68.14-A |
| Capital Murder - Verdict Form For Sentence Of Death | 68.14-A-1 |
| Capital Murder - Verdict Form For Sentence Of Death (Alternative Verdict) | 68.14-B-1 |
| Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Instruction | 68.15 |
| Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Form | 68.16 |
| Capital Murder - Sentence Of Death - Verdict Form For Sentence As Provided By Law | 68.17 |

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 |

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 .. | 70.01-A |
| B.A.T. .08 Or More Or DUI Charged In The Alternative .. | 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, Revoked, or While Habitual Violator | 70.10 |
| Felony Driving While Privileges Canceled, Suspended, Revoked, or While Habitual Violator | 70.11 |

Cross Reference Table - Statutes To Instructions

| Statutory Section | PIK 3d Number | Statutory Section | PIK 3d Number |
|----------------------------|------------------------------|----------------------------|--------------------------|
| 3-1001 | 70.06 | 21-3214 (3) (a), (b) | 54.22 |
| 3-1002 | 70.06 | 21-3215 | 54.23 |
| 3-1004 | 70.07 | 21-3216 (1) | 54.24 |
| 3-1005 | 70.07 | 21-3217 | 54.25 |
| 8-262 | 70.10, 70.11 | 21-3301 | 55.01 |
| 8-285 <i>et seq.</i> | 70.11 | 21-3301 (b) | 55.02 |
| 8-1005 | 70.01, 70.01-A, 70.02 | 21-3302 | 55.03 |
| 8-1006 | 70.02 | 21-3302 (a) | 55.05, 55.06 |
| 8-1017 | 70.08 | 21-3302 (b) | 55.04 |
| 8-1566 | 70.04 | 21-3303 | 55.09 |
| 8-1567 | 70.01, 70.01-B | 21-3303 (c) | 55.10 |
| 8-1567 (a)(1) | 70.01-A | 21-3401 | 56.01, 56.02, 56.02-A |
| 8-1568 | 70.09 | 21-3402 | 56.03, 56.03-A |
| 8-1599 | 70.03 | 21-3403 | 56.05 |
| 21-3106 (2) | 57.12-A | 21-3404 | 56.06 |
| 21-3107 | 56.05, 68.09, | 21-3405 | 56.07 |
| 21-3109 | 52.02, 52.03, 52.04, | 21-3405a | 56.07-A |
| 21-3110 (8) | 53.00 | 21-3405b | 56.07-B |
| 21-3110 (24) | 53.00 | 21-3406 | 56.08 |
| 21-3201 (a), (b) | 54.01-A | 21-3407 (1) | 56.10 |
| 21-3201 (b), (c) | 56.04 | 21-3408 | 56.12 |
| 21-3202 | 54.02 | 21-3409 | 56.13 |
| 21-3203 (1) | 54.03 | 21-3410 | 56.14 |
| 21-3203 (2) | 54.04 | 21-3411 | 56.15 |
| 21-3204 | 54.01 | 21-3412 | 56.16, 56.16-A |
| 21-3205 (1) | 54.05 | 21-3413 | 56.17 |
| 21-3205 (2) | 54.06 | 21-3414 | 56.18 |
| 21-3205 (3) | 54.07 | 21-3415 | 56.19 |
| 21-3206 (1), (2) | 54.08 | 21-3416 | 56.20 |
| 21-3207 (1) | 54.09 | 21-3417 | 56.21 |
| 21-3208 (1) | 54.11 | 21-3418 | 56.22 |
| 21-3208 (2) | 54.12, 54.12-A, 54.12-A-1 | 21-3419a | 56.23-B |
| 21-3209 | 54.13 | 21-3419 | 56.23, 56.23-A |
| 21-3210 | 54.14 | 21-3420 | 56.24 |
| 21-3211 | 54.17 | 21-3421 | 56.25 |
| 21-3212 | 54.18 | 21-3422 | 56.26 |
| 21-3213 | 54.19 | 21-3422a | 56.26-A, 56.26-B |
| 21-3214 (1) | 54.20 | 21-3423 | 56.27 |
| 21-3214 (2) | 54.21 | 21-3424 | 56.28 |

| Statutory Section | PIK 3d Number | Statutory Section | PIK 3d Number |
|----------------------|------------------|----------------------|------------------|
| 21-3425 | 56.29 | 21-3517 | 57.18, 57.19 |
| 21-3426 | 56.30 | 21-3518 | 57.18 |
| 21-3427 | 56.31 | 21-3518 (a) (1) | 57.20 |
| 21-3428 | 56.32 | 21-3518 (a) (2) | 57.23 |
| 21-3430 | 56.33, 56.34 | 21-3518 (a) (3) | 57.24, 57.25 |
| 21-3431 | 56.18-A | 21-3518 (b) | 57.21 |
| 21-3433 | 56.35 | 21-3518 (c) | 57.22 |
| 21-3434 | 56.36 | 21-3519 | 57.12-B |
| 21-3435 | 56.40 | 21-3520 | 57.26 |
| 21-3436 | 56.37 | 21-3522 | 57.27 |
| 21-3436 (b) | 56.38 | 21-3601 (a) | 58.01 |
| 21-3437 | 56.37 | 21-3601 (b) | 58.02 |
| 21-3437 (b) | 56.38 | 21-3602 | 58.03 |
| 21-3438 | 56.39 | 21-3603 | 58.04 |
| 21-3439 | 56.00-A | 21-3604 | 58.05 |
| 21-3440 | 56.41 | 21-3604a | 58.05-A |
| 21-3441 | 56.42 | 21-3605 (a) (1) | 58.06 |
| 21-3442 | 56.06-A | 21-3605 (b) (1) | 58.07 |
| 21-3443 | 56.16-B | 21-3606 | 58.08 |
| 21-3501 | 57.02 | 21-3607 | 58.09 |
| 21-3501 (2) | 57.18 | 21-3608 (a) | 58.10 |
| 21-3502 | 57.01 | 21-3608 (b) | 58.10-A |
| 21-3502 (a)(2) | 57.01-A | 21-3609 | 58.11 |
| 21-3503 | 57.05, 57.18 | 21-3610 | 58.12 |
| 21-3503 (b) | 57.05-B | 21-3610 (d) | 58.12-C |
| 21-3504 | 57.06, 57.18 | 21-3610a (a) | 58.12-A |
| 21-3504 (b) | 57.06-A | 21-3610a (d) | 58.12-D |
| 21-3505 | 57.07, 57.18 | 21-3610b | 58.12-B |
| 21-3505 (b) | 57.07-A | 21-3612 | 58.14 |
| 21-3506 | 57.08-A | 21-3701 | 59.01, 59.01-B |
| 21-3506 (a) | 57.08 | 21-3701 (a) (4) | 59.01-A |
| 21-3506 (a) (3) | 57.08-B | 21-3702 | 54.01-B |
| 21-3506 (b) | 57.08-C | 21-3703 | 59.02 |
| 21-3507 | 57.09 | 21-3704 | 59.03 |
| 21-3508 | 57.10, 57.18 | 21-3705 | 59.04 |
| 21-3509 | 57.11 | 21-3706 | 59.05 |
| 21-3510 | 57.12 | 21-3707 | 59.06 |
| 21-3511 | 57.13 | 21-3707 (b) | 59.06-A |
| 21-3512 | 57.14 | 21-3707 (c) | 59.07 |
| 21-3513 | 57.15, 57.15-A | 21-3708 | 59.08, 59.09 |
| 21-3514 | 57.16 | 21-3709 | 59.10 |
| 21-3515 | 57.17 | 21-3710 (a) (1), (2) | 59.11 |
| 21-3516 | 57.12-A | 21-3710 (a) (3) | 59.12 |

| Statutory Section | PIK 3d Number | Statutory Section | PIK 3d Number |
|----------------------------|------------------|----------------------|---------------------|
| 21-3711 | 59.13 | 21-3742 (d) | 59.52 |
| 21-3712 | 59.14 | 21-3743 | 59.56 |
| 21-3713 | 59.15 | 21-3744 | 59.56 |
| 21-3714 | 59.16 | 21-3748 | 59.58 |
| 21-3715 | 59.17 | 21-3748 (c) | 59.59 |
| 21-3716 | 59.18 | 21-3749 | 59.58-A |
| 21-3717 | 59.19 | 21-3750 | 59.60 |
| 21-3718 (a) (1) | 59.20 | 21-3752 | 59.57 |
| 21-3718 (a) (2) | 59.21 | 21-3753 | 59.62 |
| 21-3719 | 59.22 | 21-3754 (a) | 59.63 |
| 21-3720 (a) (1) | 59.23 | 21-3754 (b) | 59.63-A |
| 21-3720 (a) (2) | 59.24 | 21-3755 (b)(1)(B) | 59.64 |
| 21-3721 | 59.25, 59.33-B | 21-3755 (b)(3) | 59.64-A |
| 21-3721 (a) (2) | 59.25-A | 21-3755 (d) | 59.64-B |
| 21-3722 (a) | 59.26 | 21-3756 | 59.63-B |
| 21-3722 (b) | 59.27 | 21-3757 (b) | 59.65-A |
| 21-3724 (a), (b), (c), (f) | 59.28 | 21-3757 (c) | 59.65-B |
| 21-3724 (d), (e) | 59.29 | 21-3757 (d) | 59.65-C |
| 21-3725 | 59.30 | 21-3757 (e) | 59.65-D |
| 21-3726 | 59.31 | 21-3757 (f) | 59.65-E |
| 21-3727 | 59.32 | 21-3757 (g) | 59.65-F |
| 21-3728 | 59.33, 59.33-B | 21-3761 | 59.25-B |
| 21-3729 (a) (1) | 59.34 | 21-3762 | 59.66 |
| 21-3729 (a) (2) | 59.35 | 21-3801 (a) | 60.01 |
| 21-3729 (a) (3) | 59.36 | 21-3802 | 60.02 |
| 21-3730 | 59.37 | 21-3803 | 60.03 |
| 21-3731(a) | 59.38 | 21-3804 | 60.04 |
| 21-3732 | 59.39 | 21-3805 | 60.05 |
| 21-3733 | 59.40 | 21-3806 | 60.06 |
| 21-3734 (a) (1) | 59.41 | 21-3807 | 60.07 |
| 21-3734 (a) (2) | 59.42 | 21-3808 | 60.08, 60.09 |
| 21-3734 (a) (3) | 59.43 | 21-3809 | 60.10, 60.11, 60.12 |
| 21-3735 | 59.44 | 21-3810 | 60.11 |
| 21-3736 (a), (1), (2) | 59.45 | 21-3811 | 60.12 |
| 21-3736 (a) (3) | 59.46 | 21-3812 (a), (b) | 60.13 |
| 21-3737 | 59.47 | 21-3812 (c) | 60.14 |
| 21-3738 | 59.48 | 21-3813 | 60.15 |
| 21-3739 | 59.49 | 21-3814 | 60.15 |
| 21-3740 | 59.50 | 21-3815 | 60.16 |
| 21-3741 | 59.51 | 21-3816 | 60.17 |
| 21-3742 (a) | 59.55 | 21-3817 | 60.18 |
| 21-3742 (b) | 59.54 | 21-3818 | 60.19 |
| 21-3742 (c) | 59.53 | 21-3819 | 60.20 |

| Statutory Section | PIK 3d Number | Statutory Section | PIK 3d Number |
|----------------------|------------------|--|---------------------------------|
| 21-3820 | 60.21 | 21-4102 | 63.02 |
| 21-3821 | 60.22 | 21-4103 | 63.03 |
| 21-3822 | 60.23 | 21-4104 | 63.04 |
| 21-3823 | 60.24 | 21-4105 | 63.05 |
| 21-3824 | 60.25 | 21-4106 | 63.06, 63.07 |
| 21-3825 | 60.26 | 21-4107 | 63.07 |
| 21-3826 | 60.27 | 21-4108 | 63.08 |
| 21-3827 | 60.28 | 21-4109 | 63.09 |
| 21-3828 | 60.29 | 21-4110 | 63.10 |
| 21-3830 | 60.30 | 21-4111 | 63.11, 63.12, 63.13 |
| 21-3832 | 60.06-A | 21-4113 | 63.14 |
| 21-3833 | 60.06-B | 21-4114 | 63.15 |
| 21-3838 | 60.06-C | 21-4201 (a) (1) through (5) | 64.02 |
| 21-3839 | 60.31 | 21-4201 (a) (6), (7), (8) | 64.01 |
| 21-3840 | 60.32 | 21-4201 (a) (9) | 64.02 |
| 21-3841 | 60.33, 60.34 | 21-4201 (b) through (f) | 64.04 |
| 21-3842 | 60.35 | 21-4202 | 64.03 |
| 21-3901 | 61.01 | 21-4203 | 64.05 |
| 21-3902 | 61.02 | 21-4204 (a) (1), (5), (6) | 64.07 |
| 21-3903 | 61.03, 61.04 | 21-4204 (a) (2), (3), (4), (A), (B) | 64.06 |
| 21-3904 | 61.05 | 21-4204a | 64.07-B, 64.07-C |
| 21-3905 | 61.06 | 21-4205 | 64.08 |
| 21-3906 | 61.07 | 21-4207 | 64.09 |
| 21-3907 | 61.08 | 21-4208 | 64.10 |
| 21-3908 | 61.09 | 21-4209 | 64.11 |
| 21-3909 | 61.10 | 21-4209a | 64.11-A |
| 21-3910 | 61.11 | 21-4209a (b) | 64.11-B |
| 21-3911 | 61.12 | 21-4209b | 64.10-A |
| 21-4001 | 62.01 | 21-4210 | 64.12 |
| 21-4001 (c) | 62.02 | 21-4211 | 64.13 |
| 21-4002 | 62.03, 62.04 | 21-4212 | 64.14 |
| 21-4003 | 62.05 | 21-4213 | 64.15 |
| 21-4004 | 62.06, 62.07 | 21-4214 | 64.16 |
| 21-4005 | 62.08 | 21-4215 | 64.17 |
| 21-4006 | 62.09 | 21-4216 | 64.18 |
| 21-4007 | 62.10 | 21-4217 | 64.02-A |
| 21-4008 | 62.12 | 21-4218 | 64.07-A |
| 21-4009 | 62.11, 62.11-A | 21-4219 | 64.02-B |
| 21-4010 | 62.11, 62.11-A | 21-4301 | 65.01, 65.05, 65.05-A |
| 21-4011 | 62.11, 62.11-A | 21-4301 (b) | 65.04 |
| 21-4012 | 62.11, 62.11-A | 21-4301a | 65.02, 65.04, 65.05, 65.05-A |
| 21-4018 | 62.13 | | |
| 21-4101 | 63.01 | | |

| Statutory Section | PIK 3d Number | Statutory Section | PIK 3d Number |
|-----------------------|---|----------------------|-------------------------|
| 21-4302 | 65.07 | 22-3217 | 52.05 |
| 21-4303 | 65.06 | 22-3218 | 52.19 |
| 21-4303a | 65.06-A | 22-3220 | 54.10 |
| 21-4304 | 65.08 | 22-3221 | 68.06 |
| 21-4305 | 65.09 | 22-3403 (3) | 51.02 |
| 21-4306 | 65.10 | 22-3414 (3) | 51.01, 52.01 |
| 21-4306 (b) | 65.11 | 22-3415 | 52.09 |
| 21-4306 (d) | 65.10-A | 22-3421 | 68.01, 68.02, 68.09-B |
| 21-4307 | 65.12 | 22-3428 | 54.10-A |
| 21-4308 | 65.13 | 32-1013 (a) | 59.33-A |
| 21-4309 | 65.14 | 36-206 | 59.61 |
| 21-4310 | 65.15 | 39-702 (d) | 59.01-B |
| 21-4310 (b) | 65.16 | 39-720 | 59.01-B |
| 21-4312 | 65.17 | 59-29a01 | 57.40 |
| 21-4315 | 65.18, 65.19 | 59-29a02 | 57.41 |
| 21-4317 | 65.20 | 59-29a07 | 57.42 |
| 21-4401 | 66.01 | 60-401 (d) | 52.02 |
| 21-4402 | 66.02 | 60-439 | 52.13 |
| 21-4403 | 66.03 | 60-455 | 52.06 |
| 21-4404 | 66.04 | 60-460(i)(2) | 55.07 |
| 21-4405 | 66.05 | 60-460(dd) | 52.21 |
| 21-4406 | 66.06 | 65-4101 (bb) | 67.26 |
| 21-4407 | 66.07 | 65-4113 | 67.23 |
| 21-4408 | 66.08 | 65-4141 | 67.22 |
| 21-4409 | 66.09 | 65-4142 | 67.25 |
| 21-4410 | 66.10 | 65-4150 (e) | 67.18 |
| 21-4619 (c) | 57.12-A | 65-4152 | 67.17 |
| 21-4624 (a), (b), (c) | 56.00-B, 56.01-A | 65-4153 | 67.18, 67.18-A |
| 21-4624 (b) | 56.01-A, 68.01-A | 65-4154 | 67.19 |
| 21-4624 (c) | 56.00-D, 56.01-C | 65-4155 | 67.20 |
| 21-4624 (e) | 56.00-G, 56.00-H, 56.01-F, 56.01-G, 68.14, 68.14-A, 68.14-A-1, 68.14-B, 68.14-B-1, 68.17 | 65-4159 | 67.21, 67.21-A |
| 21-4625 | 56.00-C, 56.00-E 56.01-B, 56.01-D | 65-4159 (a), (b) | 67.26 |
| 21-4626 | 56.00-D, 56.01-C | 65-4160 | 67.13 |
| 21-4628 | 68.14-A, 68.14-B | 65-4160 (e) | 67.26 |
| 22-3204 | 52.07 | 65-4161 | 67.13, 67.13-B, 67.13-C |
| 22-3211 | 52.05, 52.12 | 65-4161 (f) | 67.26 |
| 22-3212 | 52.05 | 65-4162 | 67.16 |
| 22-3213 | 52.05 | 65-4162 (c) | 67.26 |
| | | 65-4163 | 67.14, 67.15 |
| | | 65-4163 (d) | 67.26 |
| | | 65-4164 | 67.23 |
| | | 65-7006 | 67.27, 67.28 |
| | | 74-8702 | 65.35 |

| Statutory Section | PIK 3d Number |
|----------------------|------------------|
|----------------------|------------------|

| | |
|------------------------------|--------------|
| 74-8716(a) | 65.30 |
| 74-8716(b) | 65.31 |
| 74-8717 | 65.32 |
| 74-8718 | 65.33 |
| 74-8719 | 65.19, 65.34 |
| 74-8802 | 65.52 |
| 74-8810 | 65.51 |
| 74-9801 <i>et seq.</i> | 65.36 |
| 79-5201 <i>et seq.</i> | 67.24 |
| 79-5208 | 67.24 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY
INSTRUCTIONS

| | PIK Number |
|--|---------------|
| Instructions Before Introduction of Evidence | 51.01 |
| Note Taking By Jurors | 51.01-A |
| Consideration and Binding Application of Instructions | 51.02 |
| Consideration and Guiding Application of Instructions | 51.03 |
| Consideration of Evidence | 51.04 |
| Rulings of the Court | 51.05 |
| Statements and Arguments of Counsel | 51.06 |
| Sympathy or Prejudice For or Against a Party | 51.07 |
| Form of Pronoun - Singular and Plural | 51.08 |
| If Jury Receives Instructions Before Close of Case | 51.09 |
| Penalty Not To Be Considered By Jury | 51.10 |
| Cameras In the Courtroom | 51.11 |

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.01-A NOTE TAKING BY JURORS

Members of the jury, you will be permitted to take notes during the trial. Whether you do so is entirely up to you. However, do not allow the taking of notes to distract you from listening attentively to the testimony of a witness.

You may use your notes to refresh your memory as you deliberate. However, your deliberations must be based upon the collective memory and recollection of the entire jury as to the evidence admitted. Notes should be used only as an aid to this function and not as a substitute.

You must not remove any of your notes from the courthouse. At the beginning of a recess give your packet of notes to the bailiff. Your notes will be returned to you when court reconvenes.

At the conclusion of the trial, all notes must be given to the bailiff for immediate destruction.

Notes on Use

The court should consider the anticipated length of the trial, the technical nature of the subjects about which the witnesses will testify, and the amount of detail which must be sifted through by the jurors in order to be competent fact finders before making the decision to allow note taking.

Comment

Note taking by jurors is a matter of "sound judicial discretion." *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968), cert. denied 394 U.S. 908, 22 L. Ed 2d 219, 89 S. Ct. 1019 (1969), overruled on other grounds in *State v. Mims*, 220 Kan. 726, 556 P.2d 387 (1976). A more comprehensive review of the subject is contained in 14 ALR 3rd 831.

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.02 CONSIDERATION AND BINDING APPLICATION OF INSTRUCTIONS

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

Notes on Use

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

Comment

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

See *State v. Pennington*, 254 Kan. 757, 764, 869 P.2d 624 (1994) relative to using the word "must" in this instruction. See also *State v. Whitaker*, 255 Kan. 118, 872 P.2d 278 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.03 CONSIDERATION AND GUIDING APPLICATION OF INSTRUCTIONS

The instruction which originally appeared as PIK 51.03 is deleted because it was disapproved for use by *State v. McClanahan*, 212 Kan. 208, 213, 510 P.2d 153 (1973).

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.04 CONSIDERATION OF EVIDENCE

In your fact finding you should consider and weigh everything admitted into evidence. 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.

Notes on Use

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.05 RULINGS OF THE COURT

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.

Notes on Use

This instruction should be given in ordinary cases. *State v. Boyd*, 222 Kan. 155, 159, 563 P.2d 446 (1977), would suggest that comment on the truth or the falsity of evidence would not be approved in Kansas. The questioned judicial action in *Boyd*, however, related to a judge's question to a witness rather than to comments on the evidence.

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.06 STATEMENTS AND ARGUMENTS OF COUNSEL

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.

Notes on Use

The giving of this instruction was approved in *State v. Reser*, 244 Kan. 306, 316, 767 P.2d 1277 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

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

Notes on Use

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

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.08 FORM OF PRONOUN - SINGULAR AND PLURAL

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.09 IF JURY RECEIVES INSTRUCTIONS BEFORE CLOSE OF CASE

The instruction which originally appeared as PIK 51.09 is deleted because the Committee now concludes it is unnecessary.

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is a matter for determination by the Court.

Notes on Use

This instruction was approved in *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973), when the words "guilt or innocence" were in the instruction. The Committee modified that language to comport with recent appellate court decisions. For those decisions, see PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Deletion of the second sentence of this instruction was approved when the jury was instructed on the defense of insanity in *State v. Alexander*, 240 Kan. 273, 286, 287, 729 P.2d 1126 (1986). See also, PIK 3d 54.10-A, Insanity - Commitment.

If, under K.S.A. 21-4624, the "Hard 40" sentence may be applied, the Committee recommends striking the second sentence and modifying the first sentence to read, "Your only concern, at this time, is determining if the defendant is guilty or not guilty."

PATTERN INSTRUCTIONS FOR KANSAS 3d

51.11 CAMERAS IN THE COURTROOM

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

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

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

Comment

See Kansas Supreme Court Rule 1001.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS
CONSIDERATION

| | PIK Number |
|--|---------------|
| Information - Indictment | 52.01 |
| Burden of Proof, Presumption of Innocence, Reasonable Doubt | 52.02 |
| Presumption of Innocence | 52.03 |
| Reasonable Doubt | 52.04 |
| Stipulations and Admissions | 52.05 |
| Proof of Other Crime - Limited Admissibility of Evidence | 52.06 |
| More Than One Defendant - Limited Admissibility of Evidence | 52.07 |
| Affirmative Defenses - Burden of Proof | 52.08 |
| Credibility of Witnesses | 52.09 |
| Defendant As A Witness | 52.10 |
| Number of Witnesses | 52.11 |
| Testimony Taken Before Trial | 52.12 |
| Defendant's Failure To Testify | 52.13 |
| Expert Witness | 52.14 |
| Impeachment | 52.15 |
| Circumstantial Evidence | 52.16 |
| Confession | 52.17 |
| Testimony Of An Accomplice | 52.18 |
| Testimony Of An Informant - For Benefits | 52.18-A |
| Alibi | 52.19 |
| Eyewitness Identification | 52.20 |
| Child's Hearsay Evidence | 52.21 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.01 INFORMATION - INDICTMENT

The Committee recommends that there be no separate instruction given.

Comment

K.S.A. 22-3414(3) provides in part, ". . . and the judge may, in his discretion, *after the opening statements*, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented."

Instruction on the elements for the crime charged, the Burden of Proof, Presumption of Innocence, Reasonable Doubt (PIK 3d 52.02) and Credibility of Witnesses (PIK 3d 52.09) could be given following opening statements.

K.S.A. 22-3414 does not require that the instructions be in writing.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.03 PRESUMPTION OF INNOCENCE

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.04 REASONABLE DOUBT

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

Notes on Use

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

Comment

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

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

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

The Committee's recommendation that no separate instruction on reasonable doubt be given was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980); *State v. Dum*, 249 Kan. 488, Syl. ¶ 4, 820 P.2d 412 (1991); *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994); *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995); and *State v. Banks*, 260 Kan. 918, 927 P.2d 456 (1996).

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.05 STIPULATIONS AND ADMISSIONS

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

- (1) _____.
- (2) _____.
- (3) _____.

Comment

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

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

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

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

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

**52.06 PROOF OF OTHER CRIME - LIMITED
ADMISSIBILITY OF EVIDENCE**

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

Notes on Use

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

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

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

Comment

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

I. INTRODUCTION

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

commit crimes, reads as follows:

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. at 686; *State v. Marquez*, 222 Kan. at 447-448.

The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. Reversal may also be required where no limiting instruction is given, even though not requested by the defendant. *State v. Roth*, 220 Kan. 677, 680, 438 P.2d 58 (1968). When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984).

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

P.2d 1371 (1971).

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

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

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

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

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

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

A. *Separate Hearing Required.* As with evidence admitted pursuant to K.S.A. 60-455, it is the better practice to determine the admissibility of evidence

PATTERN INSTRUCTIONS FOR KANSAS 3d

of other crimes to be admitted independently of that statute in advance of trial and in the absence of the jury. See discussion in Section II.A., Separate Hearing Required.

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

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

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

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

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

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

(3) *Res Gestae.* Acts done or declarations made before, during, or after the happening of the principal fact may be admissible as part of the *res gestae* where the acts are so closely connected with it as to form in reality a part of the occurrence. *State v. Gilder*, 223 Kan. 220, 228, 574 P.2d 196 (1977); *State v. Ferris*, 222 Kan. 515, 516-517, 565 P.2d 275 (1977); *State v. Davis*, 256 Kan. 1, 21, 883 P.2d 735 (1994).

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455 if the evidence is

PATTERN INSTRUCTIONS FOR KANSAS 3d

not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. *State v. Wood*, 230 Kan. 477, 638 P.2d 938 (1982); *State v. Crossman*, 229 Kan. 384, 624 P.2d 461 (1981); *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

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

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

(7) *Rebuttal of Credibility Evidence.* After the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior crimes for the purpose of impeaching the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a *conviction* of a crime involving *dishonesty or false statement*. The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Trucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Trucker v. Lower*, 200 Kan. at 5. See also, *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976).

(8) *Other Crimes of a Witness Other Than a Defendant.* K.S.A. 60-455 does not apply to a witness in a criminal case other than the accused, and evidence that such a witness may have committed a crime or civil wrong may not be introduced thereunder. Evidence of prior criminal convictions of a

PATTERN INSTRUCTIONS FOR KANSAS 3d

witness is subject to the restrictions found in K.S.A. 60-421 where the credibility of a witness can only be impeached by crimes involving dishonesty unless that witness has introduced evidence solely for the purpose of supporting his or her credibility. *State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980).

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

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

IV. CONCLUSIONS AND RECOMMENDATIONS

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**52.07 MORE THAN ONE DEFENDANT - LIMITED
ADMISSIBILITY OF EVIDENCE**

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

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

The defendant raises (describe the defense claimed) as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.

Notes on Use

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

- 54.03 Ignorance or Mistake of Fact
- 54.04 Ignorance or Mistake of Law - Reasonable Belief
- 54.11 Intoxication - Involuntary
- 54.13 Compulsion
- 54.14 Entrapment
- 54.17 Use of Force in Defense of a Person
- 54.18 Use of Force in Defense of a Dwelling
- 54.19 Use of Force in Defense of Property Other Than a Dwelling
- 55.04 Conspiracy - Withdrawal as a Defense
- 55.10 Criminal Solicitation - Defense
- 56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
- 56.38 Affirmative Defense to Mistreatment of a Dependent Adult
- 57.01-A Rape - Defense of Marriage
- 57.05-B Affirmative Defense to Indecent Liberties With a Child
- 57.06-A Affirmative Defense to Aggravated Indecent Liberties With a Child
- 57.07-A Affirmative Defense to Criminal Sodomy
- 57.08-C Affirmative Defense to Aggravated Criminal Sodomy
- 58.02 Affirmative Defense to Bigamy
- 58.10-A Affirmative Defense to Endangering a Child
- 58.12-C Furnishing Alcoholic Liquor to a Minor - Defense
- 58.12-D Furnishing Cereal Malt Beverage to a Minor - Defense
- 59.07 Worthless Check - Defenses
- 59.33-B Criminal Hunting - Defense
- 59.59 Piracy of Recordings - Defenses
- 59.64-A Computer Crime - Defense
- 61.04 Compensation for Past Official Acts - Defense
- 62.02 Eavesdropping - Defense of Public Utility Employee
- 62.07 Criminal Defamation - Truth as a Defense
- 62.12 Unlawful Smoking - Defense of Smoking in Designated Smoking Area
- 64.02-B Criminal Discharge of a Firearm - Affirmative Defense

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 64.04 Criminal Use of Weapons - Affirmative Defense
- 64.07-C Criminal Possession of a Firearm by a Juvenile - Affirmative Defenses
- 64.11-B Criminal Possession of Explosives - Defense
- 65.05 Promoting Obscenity - Affirmative Defenses
- 65.05-A Promoting Obscenity to a Minor - Affirmative Defenses
- 65.10-A Dealing in Gambling Devices - Defense
- 65.12-A Possession of a Gambling Device - Defense
- 65.16 Cruelty to Animals - Defense

Comment

State v. Wilson, 240 Kan. 607, 610, 731 P.2d 306 (1987), held it was error to delete from this instruction the sentence, "The State's burden of proof does not shift to the defendant."

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.09 CREDIBILITY OF WITNESSES

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

Notes on Use

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

The Committee recommends that this instruction be given without any expansion.

Comment

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

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

While not clearly erroneous, expansion of this instruction generally is not approved. *State v. Hunt*, 257 Kan. 388, 849 P.2d 178 (1995). Where objection to expanding the instruction was made in *State v. DeVries*, 13 Kan. App. 2d 609, 617-19, 780 P.2d 1118 (1989), the expansion was held to be reversible error. See also, *State v. Hartfield*, 245 Kan. 431, 449, 781 P.2d 1050 (1989), where objection was made to expanding this instruction by adding the "false in one thing, false in all" concept. While such expansion was noted as less preferable than using this instruction, it was held not to be reversible error because of the particular circumstances existing in the case.

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.10 DEFENDANT AS A WITNESS

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

Comment

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

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

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

The Supreme Court has noted "the trend to eliminate instructions which focus on the credibility of certain testimony" and the belief of this Committee that such instructions are not justified. *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987). See also, *State v. DeVries*, 13 Kan. App. 2d 609, 618, 780 P.2d 1118 (1989); *State v. Land*, 14 Kan. App. 2d 515, 518, 794 P.2d 668 (1990).

52.11 NUMBER OF WITNESSES

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.12 TESTIMONY TAKEN BEFORE TRIAL

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

Notes on Use

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

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

Comment

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

52.13 DEFENDANT'S FAILURE TO TESTIFY

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

Notes on Use

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

Comment

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

In *State v. Perry*, 223 Kan. 230, 573 P.2d 989 (1977), the Court held that a trial court should not give this instruction unless it was requested by the defendant. Giving the instruction, however, was considered not prejudicial and not reversible error. See also, *State v. Goseland*, 256 Kan. 729, 887 P.2d 681 (1994) (giving this instruction without a request from the defendant is not clearly erroneous).

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

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

The holdings in *Perry* and *Goseland* are in accordance with *Lakeside*. That does not, however, in any way alter the recommendation of the Committee: Do not give this instruction unless requested by the defendant.

52.14 EXPERT WITNESS

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

Comment

See PIK 2d 2.50, Expert Witness, Notes on Use. The Committee believes that an expert should be considered as any other witness as set forth in PIK 3d 52.09, Credibility of Witnesses. In *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995), the Court found no error in the trial court's refusal to give an expert witness instruction.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.15 IMPEACHMENT

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

Comment

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

See PIK 3d 102.30, Impeachment.

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.16 CIRCUMSTANTIAL EVIDENCE

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.17 CONFESSION

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.18 TESTIMONY OF AN ACCOMPLICE

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

Comment

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

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

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.18-A TESTIMONY OF AN INFORMANT - FOR BENEFITS

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

Notes on Use

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

Comment

Ordinarily, it is error to refuse to give a cautionary instruction on the testimony of a paid informant or agent where such testimony is substantially uncorroborated and is the main basis for defendant's conviction. Where, however, no such instruction is requested nor objection made to the court's instructions, and such testimony is substantially corroborated, the absence of a cautionary instruction is not error and is not grounds for reversal of the conviction. *State v. Novotny*, 252 Kan. 753, 760, 851 P.2d 365 (1993). Also see *State v. Brinkley*, 256 Kan. 808, 888 P.2d 819 (1995).

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

"An informant is an 'undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime. [Citation omitted.] This does not include persons who supply information only after being interviewed by police officers, or who give information as witnesses during the course of investigations' Black's Law Dictionary 780 (6th ed. 1990)." *State v. Abel*, 261 Kan. 331, 336, 932 P.2d 952 (1997). *State v. Noriega*, 261 Kan. 440, 932 P.2d 940 (1997), *State v. Bornholdt*, 261 Kan. 644, 932 P.2d 964 (1997), and *State v. Kuykendall*, 264 Kan. 647, 654, 957 P.2d 1112 (1998).

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.19 ALIBI

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

Notes on Use

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

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.20 EYEWITNESS IDENTIFICATION

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

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

Notes on Use

This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. *State v. Willis*, 240 Kan. 580, 731 P.2d 287 (1987). However, unless there is evidence

PATTERN INSTRUCTIONS FOR KANSAS 3d

which causes the trial court to question the reliability of the eyewitness identification, this instruction should not be given. *State v. Harris*, 266 Kan. 270, 278, 970 P.2d 519 (1998). The judge should omit from the instruction any factors that clearly do not relate to evidence introduced at trial.

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.21 CHILD'S HEARSAY EVIDENCE

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

Notes on Use

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

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

Comment

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

| | PIK Number |
|---|---------------|
| Presumption Of Intent | 54.01 |
| General Criminal Intent | 54.01-A |
| Statutory Presumption Of Intent To Deprive | 54.01-B |
| Criminal Intent - Ignorance Of Statute Or Age Of Minor Is Not A Defense | 54.02 |
| Ignorance Or Mistake Of Fact | 54.03 |
| Ignorance Or Mistake Of Law - Reasonable Belief | 54.04 |
| Responsibility For Crimes Of Another | 54.05 |
| Responsibility For Crimes Of Another - Crime Not Intended | 54.06 |
| Responsibility For Crime Of Another - Actor Not Prosecuted | 54.07 |
| Corporations - Criminal Responsibility For Acts Of Agents | 54.08 |
| Individual Responsibility For Corporation Crime | 54.09 |
| Mental Disease Or Defect (For Crimes Committed January 1, 1996 or Thereafter) | 54.10 |
| Mental Disease Or Defect - Commitment (For Crimes Committed Prior to January 1, 1996) | 54.10-A |
| Mental Disease Or Defect - Commitment (For Crimes Committed January 1, 1996 Or Thereafter) . | 54.10-A |
| Intoxication - Involuntary | 54.11 |
| Voluntary Intoxication - General Intent Crime | 54.12 |
| Voluntary Intoxication - Specific Intent Crime | 54.12-A |
| Voluntary Intoxication-Particular State Of Mind | 54.12-A-1 |
| Diminished Mental Capacity | 54.12-B |
| Compulsion | 54.13 |
| Entrapment | 54.14 |
| Procuring Agent | 54.14-A |
| Condonation | 54.15 |
| Restitution | 54.16 |
| Use Of Force In Defense Of A Person | 54.17 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

No Duty to Retreat 54.17-A
Use Of Force In Defense Of A Dwelling 54.18
Use of Force In Defense Of Property Other Than A
 Dwelling 54.19
Forcible Felon Not Entitled To Use Force 54.20
Provocation Of First Force As Excuse For Retaliation . . . 54.21
Initial Aggressor's Use Of Force 54.22
Law Enforcement Officer Or Private Person Summoned
 To Assist - Use Of Force In Making Arrest 54.23
Private Person's Use Of Force In Making Arrest -
 Not Summoned By Law Enforcement Officer 54.24
Use Of Force In Resisting Arrest 54.25

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.01 PRESUMPTION OF INTENT

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

Notes on Use

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

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

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.03 IGNORANCE OR MISTAKE OF FACT

It is a defense in this case if by reason of ignorance or mistake the defendant did not have at the time the mental state which the statute requires as an element of the crime. (The defendant may be convicted of a lesser offense if the facts were as [he][she] believed them to be and the other evidence in the case establishes such lesser offense.)

Notes on Use

For authority, see K.S.A. 21-3203 (1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

The parenthetical material should only be given in cases where a lesser offense is included in the greater offense committed.

As provided by the authorizing statute (K.S.A. 21-3203), this should not be given in cases where there are exclusions of requirement of proof of criminal intent. See K.S.A. 21-3202 and PIK 3d 54.02, Criminal Intent - Ignorance of Statute or Age of Minor Is Not a Defense.

Likewise, this instruction has no application to and should not be given in circumstances involving statutes providing for guilt without criminal intent. See Comment to PIK 3d 54.01-A, General Criminal Intent.

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.04 IGNORANCE OR MISTAKE OF LAW - REASONABLE BELIEF

It is a defense to the charge made against the defendant if the defendant reasonably believed that (his)(her) conduct did not constitute a crime and:

(the crime was defined by an administrative regulation or order which was not known to the defendant and had not been published, as provided by law, and the defendant could not have acquired such knowledge by the exercise of ordinary care.)

(the defendant acted in reliance upon a statute which later was determined to be invalid.)

(the defendant acted in reliance upon an order or opinion [of the Supreme Court of Kansas] or [a United States appellate court] later overruled or reversed.)

(the defendant acted in reliance upon an official interpretation of the [statute] [regulation] or [order] defining the crime made by a [public officer] or [agency] legally authorized to interpret such statute.)

Notes on Use

For authority, see K.S.A. 21-3203(2). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the State. The term "public officer" in subparagraph (d) of K.S.A. 21-3203(2) does not include judges and magistrates. *State v. V.F.W. Post No. 3722*, 215 Kan. 693, 527 P.2d 1020 (1974).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER -
CRIME NOT INTENDED**

A person who intentionally (aids) (abets) (advises) (hires) (counsels) (procures) another to commit a crime is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the other crime was reasonably foreseeable.

Notes on Use

For authority, see K.S.A. 21-3205(2).

Comment

All participants in a crime are equally guilty, without regard to the extent of their participation. *State v. Turner*, 193 Kan. 189, 195, 392 P.2d 863 (1964); *State v. Payton*, 229 Kan. 106, 622 P.2d 651 (1981). The other crime must be reasonably foreseeable. *State v. Davis*, 4 Kan. App. 2d 210, 604 P.2d 68 (1979). See Comment to PIK 3d 54.05, Responsibility for Crimes of Another.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.07 RESPONSIBILITY FOR CRIME OF ANOTHER -
ACTOR NOT PROSECUTED**

It is not a defense that (another) (others) who participated in the commission of the wrongful act constituting the crime (lacked criminal capacity) (has or has not been convicted of the crime or any lesser degree) (has been acquitted).

Notes On Use

For authority, see K.S.A. 21-3205(3). PIK 3d 54.05, Responsibility for Crimes of Another and PIK 3d 54.06, Responsibility for Crimes of Another - Crime Not Intended, should be used where applicable to the particular case. This instruction makes clear that a contrary rule which prevailed at common law is not the law in the State of Kansas.

Comment

An accessory before the fact may be convicted after the trial and conviction of the principal of a higher degree of offense than the principal was convicted of. *State v. Gray*, 55 Kan. 135, 144, 145, 39 Pac. 1050 (1895).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.08 CORPORATIONS - CRIMINAL RESPONSIBILITY FOR ACTS OF AGENTS

A corporation is responsible for acts committed by any person who is authorized to act on behalf of the corporation when acting within the scope of (his)(her) authority.

Notes on Use

For authority, see K.S.A. 21-3206(1) and (2).

Use PIK Civil 3d 107.06, Agent - Issue as to Scope of Authority, where scope of authority is an issue.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**54.09 INDIVIDUAL RESPONSIBILITY FOR CORPORATION
CRIME**

An individual who performs criminal acts, or causes criminal acts to be performed, in the name of or on behalf of a corporation, is responsible to the same extent as if such acts were performed in (his)(her) own name or on (his)(her) own behalf.

Notes on Use

For authority, see K.S.A. 21-3207(1).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

- (a) to understand the nature of (his)(her) acts, or**
- (b) to understand that what (he)(she) was doing was prohibited by law.**

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

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

Notes on Use

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

For authority, see K.S.A. 22-3220. This statute was amended so that, effective January 1, 1996, the term "insanity" has been replaced by "mental disease or defect."

This instruction should be given where the defense of mental disease or defect is asserted and evidence has been introduced in support of such claim. Where only general criminal intent is required for the crime charged, the language "intent to engage in the conduct" should be included in place of a particular state of mind in the concluding parenthetical. PIK 3d 54.01-A, General Criminal Intent, should also be given in such a case.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

For authority, see K.S.A. 22-3428 prior to amendments made by L. 1995, Ch. 251, §28.

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

If you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent, then the defendant is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

Notes on Use

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

This instruction must be given in any case where there is reliance on the defense of mental disease or defect.

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.11 INTOXICATION - INVOLUNTARY

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.12 VOLUNTARY INTOXICATION - GENERAL INTENT CRIME

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

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

Notes on Use

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

Comment

Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse for the offense, or a defense to the charge. Unless evidence is presented that shows intoxication to the extent a defendant's ability to form the requisite intent was impaired, no voluntary intoxication instruction is required. *State v. Minski*, 252 Kan. 806, 850 P.2d 809 (1993).

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

(1977).

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

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

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.12-A VOLUNTARY INTOXICATION - SPECIFIC INTENT CRIME

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

Notes on Use

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

Comment

"Where the crime charged requires a specific intent, voluntary intoxication may be a defense and an instruction thereon is required where there is evidence to support that defense." *State v. Sterling*, 235 Kan. 526, Syl. ¶ 2, 680 P.2d 301 (1984). See also, *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987); *State v. Gadelkarim*, 247 Kan. 505, 508, 802 P.2d 507 (1990).

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

"When the defense of voluntary intoxication is asserted in a criminal trial, the issue concerning the level of the defendant's intoxication is a question of fact for the jury." *State v. Falke*, 237 Kan. 668, Syl. ¶ 10, 703 P.2d 1362 (1985).

"A defendant in a criminal case may rely upon evidence of voluntary intoxication to show a lack of specific intent even though he also relies upon other defenses inconsistent therewith." *State v. Shehan*, 242 Kan. 127, 744 P.2d 824 (1987). "To require the giving of an instruction on voluntary intoxication there must be some evidence of intoxication upon which a jury might find that a defendant's mental faculties were impaired to the extent that he was incapable of forming the necessary specific intent required to commit the crime." *Id.*

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

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary

PATTERN INSTRUCTIONS FOR KANSAS 3d

element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

Comment

Where a defendant relies on evidence of voluntary intoxication to show lack of a required state of mind, the instruction on voluntary intoxication should include reference to the state of mind. Premeditation is a state of mind and a necessary element of the offense of premeditated murder. *State v. Ludlow*, 256 Kan. 139, 883 P.2d 1144 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.12-B DIMINISHED MENTAL CAPACITY

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

Notes on Use

This instruction may be used when there is some evidence of diminished mental capacity. The clause in brackets should be included when the defense of insanity has also been raised. This instruction is applicable only to crimes committed before January 1, 1996.

Comment

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

While a trial court is not required to instruct on diminished capacity, the "better practice" is to instruct on diminished capacity where necessary to inform the jury of the effect of defendant's diminished capacity on the specific intent required for the crime charged. *State v. Maas*, 242 Kan. 44, 52, 744 P.2d 1222 (1987). *State v. Pioletti*, 246 Kan. 49, 59, 785 P.2d 963 (1990), reiterated that the decision whether or not to give an instruction on diminished capacity is a matter of judicial discretion. See also, *State v. Cady*, 248 Kan. 743, 748, 811 P.2d 1130 (1991); *State v. Borman*, 264 Kan. 476, 482, 956 P.2d 1325 (1998).

The complete defense of insanity does not have to be asserted in order to claim diminished capacity. Moreover, mere personality characteristics, such as poor impulse control, a short temper, frustration, feelings of dependency, "snapping", lack of concern for the rights of other people, etc., do not constitute a mental disease or defect bringing the doctrine of diminished capacity into play. *State v. Wilburn*, 249 Kan. 678, 686, 822 P.2d 609 (1991). See also, *State v. Borman*, 264 Kan. 476, 481, 956 P.2d 1325 (1998).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.13 COMPULSION

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

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

Notes on Use

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

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

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.14 ENTRAPMENT

Entrapment is a defense if the defendant is (induced) (persuaded) to commit a crime which the defendant had no previous (disposition) (intention) (plan) (purpose) to commit. It is not a defense if the defendant (originated) (began) (conceived) the plan to commit the crime or when (he)(she) had shown (a predisposition) (a plan) (an intention) (a purpose) for committing the crime and was merely afforded (an)(the) opportunity to (consummate) (carry out [his][her] intention to complete) (complete [his][her] plan to commit) the crime and was assisted by law enforcement officers.

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

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the _____ by the defendant, solicitation by defendant to make (his)(her) sale, prior sales by defendant, or ease of access to the _____ by defendant.

Notes on Use

For authority, see K.S.A. 21-3210. Insert the name of the article or substance sold in the blank spaces. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

In discussing when the defense of entrapment is available, the Supreme Court in *State v. Jordan*, 220 Kan. 110, 112, 551 P.2d 773 (1976), stated: "The defense of entrapment arises when a law enforcement officer, or someone acting in his behalf, generates in the mind of a person who is innocent of any criminal purpose the original intent or idea to commit a crime which he had not contemplated and

PATTERN INSTRUCTIONS FOR KANSAS 3d

would not have committed but for the inducement of the law officer." *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854 (1971). A defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but he cannot rely on the defense or obtain an instruction on entrapment when the evidence establishes he had a previous intention of committing the crime and was merely afforded an opportunity by a law officer to complete it. *State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970). The trial court correctly refused to substitute the word "solicited" for "induced or persuaded" in an instruction based on 54.14. *State v. Carr*, 23 Kan. App. 2d 384, 931 P.2d 34 (1997).

For other cases discussing the availability of the defense of entrapment, see *State v. Amodei*, 222 Kan. 140, 145, 563 P.2d 440 (1977); *State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974); *State v. Smith*, 229 Kan. 533, 625 P.2d 1139 (1981); *State v. Nelson*, 249 Kan. 689, 697, 822 P.2d 53 (1991).

See *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366, 93 S.Ct. 1637 (1973).

In *State v. Farmer*, 212 Kan. 163, 510 P.2d 180 (1973), it was held: "The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged." See K.S.A. 21-3210.

See also, *State v. Rogers*, 234 Kan. 629, 675 P.2d 71 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.14-A PROCURING AGENT

In 1990, the Legislature eliminated this defense to certain charges involving controlled substances. See K.S.A. 65-4127a(e) and K.S.A. 65-4127b(e).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.15 CONDONATION

It is not a defense that the (injured party) (victim) has (excused) (forgiven) (compromised and settled) (ratified) the offense committed.

Notes on Use

Use for this instruction will not ordinarily arise as evidence to support it is generally not admissible. The pretrial conference will normally provide opportunity to settle the question in advance of trial.

Comment

For authority, see *State v. Newcomer*, 59 Kan. 668, 54 Pac. 685 (1898), a statutory rape case in which the victim married the defendant; *State v. Craig*, 124 Kan. 340, 259 Pac. 802 (1927), in which a mother, owner of an undivided interest, subsequently ratified the act of arson; *State v. Dye*, 148 Kan. 421, 83 P.2d 113 (1938), in which it was held that evidence offered to show a compromise, settlement or ratification will not constitute a bar to conviction and punishment of a crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.16 RESTITUTION

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.17 USE OF FORCE IN DEFENSE OF A PERSON

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

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

Notes on Use

For authority, see K.S.A. 21-3211 and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

To qualify for an instruction on self-defense, there must be some evidence presented at trial that the defendant reasonably believed force was necessary to defend himself. *State v. Sims*, 265 Kan. 166, 169, 960 P.2d 1271 (1998).

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.17-A NO DUTY TO RETREAT

When on (his)(her) home ground, a person is not required to retreat from an aggressor, but may stand (his)(her) ground and use such force to defend (himself)(herself) as (he)(she) believes, and a reasonable person would believe, necessary.

Notes on Use

The "no duty to retreat" instruction is required only in infrequent factual situations, such as that found in *State v. Scobee*, 242 Kan. 421, 748 P.2d 862 (1988), with such elements as a nonaggressor defendant being followed to and menaced on home ground. *State v. Ricks*, 257 Kan. 435, 894 P.2d 191 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.18 USE OF FORCE IN DEFENSE OF A DWELLING

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

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.19 USE OF FORCE IN DEFENSE OF PROPERTY OTHER THAN A DWELLING

The defendant claims (his)(her) conduct was justified as a lawful defense of (his)(her) property.

A person lawfully in possession of property, other than a dwelling, is justified in (threatening to use) (using) such force to stop an unlawful interference with such property as would appear necessary to a reasonable man under the circumstances then existing.

Notes on Use

For authority, see K.S.A. 21-3213. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

K.S.A. 21-3213 is the only section of the crimes statute which specifically makes the "reasonable man" the standard to be used with respect to the amount of permissible force. The concept is implicit, however, in K.S.A. 21-3211 (self-defense) and 21-3212 (defense of a dwelling). See *State v. Marks*, 226 Kan. 704, 712, 602 P.2d 1344 (1979); *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). See also, Comment to PIK 3d 54.17, Use of Force in Defense of a Person.

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

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

Notes on Use

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

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

Comment

In *State v. Sullivan & Sullivan*, 224 Kan. 110, 578 P.2d 1108 (1978), the Supreme Court held that, because a jury question remained as to whether the defendants committed the overt act required for an attempted burglary, the trial court erred in instructing the jury that the defendants could not claim self-defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.22 INITIAL AGGRESSOR'S USE OF FORCE

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

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

The defendant claims (his)(her) conduct was justified because (he)(she) was a (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him][her]).

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

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

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

or

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

The defendant claims (his)(her) conduct was justified because (he)(she) was a private person (making) (assisting another private person in making) a lawful arrest.

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

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

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.25 USE OF FORCE IN RESISTING ARREST

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

Notes on Use

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

Comment

See *Kansas Judicial Council Bulletin*, April 1968, p.43.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 55.00

ANTICIPATORY CRIMES

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.01 ATTEMPT

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

OR

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

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

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

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. Salcido-Corral*, 262 Kan. 392, 940 P.2d 11 (1997); *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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

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). For a discussion of whether Kansas recognizes an attempted assault or attempted aggravated assault, see *Spencer v. State*, 264 Kan. 4, 954 P.2d 1088 (1998).

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. Perry*, 266 Kan. 224, 968 P.2d 674 (1998); *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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

K.S.A. 21-3301(b) provides that it shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible. The Committee believes that PIK 3d 55.01, Attempt, is sufficient without the injection of impossibility of committing the offense into the case.

Comment

The Supreme Court of Kansas held in *State v. Logan & Cromwell*, 232 Kan. 646, 650, 656 P.2d 777 (1983), that under the provisions of K.S.A. 21-3301(b) neither legal impossibility nor factual impossibility is a defense to an attempted crime. See also, *State v. William*, 248 Kan. 389, 807 P.2d 1292 (1991); *State v. DeHerrera*, 251 Kan. 143, 834 P.2d 918 (1992).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.03 CONSPIRACY

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

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

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

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

Notes on Use

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

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

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

This instruction should be given in all crimes of conspiracy along with PIK 3d 55.05, Conspiracy - Defined, and PIK 3d 55.06, Conspiracy - Act In Furtherance Defined. When the evidence warrants its submission, PIK 3d 55.04, Conspiracy -Withdrawal as a Defense, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977). Failure of the state to show the existence of an agreement between the defendants resulted in dismissal of conspiracy charges. *State v. Harris*, 266 Kan. 610, 975 P.2d 227 (1999).

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. Speed*, 265 Kan. 26, 961 P.2d 13 (1998); *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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

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).

A defendant's convictions for contributing to a child's misconduct and conspiring with the child to sell marijuana were not multiplicitous where the conspiracy was the illegal act generating the charge of contributing to a child's misconduct. *State v. Buhr*, 25 Kan. App. 2d 529, 966 P.2d 690, rev. denied 266 Kan. __ (December 22, 1998).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. 2d at 762-763; *State v. Hernandez*, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied* 263 Kan. __ (November 14, 1997).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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); *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.06 CONSPIRACY - ACT IN FURTHERANCE DEFINED

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

Notes on Use

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

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.07 CONSPIRACY - DECLARATIONS

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

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

Notes On Use

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

Comment

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

The determination of whether a conspiracy exists for purpose of the hearsay exception [K.S.A. 60-460(i)(2)] rests with the judge not the jury. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995).

"In order to show a conspiracy, it is not necessary that there be any formal agreement manifested by formal words written or spoken; it is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances. *State v. Sherry*, 233 Kan. 920, 934, 667 P.2d 367 (1983)." *State v. Swafford*, 257 Kan. 1023, 897 P.2d 1027 (1995).

Under K.S.A. 60-460(i)(2), hearsay statements by a coparticipant that implicate the accused in a crime are admissible against the accused only if made "while the plan to commit the crime is in existence and 'before its complete execution or other termination.'" *State v. Myers*, 229 Kan. 168, 625 P.2d 1111 (1981). See also, *State v. Johnson-Howell*, 255 Kan. 928, 881 P.2d 1288 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.08 CONSPIRACY - SUBSEQUENT ENTRY

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

Notes on Use

For authority, see *State v. Becknell*, 5 Kan. App. 2d 269, 272, 615 P.2d 795 (1980); and *State v. Johnson*, 253 Kan. 356, 856 P.2d 134 (1993).

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.09 CRIMINAL SOLICITATION

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

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

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

or

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

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

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

Notes on Use

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**CHAPTER 56.00
CRIMES AGAINST PERSONS**

| | PIK Number |
|---|---------------|
| Capital Murder | 56.00-A |
| Capital Murder - Death Sentence - Sentencing Proceeding . . . | 56.00-B |
| Capital Murder - Death Sentence - Aggravating Circumstances | 56.00-C |
| Capital Murder - Death Sentence - Mitigating Circumstances | 56.00-D |
| Capital Murder - Death Sentence - Burden of Proof | 56.00-E |
| Capital Murder - Death Sentence - Aggravating And Mitigating Circumstances - Theory Of Comparison | 56.00-F |
| Capital Murder - Death Sentence - Reasonable Doubt | 56.00-G |
| Capital Murder - Death Sentence - Sentencing Recommendation | 56.00-H |
| Murder In The First Degree | 56.01 |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Sentence Proceeding | 56.01-A |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating Circumstances | 56.01-B |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Mitigating Circumstances | 56.01-C |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Burden Of Proof | 56.01-D |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating And Mitigating Circumstances - Theory of Comparison | 56.01-E |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Reasonable Doubt | 56.01-F |
| Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Sentencing Recommendation | 56.01-G |
| Murder In The First Degree - Felony Murder | 56.02 |
| Murder In The First Degree And Felony Murder - Alternatives | 56.02-A |
| Murder In The Second Degree | 56.03 |
| Murder In The Second Degree - Unintentional | 56.03-A |
| Homicide Definitions | 56.04 |
| Voluntary Manslaughter | 56.05 |
| Involuntary Manslaughter | 56.06 |
| Involuntary Manslaughter - Driving Under The Influence . . . | 56.06-A |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|---|---------|
| Vehicular Homicide | 56.07 |
| Aggravated Vehicular Homicide | 56.07-A |
| Vehicular Battery | 56.07-B |
| Assisting Suicide | 56.08 |
| Unintended Victim - Transferred Intent | 56.09 |
| Criminal Abortion | 56.10 |
| Criminal Abortion - Justification | 56.11 |
| Assault | 56.12 |
| Assault Of A Law Enforcement Officer | 56.13 |
| Aggravated Assault | 56.14 |
| Aggravated Assault Of A Law Enforcement Officer | 56.15 |
| Battery | 56.16 |
| Domestic Battery | 56.16-A |
| Battery Against A School Employee | 56.16-B |
| Battery Against A Law Enforcement Officer | 56.17 |
| Aggravated Battery | 56.18 |
| Criminal Injury To Person | 56.18-A |
| Aggravated Battery Against A Law Enforcement Officer .. | 56.19 |
| Unlawful Interference With A Firefighter | 56.20 |
| Attempted Poisoning | 56.21 |
| Permitting Dangerous Animal To Be At Large | 56.22 |
| Criminal Threat | 56.23 |
| Criminal Threat - Adulteration Or Contamination Of Food Or Drink | 56.23-A |
| Aggravated Criminal Threat | 56.23-B |
| Kidnapping | 56.24 |
| Aggravated Kidnapping | 56.25 |
| Interference With Parental Custody | 56.26 |
| Aggravated Interference With Parental Custody By Parent's Hiring Another | 56.26-A |
| Aggravated Interference With Parental Custody By Hiree .. | 56.26-B |
| Aggravated Interference With Parental Custody - Other Circumstances | 56.26-C |
| Interference With The Custody Of A Committed Person ... | 56.27 |
| Criminal Restraint | 56.28 |
| Mistreatment Of A Confined Person | 56.29 |
| Robbery | 56.30 |
| Aggravated Robbery | 56.31 |
| Blackmail | 56.32 |
| Disclosing Information Obtained In Preparing Tax Returns . | 56.33 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|--|-------|
| Defense To Disclosing Information Obtained In | |
| Preparing Tax Returns | 56.34 |
| Aircraft Piracy | 56.35 |
| Hazing | 56.36 |
| Mistreatment Of A Dependent Adult | 56.37 |
| Affirmative Defense To Mistreatment Of A Dependent Adult | 56.38 |
| Stalking | 56.39 |
| Unlawfully Exposing Another To A Communicable Disease | 56.40 |
| Injuring A Pregnant Woman | 56.41 |
| Injury To A Pregnant Woman By Vehicle | 56.42 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.00-A CAPITAL MURDER

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

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

1. That the defendant intentionally killed _____.
2. That such killing was done with premeditation.
3. (a) That such killing was done in the commission of a (kidnapping) (aggravated kidnapping) when the (kidnapping) (aggravated kidnapping) was committed with the intent to hold _____ for ransom;
or
(b) That such killing was done pursuant to a contract or agreement to kill _____;
or
(c) That the defendant was an inmate or prisoner (confined in a state correctional institution) (confined in a community correctional institution) (confined in a jail) (in the custody of an officer or employee of a [state correctional institution] [community correctional institution] [jail]);
or
(d) That _____ was a victim of (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy), and such killing was done in the commission of or subsequent to such (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy);
or
(e) That _____ was a law enforcement officer; [Law enforcement officer means any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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."

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 (Okla. 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 (Okla. Cr. 1989), noted the unconstitutional vagueness problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; and 'cruel' means pitiless or

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 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. [A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.]
and/or
10. 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

K.S.A. 21-4626 is not an exclusive list of mitigating factors. In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the United States Supreme Court held that under the Georgia statute, once a jury has determined that an aggravating factor exists, "[t]he jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the trial court." 428 U.S. 197.

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-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
CIRCUMSTANCES - THEORY OF COMPARISON**

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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 _____, _____, 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. 1993 Supp. 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. K.S.A. 21-4635. This instruction is retained for crimes committed prior to 1994.

K.S.A. 21-4636 was amended in 1999 to expand the definition of what is "an especially heinous, atrocious or cruel manner" of committing a Hard 50 crime. L. 1999, ch. 138, § 1. This definition is a guide for trial courts in deciding the sentence to be imposed pursuant to K.S.A. 21-4633 *et seq.* This amendment to K.S.A. 21-4636 should not be used in PIK 56.01-B.

Comment

The "Hard 40" sentence cases which involve crimes committed before July 1, 1994, are annotated under K.S.A. 21-4622 through 21-4631.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

and/or

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

and/or

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

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4625. This instruction should be included in all cases involving the mandatory minimum 40 year sentencing proceeding.

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

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

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

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. This instruction is retained for crimes committed prior to 1994.

K.S.A. 21-4636 was amended in 1999 to expand the definition of what is "an especially heinous, atrocious or cruel manner" of committing a Hard 50 crime. L. 1999, ch. 138, § 1. This definition is a guide for trial courts in deciding the sentence to be imposed pursuant to K.S.A. 21-4633 *et seq.* This amendment to K.S.A. 21-4636 should not be used in this instruction.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

"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 (Okla. Cr. 1989), noted the unconstitutionality vagueness problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; and 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others."

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4624(c) and 21-4626. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the mandatory 40 year sentencing proceeding.

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

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. This instruction is retained for crimes committed prior to 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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. 1993 Supp. 21-4625.

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. 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).

**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. K.S.A. 21-4635. 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

If you find beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall recommend a mandatory minimum term of 40 years. If you recommend that the defendant shall serve a mandatory minimum term of 40 years, you must designate upon the verdict form with particularity the aggravating circumstances which you found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances, then it is your duty to return a verdict of life imprisonment with parole eligibility in 15 years.

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4624(5).

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. This instruction is retained for crimes prior to 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

**The verdict forms provide the following alternative
verdicts:**

- A. Life imprisonment with the defendant eligible for
parole after 15 years;**
- or**
- B. Life imprisonment with the defendant eligible for
parole after 40 years.**

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4624(5).

Effective July 1, 1994, the decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. This instruction is retained for crimes committed prior to 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.02 MURDER IN THE FIRST DEGREE - FELONY MURDER

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

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

1. That the defendant (or another) killed _____;
2. That such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) _____; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

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

Notes on Use

For authority, see K.S.A. 21-3401. Felony murder is an off-grid person felony.

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

Where there is some indication that a participant in the felony, other than the defendant, may actually have caused the victim's death, the parenthetical in the first paragraph may be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

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

Felony murder is not a lesser included offense of premeditated murder. *State v. McKinney*, 265 Kan. 104, 110, 961 P.2d 1 (1998).

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

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

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

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

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

In a felony-murder case, evidence of who the triggerman is irrelevant and all participants are principals. *State v. Myrick & Nelms*, 228 Kan. 406, 416, 616 P.2d 1066 (1980); *State v. Littlejohn*, 260 Kan. 821, 925 P.2d 839 (1996).

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

In determining whether a killing occurs in the commission of the underlying felony, factors to be considered are time, distance, and the causal relationship between the underlying felony and the killing. *State v. Kaesontae*, 260 Kan. 386, 920 P.2d 959 (1996).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.02-A MURDER IN THE FIRST DEGREE AND FELONY
MURDER - ALTERNATIVES**

In this case, the State has charged the defendant with one offense of murder in the first degree and has introduced evidence on two alternate theories of proving this crime.

The State may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed _____ and that such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) _____ or in the alternative by proving beyond a reasonable doubt that the defendant killed _____ intentionally and with premeditation, as fully set out in these instructions.

Where evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict.

In Instruction No. _____, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of felony murder, that is the killing of a person (in the commission of) (in an attempt to commit) (in flight from [committing] [attempting to commit]) _____.

In Instruction No. _____, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of premeditated murder.

If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree on both theories, then you must enter a verdict of not guilty.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

OR

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree, then you must consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter).]

Notes on Use

For authority, see K.S.A. 21-3401. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence include both felony murder and premeditated murder, this instruction must be given in addition to PIK 3d 56.01, Murder in the First Degree, and PIK 3d 56.02, Murder in the First Degree - Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. See PIK 3d 69.01, Murder in the First Degree With Lesser Included Offenses.

Comment

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the State may proceed on both theories. The defendant is entitled to notice that the State is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978); *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The State is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, in _____ County, Kansas.

Notes on Use

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

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

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

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

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

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

(b) Deliberately and with premeditation.

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

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

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

(c) Willfully.

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

(d) **Intentionally.**

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

For authority, see K.S.A. 21-3201(b). See also, *State v. Stafford*, 223 Kan. 62, 65, 573 P.2d 970 (1977).

(e) **Heat of Passion.**

Heat of passion means any intense or vehement emotional excitement which was spontaneously provoked from circumstances. Such emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection.

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

(f) **Reckless.**

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.06-A INVOLUNTARY MANSLAUGHTER - DRIVING UNDER THE INFLUENCE

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

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

1. That the defendant unintentionally killed _____;

2. That it was done (in the commission of) (while attempting to commit) (while in flight from [committing][attempting to commit]) the act of operating any vehicle in this state

(a) While under the influence of (alcohol)(a drug)(a combination of drugs)(a combination of alcohol and any drug[s]) to a degree that rendered (him)(her) incapable of safely driving a vehicle;
and/or

(b) While having an alcohol concentration in (his)(her) blood of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle];

The phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood)(210 liters of breath).

and/or

(c) By a person who is a habitual user of any (narcotic) (hypnotic)(sommifacient)(stimulating) drug; and

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

Notes on Use

For authority, see K.S.A. 21-3442. Involuntary manslaughter while driving under the influence is a severity level 4, person felony. See also, PIK 3d 70.01, Traffic

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.07 VEHICULAR HOMICIDE

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

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

- 1. That the defendant unintentionally killed _____ by the operation of (an automobile) (an airplane) (a motorboat) (other motor vehicle);**
- 2. That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and**
- 3. That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances; and**
- 4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3405. Vehicular homicide is a class A, person misdemeanor.

Comment

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the Court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

Where the homicide is unintentional and caused by the operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter, K.S.A. 21-3404. But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary

PATTERN INSTRUCTIONS FOR KANSAS 3d

manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978); *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). See PIK 3d 56.06, Involuntary Manslaughter.

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

In *State v. Boydston*, 4 Kan. App. 2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The Court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.07-A AGGRAVATED VEHICULAR HOMICIDE

The statute upon which this instruction was based (K.S.A. 21-3405a) has been repealed, effective July 1, 1993. See PIK 3d 56.06, Involuntary Manslaughter.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.07-B VEHICULAR BATTERY

The statute upon which this instruction was based (K.S.A. 21-3405b) has been repealed, effective July 1, 1993.

See PIK 3d 56.18, Aggravated Battery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.10 CRIMINAL ABORTION

The statute upon which this instruction was based (K.S.A. 21-3407(1)) has been repealed, effective July 1, 1993.

See L. 1992, ch. 183, § 9.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.11 CRIMINAL ABORTION - JUSTIFICATION

Notes on Use

See PIK 3d 56.10, Criminal Abortion.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.12 ASSAULT

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

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

- 1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3408. Assault is a class C person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER

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

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

1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;
2. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That _____ was engaged in the performance of (his)(her) duty; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3409. Assault of a law enforcement officer is a class A, person misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, PIK 3d 56.12, Assault, should be given.

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

Comment

See Comment to PIK 3d 56.12, Assault.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.14 AGGRAVATED ASSAULT

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

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

- 1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;**
- 2. (a) That the defendant used a deadly weapon;
or
(b) That the defendant was disguised in a manner designed to conceal identity;
or
(c) That the defendant did so with intent to commit _____, a felony; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

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

Notes on Use

For authority, see K.S.A. 21-3410. Aggravated assault is a severity level 7, person felony. If a firearm is used, a sentence of imprisonment is presumed although the court may impose an optional nonprison sentence upon certain findings. L. 1992, ch. 239, § 4(h), as amended by § 254 of 1993 Senate Bill No. 423.

Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, instruction on assault should be included. See PIK 3d 56.12, Assault.

Under circumstances when the phrase "deadly weapon" should be defined, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

Where element 2(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.15 AGGRAVATED ASSAULT OF A LAW ENFORCEMENT OFFICER

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

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

1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;
2. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That _____ was engaged in the performance of (his)(her) duty;
4. (a) That the defendant used a deadly weapon;
or
(b) That the defendant was disguised in a manner designed to conceal identity;
or
(c) That the defendant did so with intent to commit _____, a felony; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

No bodily contact is necessary.

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

PIK 3d 56.12, Assault, should be given.

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

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

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

Comment

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

See Comment to PIK 3d 56.14, Aggravated Assault.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.16 BATTERY

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.16-A DOMESTIC BATTERY

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

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

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

or

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.16-B BATTERY AGAINST A SCHOOL EMPLOYEE

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

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

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

or

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

2. That _____ was a school employee;

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

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

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

or

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

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

or

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

or

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

or

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

or

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Notes on Use

For authority, see K.S.A. 21-3413. Battery against a state, county or city law enforcement officer is a class A, person misdemeanor. Battery against a state, city or county correctional officer or employee, a juvenile correctional facility officer or employee, or a juvenile detention facility officer or employee is a severity level 5, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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,

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.18-A CRIMINAL INJURY TO PERSON

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) another person;
or
(b) That the defendant intentionally caused bodily harm to another person (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);
or
(c) That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted);
2. That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;
3. That _____ was engaged in the performance of (his)(her) duty; and
4. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3415. Battery against a law enforcement officer, as defined by K.S.A. 21-3413, and Battery, as defined by K.S.A. 21-3412, are lesser included offenses and where the evidence warrants it, PIK 3d 56.17, Battery Against A Law Enforcement Officer, and PIK 3d 56.16, Battery, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.20 UNLAWFUL INTERFERENCE WITH A FIREFIGHTER

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

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

1. That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;
or
That the defendant knowingly and intentionally interfered with _____;
or
That the defendant knowingly and intentionally (obstructed) (interfered with) (impeded) the efforts of _____ to reach the location of a fire;
2. That _____ was a firefighter engaged in the performance of (his)(her) duties; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3416. Unlawful interference with a firefighter is a class B, person misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.21 ATTEMPTED POISONING

The statute upon which this instruction was based (K.S.A. 21-3417) has been repealed, effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.22 PERMITTING DANGEROUS ANIMAL TO BE AT LARGE

The defendant is charged with the crime of permitting a dangerous animal to be at large. The defendant pleads not guilty.

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

1. That the defendant was the owner or custodian of an animal of a dangerous or vicious nature;
2. That the defendant knew of such nature;
3. That the defendant (permitted the animal to go at large) (kept such animal without taking ordinary care to restrain it); and
4. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3418. Permitting a dangerous animal to be at large is a class B misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under L. 1992, ch. 239, § 10.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.23 CRIMINAL THREAT

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

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

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

or

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

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

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

Notes on Use

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

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.23-A CRIMINAL THREAT - ADULTERATION OR
CONTAMINATION OF FOOD OR DRINK**

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

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

1. That the defendant threatened to adulterate or contaminate a (food) (beverage) (public water supply); and
2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

[Under this instruction, a statement that defendant has already committed the act described in Claim No. 1 is the same as a threat to commit the act.]

Notes on Use

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

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

Comment

The 1984 Legislature added the crime defined by this instruction to former K.S.A. 21-3419. Note that unlike a threat to commit violence, this crime requires no specific intent.

The Committee has grave reservations about the validity of the amendment because of the lack of any required intent to affect other persons, and also because of the potential ambiguity in the term "adulterate."

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.23-B AGGRAVATED CRIMINAL THREAT

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

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

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

or

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

- 3. That a ([public][commercial][industrial] building) (place of assembly)(facility of transportation) was evacuated as a result of the threat; and**
- 4. That the loss of productivity measured by the total wages and salaries of all persons evacuated as a result of the threat was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and**
- 5. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3419a. Aggravated criminal threat is a severity level 6 person felony when the loss of productivity measured by the total wages and salaries of all persons evacuated as a result of the threat is less than \$500; a severity level 5 person felony when the loss of productivity is at least \$500 but less than \$25,000; a severity level 4 person felony when the loss of productivity equals or exceeds \$25,000.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.24 KIDNAPPING

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

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

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

Notes on Use

For authority, see K.S.A. 21-3420. Kidnapping is a severity level 3, person felony.

Comment

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

The "taking or confinement" requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping. The word "facilitate" means something more than just to make more convenient. "To facilitate" must have

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.25 AGGRAVATED KIDNAPPING

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

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

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

Notes on Use

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

56.26 INTERFERENCE WITH PARENTAL CUSTODY

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

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

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

Notes on Use

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3422a. Aggravated interference with parental custody is a severity level 7, person felony. Considering the various alternatives, the Committee is of the opinion that separate instructions would be more feasible and clearer to juries than one instruction with all alternative elements. PIK 3d 56.26-A is applicable where the defendant is the non-custodial parent who hires another to interfere with parental custody. PIK 3d 56.26-B, Aggravated Interference with Parental Custody by Hiree, is applicable when the person hired to interfere with parental custody is the defendant, and PIK 3d 56.26-C, Aggravated Interference with Parental Custody - Other Circumstances, would apply to any person, parent or otherwise, provided one of the elements of paragraph 5 is present.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

Note that the misdemeanor charge (PIK 3d 56.26, Interference with Parental Custody) includes the element of "intent to detain or conceal such child," whereas the language of the felony offense states "when done with the intent to deprive of custody. . ." The Committee has retained the language of the respective statutes, although it would appear that "intent to deprive" and "intent to detain or conceal" are synonymous as any intent to detain or conceal implies intent to deprive.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.26-B AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIREE

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

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

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

Notes on Use

For authority, see K.S.A. 21-3422a. Aggravated Interference with parental custody by hiree is a severity level 7, person felony. See PIK 3d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Comment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY - OTHER CIRCUMSTANCES

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

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

1. That _____ was a child under 16 years of age;
2. That the child was in the custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to deprive _____ of the custody of the child;
5. That the defendant has previously been convicted of interference with parental custody;

or

That the defendant took the child outside the state without the consent of _____ (or the court);

or

That the defendant, after lawfully taking the child outside the state while exercising visitation or custody rights, refused to return the child at the expiration of these rights;

or

That the defendant (refused to return) (impeded the return) of the child at the expiration of visitation or custody rights outside the state;

or

That the defendant detained or concealed the child in a place unknown to _____, either inside or outside this state; and

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Comment

See PIK 3d 56.26-A, Aggravated Interference with Parental Custody by Parent's Hiring Another, for Notes on Use and Comment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON

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

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

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

Notes on Use

For authority, see K.S.A. 21-3423. Interference with the custody of a committed person is a class A, nonperson misdemeanor.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.28 CRIMINAL RESTRAINT

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

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

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

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.29 MISTREATMENT OF A CONFINED PERSON

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

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

1. That the defendant was (a law enforcement officer) (a person in charge of or employed by the owner or operator of a [correctional institution] [hospital] [nursing home]);
2. That the defendant (intentionally abused) (neglected) (ill-treated) _____;
3. That _____ was (physically disabled) (mentally ill) (detained or confined involuntarily); and
4. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3425. Mistreatment of a confined person is a class A, person misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.30 ROBBERY

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

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

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

Notes on Use

For authority, see K.S.A. 21-3426. Robbery is a severity level 5, person felony.

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

The definitions of bodily harm used in aggravated kidnapping cases are appropriate for use in differentiating between aggravated robbery and robbery. Some trivial injuries can happen in the course of a robbery, but bodily harm that leaves permanent scarring or unnecessary acts of violence committed upon a victim transform the robbery into aggravated robbery. *State v. Bryant*, 22 Kan. App. 2d 732, 922 P.2d 1118 (1996).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.31 AGGRAVATED ROBBERY

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3427. Aggravated robbery is a severity level 3, person felony. Robbery as defined by K.S.A. 21-3426 is a lesser included offense and where the evidence warrants it PIK 3d 56.30, Robbery, should be given.

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

Comment

See Comment to PIK 3d 56.30, Robbery.

In *State v. Mitchell*, 234 Kan. 185, 190, 672 P.2d 1 (1983), the Court approved the use of "deadly weapon" as being synonymous with the statutory use of "dangerous weapon." See also, *State v. Davis*, 227 Kan. 174, 605 P.2d 572 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

The definitions of bodily harm used in aggravated kidnapping cases are appropriate for use in differentiating between aggravated robbery and robbery. Some trivial injuries can happen in the course of a robbery, but bodily harm that leaves permanent scarring or unnecessary acts of violence committed upon a victim transform the robbery into aggravated robbery. *State v. Bryant*, 22 Kan. App. 2d 732, 922 P.2d 1118 (1996).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.32 BLACKMAIL

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

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

- 1. That the defendant threatened to communicate (accusations) (statements) about _____ that would subject _____ to public (ridicule) (contempt) (degradation);**
- 2. That the defendant did so to ([gain] [attempt to gain] something of value from _____) (compel _____ to act against [his][her] will); and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3428. Blackmail is a severity level 7, nonperson felony. The elements of this crime were modified effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.33 DISCLOSING INFORMATION OBTAINED IN PREPARING TAX RETURNS

The defendant is charged with the crime of disclosing information obtained in preparing tax returns. The defendant pleads not guilty.

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

1. That the defendant was a (person, firm, corporation, association, partnership, joint venture or any employee therefor) engaged in the business of (the preparation of federal or state income tax returns) (assisting taxpayers in preparing federal or state income tax returns);
2. That the defendant disclosed or used for commercial purposes any information obtained in assisting taxpayers in the preparation of federal or state income tax returns; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

A person is engaged in the business of preparing federal or state income tax returns or in the business of assisting taxpayers in preparing such returns if (he)(she) advertises or gives publicity to the effect that (he)(she) prepares or assists others in the preparation of such returns or prepares or assists others in the preparation of such returns for compensation.

Notes on Use

For authority, see K.S.A. 21-3430. Disclosing information obtained in preparing tax returns is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.34 DEFENSE TO DISCLOSING INFORMATION
OBTAINED IN PREPARING TAX RETURNS**

It is a defense to the charge of disclosing information obtained in preparing tax returns that the defendant disclosed such information (with the separate written consent of the taxpayer) (under a state or federal tax law expressly authorizing [him][her] to do so) (as a necessary element in the preparation of the tax return) (pursuant to a court order).

Notes on Use

For authority, see K.S.A. 21-3430. In addition to the above defense, K.S.A. 21-3430 provides that contacting a taxpayer to obtain his or her written consent to disclosure does not violate this statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.35 AIRCRAFT PIRACY

The statute upon which this instruction was based (K.S.A. 21-3433) has been repealed, effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.36 HAZING

The defendant is charged with the crime of (promoting) (permitting) hazing. The defendant pleads not guilty.

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

1. That the defendant is a social or fraternal organization;
2. That the defendant participated in (coercing) (demanding) (encouraging) another person _____ to perform as a condition of membership in a social or fraternal organization, any act which could reasonably be expected to result in great bodily harm, disfigurement or death;

or

That the defendant participated in (coercing) (demanding) (encouraging) another person _____ to perform as a condition of membership in a social or fraternal organization, any act in a manner whereby great bodily harm, disfigurement or death could be inflicted;

3. That the defendant did so purposely and intentionally, realizing the imminence of danger, and with a reckless disregard, indifference or unconcern for the consequences; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3434. Promoting or permitting hazing is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.37 MISTREATMENT OF A DEPENDENT ADULT

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

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

1. That the defendant knowingly and intentionally inflicted (physical injury) (unreasonable confinement) (cruel punishment) upon _____;

or

That the defendant knowingly and intentionally took unfair advantage of _____'s (physical) (financial) resources for another individual's (personal) (financial) advantage by the use of (undue influence) (coercion) (harassment) (duress) (deception) (false pretense);

or

That the defendant knowingly and intentionally (omitted) (deprived) _____ of (treatment) (goods) (services) necessary to maintain the (physical) (mental) health of _____;

2. That _____ was a dependent adult; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.38 AFFIRMATIVE DEFENSE TO MISTREATMENT OF A
DEPENDENT ADULT**

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

Notes on Use

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.39 STALKING

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

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

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

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

This statute was amended by the Legislature in 1994 and 1995. Please consult the 1993 Stalking instruction for offenses between July 1, 1993 and June 30, 1994. The 1994 statute was declared unconstitutional in *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

The bracketed definitions should be given when harassment is alleged.

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.40 UNLAWFULLY EXPOSING ANOTHER TO A COMMUNICABLE DISEASE

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

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

1. That the defendant knew (he)(she) was infected with _____, a life threatening communicable disease;
2. That the defendant:
engaged in sexual intercourse or sodomy with another individual;
or
sold or donated defendant's blood, blood products, semen, tissue, organs, or other body fluids;
or
shared with another individual a hypodermic needle or syringe for the introduction of drugs or other substance into the other individual's body;
or
shared with another individual a hypodermic needle, syringe, or both, for the withdrawal of blood or body fluids from the other individual's body;
3. That the defendant intended to expose (that individual) (the recipient) (another person) to a life threatening communicable disease; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-3435. Unlawfully exposing another to a communicable disease is a severity level 7, person felony. The statute provides that neither sexual intercourse nor sodomy include penetration by any object other than the male penis.

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

56.41 INJURING A PREGNANT WOMAN

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

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

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

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

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.42 INJURY TO A PREGNANT WOMAN BY VEHICLE

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

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

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

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

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

Notes on Use

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 57.00

SEX OFFENSES

| | PIK Number |
|---|---------------|
| Rape | 57.01 |
| Rape - Defense Of Marriage | 57.01-A |
| Sexual Intercourse - Definition | 57.02 |
| Rape, Credibility Of Prosecutrix's Testimony | 57.03 |
| Rape, Corroboration Of Prosecutrix's Testimony Unnecessary | 57.04 |
| Indecent Liberties With A Child | 57.05 |
| Indecent Liberties With A Child - Sodomy | 57.05-A |
| Affirmative Defense To Indecent Liberties With A Child .. | 57.05-B |
| Aggravated Indecent Liberties With A Child | 57.06 |
| Affirmative Defense To Aggravated Indecent Liberties With A Child | 57.06-A |
| Criminal Sodomy | 57.07 |
| Affirmative Defense To Criminal Sodomy | 57.07-A |
| Aggravated Criminal Sodomy - Nonmarital Child Under 14 | 57.08 |
| Aggravated Criminal Sodomy - Causing Child Under 14 To Engage In Sodomy With A Person Or An Animal . | 57.08-A |
| Aggravated Criminal Sodomy - No Consent | 57.08-B |
| Affirmative Defense To Aggravated Criminal Sodomy ... | 57.08-C |
| Adultery | 57.09 |
| Lewd And Lascivious Behavior | 57.10 |
| Enticement Of A Child | 57.11 |
| Indecent Solicitation Of A Child | 57.12 |
| Sexual Exploitation Of A Child | 57.12-A |
| Promoting Sexual Performance By A Minor | 57.12-B |
| Aggravated Indecent Solicitation Of A Child | 57.13 |
| Prostitution | 57.14 |
| Promoting Prostitution | 57.15 |
| Promoting Prostitution - Child Under 16 | 57.15-A |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|---|---------------|
| Habitually Promoting Prostitution | 57.16 |
| Patronizing A Prostitute | 57.17 |
| Sex Offenses - Definitions | 57.18 |
| Sexual Battery | 57.19 |
| Aggravated Sexual Battery - Force Or Fear | 57.20 |
| Aggravated Sexual Battery - Child Under 16 | 57.21 |
| Aggravated Sexual Battery - Dwelling | 57.22 |
| Aggravated Sexual Battery - Victim Unconscious Or Physically Powerless | 57.23 |
| Aggravated Sexual Battery - Mental Deficiency Of Victim | 57.24 |
| Aggravated Sexual Battery - Intoxication | 57.25 |
| Unlawful Sexual Relations With Inmates, Etc. | 57.26 |
| Unlawful Voluntary Sexual Relations | 57.27 |
| RESERVED FOR FUTURE USE | 57.28 - 57.39 |
| Sexual Predator/Civil Commitment | 57.40 |
| Sexual Predator/Civil Commitment- Definitions | 57.41 |
| Sexual Predator/Civil Commitment - Burden Of Proof | 57.42 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.01 RAPE

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

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

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

Comment

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

Whether a victim is overcome by fear, for purposes of K.S.A. 21-3502(a)(1)(A), is a question to be resolved by the fact finder. The force required to sustain a rape conviction does not require a rape victim to resist the assailant to the point of becoming the victim of a battery or aggravated assault nor does Kansas law require that a rape victim be physically overcome by force in the form of beating or physical restraint in addition to forced sexual intercourse. See *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Cantrell*, 234 Kan. 426, 434, 673 P.2d 1147 (1983), the Kansas Supreme Court held that the crime of rape under K.S.A. 21-3502 did not require a specific intent to commit rape. Language to the contrary in *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974), and in *State v. Carr*, 230 Kan. 322, 634 P.2d 1104 (1981) was overruled. Since rape is a general intent crime and PIK 3d 57.01 follows the language of the statute, the lack of the word "intentionally" in the instruction is proper. *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997).

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

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

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

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

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

The crime of indecent liberties with a child is a lesser included offense of rape where the evidence establishes that the defendant forcibly raped a female under 16 years of age. *State v. Lilley*, 231 Kan. 694, 696, 647 P.2d 1323 (1982); and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.01-A RAPE - DEFENSE OF MARRIAGE

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

Notes on Use

For authority, see K.S.A. 21-3502(a)(2). This instruction should be given only with respect to a prosecution of rape of a child under 14 years of age pursuant to 21-3502(a)(2) and not in cases of nonconsensual sexual intercourse.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.02 SEXUAL INTERCOURSE - DEFINITION

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

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

- (a) Generally recognized health care practices; or**
- (b) a body cavity search conducted in accordance with the law.)**

Notes on Use

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

Comment

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

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

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

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

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

57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

The Committee recommends that there be no separate instruction given.

Comment

The Committee believes PIK 3d 52.09, Credibility of Witnesses, adequately covers the credibility of the testimony of the prosecutrix. See *State v. Loomer*, 105 Kan. 410, 184 Pac. 723 (1919) and 65 Am. Jur. 2d, Rape §§ 86-87.

The credibility of the prosecutrix's testimony is a question of fact for the jury. See *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973), a prosecution for rape and indecent liberties with a child; *State v. Griffin*, 210 Kan. 729, 504 P.2d 150 (1972), a prosecution for indecent liberties with a child; *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971), a prosecution for forcible rape; and *State v. Wade*, 203 Kan. 811, 457 P.2d 158 (1969), a prosecution for burglary and attempted forcible rape.

In *Nichols*, the Supreme Court approved the trial court's refusal to give a requested cautionary instruction on the testimony of a 13-year-old prosecutrix where the instructions as a whole were adequate.

The rape shield statute, as contained in K.S.A. 1983 Supp. 21-3525, was originally enacted into law in 1976 in K.S.A. 60-447a. The statute prohibits the admission into evidence of previous sexual conduct of the victim unless its relevancy has been determined at a pre-trial hearing. It requires the defendant to file a written motion within seven days before the commencement of the trial if such inquiry will be made and requires the court to have a hearing on the relevancy of the proffered evidence. The statute was expanded by the Kansas Legislature in 1983 to cover several additional sex crimes. Reference to the statute should be made to determine whether the crime charged is covered by the statute. The statute was further held to be constitutional in *In re Nichols*, 2 Kan. App. 2d 431, 580 P.2d 1370 (1978); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); and in *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979). Furthermore, in *State v. Cook*, 224 Kan. 132, 135, 578 P.2d 257 (1978), the Supreme Court interpreted the provisions of K.S.A. 60-422(c) to prohibit cross-examination on sexual morality as it was not relevant to the honesty or veracity of a witness.

In *State v. Williams*, 235 Kan. 485, 681 P.2d 660 (1984), the Supreme Court held that a prosecutrix could not be cross-examined as to prior sexual contact with the accused when the provisions of the rape shield statute, K.S.A. 1983 Supp. 21-

PATTERN INSTRUCTIONS FOR KANSAS 3d

3525(2), had not been complied with because the affidavit was inadequate. The Court further held that the incident was irrelevant because it was too remote.

To stop further sexual assaults upon her, the statement of the prosecutrix that she had gonorrhea did not justify inquiry into her prior history of gonorrhea in order to attack her credibility. *State v. Bressman*, 236 Kan. 296 P.2d 901 (1984). A ruling that excludes evidence of a victim's prior sexual conduct will be overturned only if the ruling is a clear abuse of discretion. See *State v. Zuniga*, 237 Kan. 788, 793, 703 P.2d 805 (1985).

Where consent is the sole issue on a rape charge, the truthfulness of the complaining witness' testimony is an essential element of the State's prosecution. Therefore, it is prejudicial error to exclude rebuttal evidence bearing on the credibility of the complaining witness, even when such testimony is collateral to the issue at hand. *State v. Beans*, 247 Kan. 343, 800 P.2d 145 (1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.05 INDECENT LIBERTIES WITH A CHILD

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

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

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

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

or

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

2. That _____ was then a child 14 or more years of age but less than 16 years of age; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3503. If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00.

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

age is rape under K.S.A. 21-3502(b). Sexual intercourse with children 14 to 16 years of age and "lewd fondling or touching" of children under 14 years of age are both covered by K.S.A. 21-3504, Aggravated indecent liberties with a child. See PIK 3d 57.06, Aggravated Indecent Liberties With a Child.

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

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the State to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonser*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App. 2d 349, 578 P.2d 1147 (1978).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

The decision of the trial court in permitting a mother to testify to statements made by her 4-year-old child who was the victim of the crime of indecent liberties with a child was upheld in *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983). The Court determined that the testimony was admissible under K.S.A. 60-460(d)(2). Since that holding, the Legislature has enacted K.S.A. 60-460(dd) that specifically permits such testimony when certain findings are made by the trial court.

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Supreme Court held that the child hearsay exception, K.S.A. 60-460(dd), did not violate the defendant's Sixth Amendment right to confrontation. The case also lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. See also, *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

The authority statute was further amended in 1987 to enlarge the crime to include solicitation of a child to engage in any lewd fondling or touching of another person.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties. In 1992, the Legislature deleted subsection (1)(b) from K.S.A. 21-3503; therefore, these offenses are no longer identical. Both Criminal sodomy, K.S.A. 21-3505, and Aggravated indecent liberties with a child, K.S.A. 21-3504, include sexual relations with a child at least 14 but less than 16 years of age. However, K.S.A. 21-3504 specifies "sexual intercourse" while K.S.A. 21-3505 specifies oral or anal sexual relations.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.05-A INDECENT LIBERTIES WITH A CHILD -
SODOMY**

This instruction has been deleted due to the 1985 amendment of K.S.A. 21-3503. The Legislature deleted the section in K.S.A. 21-3503 which referred to sodomy since the crime of sodomy with a child was covered by K.S.A. 21-3506, Aggravated criminal sodomy. See PIK 3d 57.07, Criminal Sodomy and PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital Child Under 14.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.05-B AFFIRMATIVE DEFENSE TO INDECENT LIBERTIES WITH A CHILD

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

Notes on Use

For authority, see K.S.A. 21-3503(b). This instruction should be given only with respect to a prosecution of indecent liberties with a child in which the defendant is charged with:

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

Pursuant to K.S.A. 21-3503(b), this defense is not applicable to prosecutions in which the defendant is charged with soliciting the child to engage in any lewd fondling or touching of the person of another.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.07 CRIMINAL SODOMY

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

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

1. That the defendant engaged in sodomy with (another person of the same sex who was 16 or more years of age) (an animal); and

or

That the defendant engaged in sodomy with a child who was 14 or more years of age but less than 16 years of age; and

or

That the defendant caused a child 14 or more years of age but less than 16 years of age to engage in sodomy with (any person) (an animal); and

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

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

Notes on Use

For authority, see K.S.A. 21-3505. Criminal sodomy involving sexual relations between the defendant and a person of the same sex and 16 or more years of age or between the defendant and an animal is a class B, nonperson misdemeanor. Criminal sodomy with a child 14 or more years of age but less than 16 years of age is a severity level 3, person felony. For a definition of "sodomy", see K.S.A. 21-3501(2) and PIK 3d 57.18, Sex Offenses - Definitions.

If the crime is sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

Sodomy between a husband and wife or between consenting adults of the opposite sex is not a crime.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.07-A AFFIRMATIVE DEFENSE TO CRIMINAL SODOMY

It is a defense to the charge of criminal sodomy that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3505(b). This instruction should be given only with respect to a prosecution of criminal sodomy in which the defendant is charged with sodomy with a child (second alternative to paragraph 1). Pursuant to K.S.A. 21-3505(b), this defense is not applicable to prosecutions in which the defendant is charged with sodomy with a member of the same sex or with causing a child to engage in sodomy with any person or animal.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08 AGGRAVATED CRIMINAL SODOMY -
NONMARITAL CHILD UNDER 14**

The defendant is charged with aggravated criminal sodomy. The defendant pleads not guilty.

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

1. That the defendant engaged in sodomy with a child who was under 14 years of age; and

or

That the defendant caused a child under 14 years of age to engage in sodomy with (any person) (an animal); and

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

**Sodomy means: (See PIK 3d 57.18, Sex Offenses -
Definitions, for appropriate definition).**

Notes on Use

For authority, see K.S.A. 21-3506(a). Aggravated criminal sodomy is a severity level 2, person felony.

Comment

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

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989), the Court held that oral-genital stimulation between the tongue of a male and the genital area of a female is not sodomy under K.S.A. 21-3501(2). The Legislature amended the statute in L. 1990, ch. 149, § 2. A new definition of sodomy has been included in PIK 3d 57.18, Sex Offenses - Definitions.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08-A AGGRAVATED CRIMINAL SODOMY - CAUSING
CHILD UNDER FOURTEEN TO ENGAGE IN
SODOMY WITH A PERSON OR AN ANIMAL**

**This instruction has been consolidated into
PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital
Child Under 14.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.08-B AGGRAVATED CRIMINAL SODOMY - NO CONSENT

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

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

1. That the defendant engaged in sodomy with _____;

or

That the defendant caused _____ to engage in sodomy with (any person) (an animal);

2. That the act of sodomy was committed without the consent of _____ under circumstances when:

(a) (she)(he) was overcome by (force) (fear); and
or

(b) (she)(he) was unconscious or physically powerless; and
or

(c) (she)(he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and
or

(d) (she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and

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

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-3506(a)(3). The crime of aggravated criminal sodomy is a severity level 2, person felony.

If the crime involves sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

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

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

Use of an instruction that differed from PIK 3d 57.08-B was held erroneous in *State v. Castoreno*, 255 Kan. 401, 874 P.2d 1173 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.08-C AFFIRMATIVE DEFENSE TO AGGRAVATED
CRIMINAL SODOMY**

It is a defense to the charge of aggravated criminal sodomy that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3506(b). This instruction should be given only with respect to a prosecution of aggravated criminal sodomy in which the defendant is charged with engaging in sodomy with a child under 14 years of age (PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital Child Under 14, first alternative to paragraph 1). Pursuant to K.S.A. 21-3506(b), this defense is not applicable to prosecutions in which the defendant is charged with causing a child under 14 years of age to engage in sodomy with any person or animal or is charged with nonconsensual sodomy under K.S.A. 21-3506(a)(3).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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
_____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.*

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

57.12 INDECENT SOLICITATION OF A CHILD

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

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

1. That the defendant (enticed) (solicited) _____ to (commit) (submit to) an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);

or

That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter any (vehicle) (building) (room) (secluded place) with intent to commit an act of [(rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery)] [(upon) (with)] _____;

2. That _____ was then 14 or more years of age but less than 16 years of age; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: _____.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-3510. Indecent solicitation of a child is a severity level 7, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction.

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12 years of age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

The Legislature enlarged the definition of an unlawful sex act in 1983.

The provisions of K.S.A. 21-4619(c) were amended to provide that there shall be no expungement of convictions for the offense of indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) were amended to provide that a prosecution for the crime of indecent solicitation of a child must be commenced within five years after its commission.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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,

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

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

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

1. That the defendant (enticed) (solicited) _____ to (commit) (submit to) the act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);

or

That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter any (vehicle) (building) (room) (secluded place) with the intent to commit [(rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery)] [(upon) (with)] _____;

2. That _____ was then a child under the age of 14 years; and

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

The act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means: _____.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-3511. Aggravated indecent solicitation of a child is a severity level 6, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction. The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12 years of age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979). Note: K.S.A. 21-3511, as amended by L. 1992, ch. 298, provides that the child be under the age of 14 at the time of the crime.

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated indecent solicitation of a child. Furthermore, the provisions of K.S.A. 21-3106(2) provide that a prosecution for the crime of aggravated indecent solicitation of a child must be commenced within five years after its commission.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.14 PROSTITUTION

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

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

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.15 PROMOTING PROSTITUTION

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

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

The appropriate category of the offense should be selected.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.15-A PROMOTING PROSTITUTION - CHILD UNDER 16

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

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

1. That the defendant (procured _____ as a prostitute for a house of prostitution) (induced _____ to become a prostitute) (solicited a patron for _____, a prostitute) (procured _____, a prostitute, for a patron) [(procured transportation for) (paid for the transportation of) (transported) _____ with the intent of assisting or promoting _____'s engaging in prostitution];
2. That _____ was then under 16 years of age; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution of a prostitute under 16 years of age is a severity level 6, person felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.16 HABITUALLY PROMOTING PROSTITUTION

The statute upon which this instruction was based (K.S.A. 21-3514) was repealed in 1992. L. 1992, ch. 298. See PIK 3d 57.15, Promoting Prostitution.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.17 PATRONIZING A PROSTITUTE

The defendant is charged with the crime of patronizing a prostitute. The defendant pleads not guilty.

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

- 1. That the defendant knowingly (entered) (remained) in a house of prostitution with the intent to engage in (sexual intercourse) (sodomy) (an unlawful sexual act) with a prostitute; and**

or

That the defendant hired a prostitute to engage in (sexual intercourse) (sodomy) (an unlawful sexual act); and

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

The act of (sexual intercourse) (sodomy) (unlawful sexual act) means: _____.

Notes on Use

For authority, see K.S.A. 21-3515. Patronizing a prostitute is a class C misdemeanor. See PIK 3d 57.18, Sex Offenses - Definitions, for definition of sodomy or unlawful sexual act. See PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse.

Comment

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

57.18 SEX OFFENSES - DEFINITIONS

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

B. Unlawful sexual acts are defined as follows:

(a) Rape.

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

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

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

(b) Indecent liberties with a child.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(c) **Aggravated indecent liberties with a child.**

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

(d) **Sodomy.**

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

(e) Criminal sodomy.

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

(f) Aggravated criminal sodomy.

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

(g) Lewd and lascivious behavior.

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

(h) Sexual battery.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(i) Aggravated sexual battery.

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.19 SEXUAL BATTERY

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

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

1. That the defendant intentionally touched the person of _____;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That _____ was not the spouse of defendant;
4. That _____ did not consent to the touching;
5. That _____ was then 16 or more years of age; and
6. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3517. Sexual battery is a class A, person misdemeanor. The definition of a spouse, as contained in PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

Sexual battery is not a lesser included crime of aggravated kidnapping, attempted aggravated sodomy, or attempted rape. *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992).

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.20 AGGRAVATED SEXUAL BATTERY - FORCE OR FEAR

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

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

- 1. That the defendant intentionally touched the person of _____;**
- 2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;**
- 3. That _____ was then 16 or more years of age;**
- 4. That the touching was committed without the consent of _____ under circumstances when _____ was overcome by force or fear; and**
- 5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3518(a)(1). Aggravated sexual battery is a severity level 5, person felony.

Comment

Aggravated sexual battery is not a lesser included crime of rape. *State v. Gibson*, 246 Kan. 298, 787 P.2d 1176 (1990).

The State does not need to prove that the victim was physically harmed or that the victim had no freedom of movement to prove that the touching was not consensual. *State v. Blount*, 13 Kan. App. 2d 347, 770 P.2d 852 (1989).

The Court of Appeals in *Blount* also held that K.S.A. 21-3518 was not unconstitutionally vague or overbroad as the language put a person of ordinary intelligence on notice of the prohibited conduct.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.21 AGGRAVATED SEXUAL BATTERY - CHILD UNDER SIXTEEN

L. 1992, ch. 298 deleted this provision from K.S.A. 21-3518. See PIK 3d 57.05, Indecent Liberties with a Child and PIK 3d 57.06, Aggravated Indecent Liberties with a Child.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.22 AGGRAVATED SEXUAL BATTERY - DWELLING

L. 1992, ch. 298 deleted this provision from K.S.A. 21-3518. See PIK 3d 59.17, Burglary and PIK 3d 59.18, Aggravated Burglary.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.23 AGGRAVATED SEXUAL BATTERY - VICTIM UNCONSCIOUS OR PHYSICALLY POWERLESS

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

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

1. That the defendant intentionally touched the person of _____;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That _____ was then 16 or more years of age;
4. That the touching was done without the consent of _____ under circumstances when _____ was (unconscious) (physically powerless); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3518(a)(2). Aggravated sexual battery is a severity level 5, person felony.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.24 AGGRAVATED SEXUAL BATTERY - MENTAL DEFICIENCY OF VICTIM

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

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

1. That the defendant intentionally touched the person of _____;
2. That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;
3. That _____ was then 16 or more years of age;
4. That the touching was done without the consent of _____ under circumstances when _____ was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by, or was reasonably apparent to, the defendant; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

1. That the defendant intentionally touched the person of _____;
2. That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or another;
3. That _____ was then 16 or more years of age;
4. That the touching was done without the consent of _____ under circumstances when _____ was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.26 UNLAWFUL SEXUAL RELATIONS WITH INMATES,
ETC.**

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

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

1. The defendant engaged in consensual (sexual intercourse) (lewd fondling or touching) (sodomy) with _____;
2. That the defendant and _____ are not married;
- [3. That the defendant is an employee of (the Department of Corrections) (a contractor who is under contract to provide services in a correctional institution);
4. That _____ is an inmate;] and

OR

- [3. That the defendant is a parole officer;
4. That _____ has been released on (parole) (conditional release) (post-release supervision) and is under the direct supervision and control of the defendant;] and

OR

- [3. That the defendant is (a law enforcement officer) (an employee of a jail) (an employee of a contractor who is under contract to provide services in a jail); and
4. That _____ is a person 16 years of age or older who is confined by lawful custody to a jail;] and

OR

- [3. That the defendant is (a law enforcement officer) (an employee of a juvenile detention facility or sanctions house) (an employee of a contractor who is under contract to provide services in a juvenile detention facility or sanctions house); and
4. That _____ is a person 16 years of age or older who is confined by lawful custody to a juvenile detention facility or sanctions house;] and

PATTERN INSTRUCTIONS FOR KANSAS 3d

OR

- [3. That the defendant is an employee of (the Juvenile Justice Authority) (a contractor who is under contract to provide services in a juvenile correctional facility); and**
- 4. That _____ is a person 16 years of age or older who is confined by lawful custody to a juvenile correctional facility;] and**

OR

- [3. That the defendant is an employee of (the Juvenile Justice Authority) (a contractor who is under contract to provide direct supervision and offender control services to the Juvenile Justice Authority); and**
- 4. That _____ is a person 16 years of age or older (released on conditional release from a juvenile correctional facility under the direct supervision and control of the defendant) (placed in the custody of the Juvenile Justice Authority under the direct supervision and control of the defendant);] and**
- 5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, See K.S.A. 21-3520. Unlawful sexual relations with inmates, etc. is a severity level 10, person felony. For the definitions of "correctional institution," "inmate," and "parole officer," see K.S.A. 75-5202. For the definition of "postrelease supervision," see K.S.A. 21-4703. For the definitions of "juvenile detention facility," "juvenile correctional facility," and "sanctions house," see K.S.A. 38-1602.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.27 UNLAWFUL VOLUNTARY SEXUAL RELATIONS

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

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

1. That the defendant engaged in (sexual intercourse) (sodomy) (lewd fondling or touching) with (_____);
2. That (_____) is a child who is 14 years of age but less than 16 years of age at the time of the act;
3. That the defendant is less than 19 years of age and less than 4 years of age older than (_____);
4. That (_____) and the defendant are the only parties involved in the act;
5. That the defendant and (_____) are members of the opposite sex; and
6. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority see 1999 Laws of Kansas, Chapter 164, Section 38. Under this statute, sexual intercourse is a severity level 8, person felony; sodomy is a severity level 9 person felony; and lewd fondling or touching is a severity level 10, person felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.28 - 57.39 RESERVED FOR FUTURE USE.

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.40 SEXUAL PREDATOR/CIVIL COMMITMENT

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

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

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

OR

- 1. That the respondent has been convicted of _____;**
- 2. That the crime was sexually motivated; and**
- 3. That the respondent suffers from a (mental abnormality) (personality disorder) which makes the respondent likely to engage in repeat acts of sexual violence.**

Notes on Use

For authority, see K.S.A. 59-29a01, *et seq.* The first alternative should be used when the crime is specifically listed as a sexually violent offense under K.S.A. 59-29a02(e)(1) through (e)(12). The second alternative should be used when the crime is not specifically listed, but is alleged to be sexually motivated under K.S.A. 59-29a02(e)(13).

Comment

While designated a civil commitment, the burden of proof in this type of case is beyond a reasonable doubt. The matter may be tried to a jury of 12 pursuant to K.S.A. 22-3403, and the defendant is entitled to appointed counsel if indigent.

The legislature borrowed extensively from Washington State's Community Protection Act of 1990, codified at RCW 71.09. The Supreme Court of Washington upheld the constitutionality of the act in *In Re Young*, 122 Wash. 2d

PATTERN INSTRUCTIONS FOR KANSAS 3d

1, 857 P.2d 989 (1993). However, in *Young*, the court held inter alia that if the proceeding is brought against a person living in the community immediately prior to the initiation of proceedings, due process requires that the State plead and prove the existence of a recent overt act to support a "dangerousness" showing, citing the United States Supreme Court's holding in *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed. 2d 437 (1992). [Syl. 8, pp.1006-07; 1008-09] The Kansas Act, like the Washington legislation, does not require proof of a recent overt act.

In *Kansas v. Hendricks*, 521 U.S. ____, 138 L.Ed. 2d 501, 117 S.Ct. 2072 (1997), the United States Supreme Court reversed the Kansas Supreme Court and held that the Kansas sexually violent predator act's definition of mental abnormality satisfied substantive due process requirements and the act did not violate either the double jeopardy clause or the ex post facto clause of the Federal Constitution.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.41 SEXUAL PREDATOR/CIVIL COMMITMENT -
DEFINITIONS**

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

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

"Likely to engage in repeat acts of sexual violence" means the respondent's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**57.42 SEXUAL PREDATOR/CIVIL COMMITMENT -
BURDEN OF PROOF**

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 58.00

CRIMES AFFECTING FAMILY
RELATIONSHIPS AND CHILDREN

| | PIK Number |
|---|---------------|
| Bigamy | 58.01 |
| Affirmative Defense To Bigamy | 58.02 |
| Incest | 58.03 |
| Aggravated Incest | 58.04 |
| Abandonment Of A Child | 58.05 |
| Aggravated Abandonment Of A Child | 58.05-A |
| Nonsupport Of A Child | 58.06 |
| Nonsupport Of A Spouse | 58.07 |
| Criminal Desertion | 58.08 |
| Encouraging Juvenile Misconduct | 58.09 |
| Endangering A Child | 58.10 |
| Affirmative Defense To Endangering A Child | 58.10-A |
| Abuse Of A Child | 58.11 |
| Furnishing Alcoholic Liquor To A Minor | 58.12 |
| Furnishing Cereal Malt Beverage To A Minor | 58.12-A |
| Furnishing Alcoholic Beverages To A Minor For Illicit Purposes | 58.12-B |
| Furnishing Alcoholic Liquor To A Minor - Defense | 58.12-C |
| Furnishing Cereal Malt Beverage To A Minor - Defense .. | 58.12-D |
| Aggravated Juvenile Delinquency | 58.13 |
| Contributing To A Child's Misconduct Or Deprivation . . . | 58.14 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.01 BIGAMY

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

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

1. That the defendant entered into a marriage in the State of Kansas while married to another; and

or

That the defendant entered into a marriage in the State of Kansas with a person the defendant knew was the spouse of another; and

or

That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse while married to another at the time of the cohabitation; and

or

That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse whom the defendant knew was a spouse of another at the time of the cohabitation; and

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.02 AFFIRMATIVE DEFENSE TO BIGAMY

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

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.03 INCEST

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

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

1. That the defendant (married) (engaged in sexual intercourse with) (engaged in sodomy with) _____;
2. That _____ was a person 18 or more years of age;
3. That _____ was known to the defendant to be related to the defendant as biological (parent) (child) (grandparent of any degree) (grandchild of any degree) (brother) (sister) (half-brother) (half-sister) (uncle) (aunt) (nephew) (niece); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

(Sexual intercourse) (sodomy) means: _____

_____.

Notes on Use

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

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.04 AGGRAVATED INCEST

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

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

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

OR

1. That the defendant engaged in (sexual intercourse) (sodomy) with _____; or
That the defendant (engaged in lewd fondling or touching of the person of _____) (submitted to lewd fondling or touching of [his][her] person by _____) with the intent to arouse or to satisfy the sexual desires of either _____ or the defendant, or both;
2. That _____ was at least 16 years old but under 18 years old;
3. That the defendant knew that _____ was related to defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

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

As the facts require, reference should be made to PIK 3d 57.02, Sexual

PATTERN INSTRUCTIONS FOR KANSAS 3d

Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

Comment

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

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

Lewd fondling or touching has been defined as: "fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person and which is done with a specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977). Also refer to PIK 3d 57.05, Indecent Liberties with a Child, Notes on Use.

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

In *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), the Supreme Court compared the then existing elements of aggravated incest and indecent liberties with a child. The Court held that when a defendant is related to the victim as set forth in K.S.A. 21-3603(a), the State may charge the defendant with aggravated incest for engaging in the acts prohibited therein but not with indecent liberties with a child. 250 Kan. at 737. *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994). See also, *State v. Rowell*, 256 Kan. 200, 883 P.2d 1184 (1994).

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.05 ABANDONMENT OF A CHILD

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.05-A AGGRAVATED ABANDONMENT OF A CHILD

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.06 NONSUPPORT OF A CHILD

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

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

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

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

Notes on Use

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

Comment

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

One who is outside the state may be chargeable with nonsupport of a child within this state even though he or she did not know the child was within the state. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *In Re Fowles*, 89 Kan. 430, 131 Pac. 598 (1913).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Necessitous circumstances was defined in *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913), and was cited with approval in *State v. Knetzer*, supra. Compare with *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.07 NONSUPPORT OF A SPOUSE

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

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

- 1. That the defendant was the (wife) (husband) of _____;**
- 2. That the defendant willfully and without just cause failed to provide for the support of _____, who was in necessitous circumstances; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

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

Notes on Use

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

Comment

If the support claim is founded upon a common-law marriage, an instruction should be given that common-law marriages are recognized in this State, and as to what is necessary to prove a common-law marriage. The basic elements of a common-law marriage are: (1) capacity of the parties to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public. *Fleming v. Fleming*, 221 Kan. 290, 559 P.2d 329 (1977). The statute makes no reference to that type of marriage.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.08 CRIMINAL DESERTION

**The statute on which this instruction was based
(K.S.A. 21-3606) was repealed effective July 1, 1993.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.09 ENCOURAGING JUVENILE MISCONDUCT

The statute on which this instruction was based (K.S.A. 21-3607) was repealed effective July 1, 1978. L. 1978, ch. 123 § 3.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.10 ENDANGERING A CHILD

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

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

- 1. That the defendant intentionally and unreasonably caused or permitted _____ to be placed in a situation in which _____'s life, body or health might be injured or endangered;**
- 2. That _____ was then a child under the age of 18 years; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3608(a). Endangering a child is a class A, person misdemeanor. See K.S.A. 21-3608(b) for exception based on good faith selection of spiritual means for treatment, cure or care of a child.

Comment

The constitutionality of K.S.A. 21-3608(1)(b), [now K.S.A. 21-3608(a)] was upheld upon the finding that the purpose of the statute is to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common-sense interpretation, is not vague. *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981).

In *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), the Supreme Court held that the State is not required to prove that the defendant had any independent legal duty to the child.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.11 ABUSE OF A CHILD

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

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

1. That the defendant intentionally (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) (shook _____, which resulted in great bodily harm to) _____;
2. That _____ was a child under the age of 18 years; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3609. Abuse of a child is a severity level 5, person felony.

Comment

The above instruction was deemed to be sufficient in *State v. Carr*, 265 Kan. 608, 617, 963 P.2d 421 (1998).

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

After the *Lucas* and *Prouse* decisions, the Legislature amended K.S.A. 21-3401 to provide that felony murder includes a killing committed in the perpetration of abuse of a child. In 1993, the Legislature included abuse of a child in the list of inherently dangerous felonies for purposes of felony murder. See K.S.A. 21-3436. In *State v. Smallwood*, 264 Kan. 69, 955 P.2d 1209 (1998), the court held that a single instance of child abuse could be the underlying felony for a felony murder conviction.

In *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991), the Supreme Court held K.S.A. 21-3609 to be constitutional and that it does not require proof of a specific intent to injure. On July 1, 1995, K.S.A. 21-3609 was amended by inserting the words, "shaking which results in great bodily harm." After this amendment, the court was asked in *State v. Carr*, 265 Kan. 608, to revisit the constitutionality of the statute and concluded that the statute was not vague.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.12 FURNISHING ALCOHOLIC LIQUOR TO A MINOR

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

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

1. That the defendant directly or indirectly (sold alcoholic liquor to) (bought alcoholic liquor for) (gave alcoholic liquor to) (furnished alcoholic liquor to) _____;
2. That _____ was a person under the age of 21 years; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3610. Furnishing alcoholic liquor to a minor is a class B, person misdemeanor for which the minimum fine is \$200.

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.12-A FURNISHING CEREAL MALT BEVERAGE TO MINOR

The defendant is charged with the crime of furnishing cereal malt beverage to a minor. The defendant pleads not guilty.

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

- 1. That the defendant directly or indirectly (sold cereal malt beverage to) (bought cereal malt beverage for) (gave cereal malt beverage to) (furnished cereal malt beverage to) _____;**
- 2. That _____ was a person under the age of 21 years; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3610a(a). Furnishing cereal malt beverage to a minor is a class B, person misdemeanor for which the minimum fine is \$200.

Comment

K.S.A. 21-3610a(c) and K.S.A. 41-2701 exempts from prosecution under this statute the parents or legal guardians of the minor or ward.

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986).

See PIK 3d 58.12-D, Furnishing Cereal Malt Beverage to a Minor - Defense, for defense available to licensed retailers.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.12-B FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR ILLICIT PURPOSES

The defendant is charged with the crime of furnishing alcoholic beverages to a minor for illicit purposes. The defendant pleads not guilty.

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

1. That the defendant directly or indirectly ([sold] [bought] [gave] [furnished]) ([a cereal malt beverage] [an intoxicating liquor]) ([for] [to]) _____;
2. That _____ was a child under 18 years of age;
3. That the defendant did so with the intent (to commit against _____) (to [encourage] [induce] _____ to [commit] [participate in]) the crime of (set out the crime as defined in Article 35 of Chapter 21 of Kansas Statutes Annotated or in K.S.A. 21-3602 or 21-3603 and amendments thereto); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3610b. Furnishing alcoholic beverages to a minor for illicit purposes is a severity level 9, person felony.

For a definition of "cereal malt beverage," see K.S.A. 41-2701 and amendments thereto.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**58.12-C FURNISHING ALCOHOLIC LIQUOR TO A
MINOR - DEFENSE**

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

Notes on Use

For authority, see K.S.A. 21-3610(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

For authority, see K.S.A. 21-3610a(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.13 AGGRAVATED JUVENILE DELINQUENCY

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.14 CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

or

- (g) (sheltered) (concealed) a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

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

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

Notes on Use

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 59.00

CRIMES AGAINST PROPERTY

| | PIK Number |
|--|---------------|
| Theft | 59.01 |
| Theft - Knowledge Property Stolen | 59.01-A |
| Theft - Welfare Fraud | 59.01-B |
| Theft Of Lost Or Mislaid Property | 59.02 |
| Theft Of Services | 59.03 |
| Criminal Deprivation Of Property | 59.04 |
| Fraudulently Obtaining Execution Of A Document | 59.05 |
| Worthless Check | 59.06 |
| Statutory Presumption Of Intent To Defraud - Knowledge Of Insufficient Funds | 59.06-A |
| Worthless Check - Defenses | 59.07 |
| Habitually Giving A Worthless Check Within Two Years . | 59.08 |
| Habitually Giving Worthless Checks - On Same Day | 59.09 |
| Causing An Unlawful Prosecution For Worthless Check .. | 59.10 |
| Forgery - Making Or Issuing A Forged Instrument | 59.11 |
| Forgery - Possessing A Forged Instrument | 59.12 |
| Making False Information | 59.13 |
| Destroying A Written Instrument | 59.14 |
| Altering A Legislative Document | 59.15 |
| Possession Of Forgery Devices | 59.16 |
| Burglary | 59.17 |
| Aggravated Burglary | 59.18 |
| Possession Of Burglary Tools | 59.19 |
| Arson | 59.20 |
| Arson - Defraud An Insurer Or Lienholder | 59.21 |
| Aggravated Arson | 59.22 |
| Criminal Damage To Property - Without Consent | 59.23 |
| Criminal Damage To Property - With Intent To Defraud An Insurer Or Lienholder | 59.24 |
| Criminal Trespass | 59.25 |
| Criminal Trespass - Health Care Facility | 59.25-A |
| Criminal Trespass On Railroad Property | 59.25-B |
| Littering - Public | 59.26 |
| Littering - Private Property | 59.27 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|--|---------|
| Tampering With A Landmark | 59.28 |
| Tampering With A Landmark - Highway Sign Or Marker . . | 59.29 |
| Tampering With A Traffic Signal | 59.30 |
| Aggravated Tampering With A Traffic Signal | 59.31 |
| Injury To A Domestic Animal | 59.32 |
| Criminal Hunting | 59.33 |
| Unlawful Hunting - Posted Land | 59.33-A |
| Criminal Hunting - Defense | 59.33-B |
| Criminal Use Of Financial Card of Another | 59.34 |
| Criminal Use Of Financial Card - Cancelled | 59.35 |
| Criminal Use Of Financial Card - Altered Or Nonexistent . . | 59.36 |
| Unlawful Manufacture Or Disposal Of False Tokens | 59.37 |
| Criminal Use Of Explosives | 59.38 |
| Possession Or Transportation Of Incendiary Or Explosive Device | 59.39 |
| Criminal Use Of Noxious Matter | 59.40 |
| Impairing A Security Interest - Concealment Or Destruction | 59.41 |
| Impairing A Security Interest - Sale Or Exchange | 59.42 |
| Impairing A Security Interest - Failure To Account | 59.43 |
| Fraudulent Release Of A Security Agreement | 59.44 |
| Warehouse Receipt Fraud - Original Receipt | 59.45 |
| Warehouse Receipt Fraud - Duplicate Or Additional Receipt | 59.46 |
| Unauthorized Delivery Of Stored Goods | 59.47 |
| Automobile Master Key Violation | 59.48 |
| Posting Of Political Pictures Or Advertisements | 59.49 |
| Opening, Damaging Or Removing Coin-Operated Machines | 59.50 |
| Possession Of Tools For Opening, Damaging Or Removing Coin-Operated Machines | 59.51 |
| Casting An Object Unto A Street Or Road - Damage To Vehicle, Resulting In Bodily Injury | 59.52 |
| Casting An Object Onto A Street Or Road - Bodily Injury . . | 59.53 |
| Casting An Object Onto A Street Or Road - Vehicle Damage | 59.54 |
| Casting An Object Onto A Street Or Road - No Damage . . . | 59.55 |
| Sale Of Recut Tires | 59.56 |
| Theft Of Cable Television Services | 59.57 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|---|-------------|
| Piracy Of Recordings | 59.58 |
| Dealing In Pirated Recordings | 59.58-A |
| Piracy of Recordings - Defenses | 59.59 |
| Non-Disclosure Of Source Of Recordings | 59.60 |
| Defrauding An Innkeeper | 59.61 |
| Grain Embezzlement | 59.62 |
| Making False Public Warehouse Records And Statements | 59.63 |
| Making False Public Warehouse Reports | 59.63-A |
| Adding Dockage Or Foreign Material To Grain | 59.63-B |
| Computer Crime | 59.64 |
| Computer Crime - Defense | 59.64-A |
| Computer Trespass | 59.64-B |
| Violation Of The Kansas Odometer Act - Tampering, Etc. | 59.65-A |
| Violation Of The Kansas Odometer Act - Conspiring | 59.65-B |
| Violation Of The Kansas Odometer Act - Operating A Vehicle | 59.65-C |
| Violation Of The Kansas Odometer Act - Unlawful Device | 59.65-D |
| Violation Of The Kansas Odometer Act - Unlawful Sale | 59.65-E |
| Violation Of The Kansas Odometer Act - Unlawful Service, Repair Or Replacement | 59.65-F |
| Promoting a Pyramid Promotional Scheme | 59.66 |
| RESERVED FOR FUTURE USE | 59.67-59.69 |
| Value In Issue | 59.70 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01 THEFT

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

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

1. That _____ was the owner of the property;

2. That the defendant (obtained) (exerted) unauthorized control over the property;

or

That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant;

or

That the defendant obtained by threat control over property;

or

That the defendant obtained control over property knowing the property to have been stolen by another;

3. That the defendant intended to deprive _____ permanently of the use or benefit of the property;

4. That the value of the property was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

of property of the value of less than \$500 is a class A, nonperson misdemeanor, except that it is a severity level 9, nonperson felony if committed by a person who has within five years immediately preceding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

For a definition of "deprive permanently", see PIK 3d Chapter 53.00, Definitions and Explanation of Terms.

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 to establish intent to permanently deprive, an instruction on the meaning of *prima facie* is required. See PIK 3d 54.01-B, Presumption of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

In situations where there is a question in the mind of the prosecutor as to the type of theft to charge under K.S.A. 21-3701, it is permissible to charge in the alternative. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

When instructing on the lesser included offense of criminal deprivation of property (PIK 3d 59.04), see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

Comment

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

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

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

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

To convict a defendant of theft under K.S.A. 21-3701a(4), the State has the burden of proving that the defendant, at the time he received property, had a belief or reasonable suspicion from all the circumstances known to him that the property

PATTERN INSTRUCTIONS FOR KANSAS 3d

was stolen, and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved, additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 3d 59.01-A should be used with PIK 3d 59.01 in possession of stolen property cases.

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires the State to prove in a theft-by-deception prosecution, pursuant to K.S.A. 21-3701a(2), that the victim was deceived by reliance in whole or in part upon the false statement. See also, *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701a(2) violation are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), where concealment of merchandise in a toy box was deceptive because the cashier was unaware of the concealed merchandise, and *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

In *State v. Keeler*, 238 Kan. 356 Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

In *State v. Ringi*, 238 Kan. 523 Syl. ¶ 2, 712 P.2d 1223 (1986), the Court held: "The charge of theft by deception under K.S.A. 1984 Supp. 21-3701a(2) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3707." In that case, a defendant could be charged with both offenses when they occurred on different days.

In *State v. Hanks*, 10 Kan. App. 2d 666, 708 P.2d 991 (1985), the Court rejected the defendant's arguments that: (1) proof of two prior theft convictions is an element of a class E felony theft which should have been included in the jury instructions, and (2) that "theft" is a lesser included offense of "theft after having been convicted of theft two or more times within the preceding five years."

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

PATTERN INSTRUCTIONS FOR KANSAS 3d

The asportation (carrying away) element of common-law larceny is included within the term "obtain or exert control" by statutory definition contained in K.S.A. 21-3110(12) and does not need to be separately set forth in a theft charge under K.S.A. 21-3701a(1) alleging a defendant obtained or exerted unauthorized control over the property. *State v. Freitag*, 247 Kan. 499, 802 P.2d 502 (1990).

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

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

An information charging the defendant with felonious theft of 8,434 gallons of regular gasoline in violation of K.S.A. 21-3701, a class E felony, and which did not allege that the defendant had been convicted of theft two or more times in the last five years, when read in its entirety, construed according to common sense, and interpreted to include facts necessarily implied, sufficiently informed the defendant that the value of the gasoline taken was \$150 or more even though not specifically alleged. *State v. Crichton*, 13 Kan. App. 2d 213, 766 P.2d 832, *rev. denied* 244 Kan. 739 (1988).

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01-A THEFT - KNOWLEDGE PROPERTY STOLEN

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

Notes on Use

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

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01-B THEFT - WELFARE FRAUD

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

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

1. That the defendant (obtained) (attempted to obtain) (aided or abetted [name of applicant or client] to obtain) assistance in the form of (describe applicable assistance as defined in K.S.A. 39-702(d)) to which (defendant or name of other applicant or client) was not entitled;
2. That the defendant did so by (means of a willfully false statement or representation) (impersonation) (collusion) (fraudulent device);
3. That the value of the assistance was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 39-720, 39-702(d) and 21-3701. Theft of assistance of the value of \$25,000 or more is a severity level 7, nonperson felony. Theft of assistance of the value of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of assistance of the value of less than \$500 is a class A, nonperson misdemeanor, except that theft of assistance of the value of less than \$500 is a severity level 9, nonperson felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.02 THEFT OF LOST OR MISLAID PROPERTY

The defendant is charged with the crime of theft of lost or mislaid property. The defendant pleads not guilty.

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

1. That _____ was the lawful owner of the property;
2. That the property was lost or mislaid;
3. That the defendant came into possession of the property;
4. That the defendant (knew) (learned) that _____ was the lawful owner of the property;
5. That the defendant failed to take reasonable measures to restore the property to _____;
6. That the defendant intended to deprive _____ permanently of the use or benefit of the property; and
7. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3703. Theft of lost or mislaid property is a class A, nonperson misdemeanor.

For a definition of "deprive permanently," see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

Comment

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime. (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.03 THEFT OF SERVICES

The defendant is charged with the crime of theft of services of the value of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally obtained services in the form of _____ from _____;
2. That the defendant obtained these services by (deception by means of a false statement or representation which deceived _____, who relied in whole or in part upon the false representation or statement of the defendant) (threat) (coercion) (stealth) (tampering by [describe the form of tampering]) (use of a false token or device);
3. That the value of the services obtained was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3704. Theft of services of the value of \$25,000 or more is a severity level 7, nonperson felony. Theft of services of the value of at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Theft of services of the value of less than \$500 is a class A, nonperson misdemeanor.

In a felony theft of services prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft of services if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

Forms of tampering are described in K.S.A. 21-3704(c).

Services is defined in K.S.A. 21-3704(b).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant.

State v. Saylor, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Hamilton*, 6 Kan. App. 2d 646, 631 P.2d 1255 (1981), are additional cases relating to the requirements of "deception" and "reliance" in theft cases.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.04 CRIMINAL DEPRIVATION OF PROPERTY

The defendant is charged with criminal deprivation of property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That _____ was the owner of the property in question;**
- 2. That the defendant (obtained) (exerted) unauthorized control over the property without the owner's consent;**
- 3. That the defendant intended to temporarily deprive the owner of the use or benefit of such owner's property; and**
- 4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3705. Criminal deprivation of property other than a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A, nonperson misdemeanor. Upon a second or subsequent conviction, the sentence shall be not less than 30 days imprisonment and not less than a \$100 fine, except where such sentence and fine would result in a manifest injustice.

Criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A nonperson misdemeanor. Upon a first conviction of this subsection, a person shall be sentenced to not less than 30 days nor more than one year's imprisonment and fined not less than \$100. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 60 days nor more than one year's imprisonment and fined not less than \$200. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice.

For definition of "temporarily deprive," see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

When instructing on this crime as a lesser included offense of theft, see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In *State v. Keeler*, 238 Kan. 356, Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.05 FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT

The statute upon which this instruction was based (K.S.A. 21-3706) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.06 WORTHLESS CHECK

The defendant is charged with the crime of giving a worthless check. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;

or

That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;

2. That the defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;

3. That the defendant intended to defraud _____;

4. That the amount of the (check) (order) (draft) was (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and

5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3707. Giving a worthless check is a severity level 7, nonperson felony if the check, order, or draft is drawn for \$25,000 or more. Giving a worthless check is a severity level 9, nonperson felony if the check, order, or draft is drawn for at least \$500 but less than \$25,000. Giving a worthless check is a class A, nonperson misdemeanor if the check, order, or draft is drawn for less than \$500, except it is a severity level 9, nonperson felony if committed by a person who has been convicted of giving a worthless check two or more times within five years immediately preceding the commission of the

PATTERN INSTRUCTIONS FOR KANSAS 3d

present crime.

If the amount of the check, order or draft is in issue, it will be necessary to include PIK 3d 59.70 in the jury instruction and to use PIK 3d 68.11, Verdict Form.

Defenses to the charge of giving a worthless check are set forth in PIK 3d 59.07, Worthless Check - Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit, and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(b), then PIK 3d 59.06-A, should be given and modified accordingly.

Comment

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Imprisonment for a worthless check offense does not violate either Section 16 in the Bill of Rights of the Kansas Constitution, or the Fourteenth Amendment to the United States Constitution. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982).

For a discussion of the intent of the worthless check statute, K.S.A. 21-3707, what constitutes the gravamen of the offense and the proof required by the defendant to rebut the statutory presumption, see *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

In *State v. Ringi*, 238 Kan. 523, Syl. ¶¶ 1, 2, 712 P.2d 1223 (1986), the Court held: (1) "Under K.S.A. 1984 Supp. 21-3707, it is not necessary for the worthless check or draft to be used to obtain possession of money, merchandise or anything of value in order to constitute the crime of passing a worthless check," and (2) "The charge of theft by deception under K.S.A. 1984 Supp. 21-3707(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3703. A defendant may be charged with both offenses when they occur as separate transactions."

K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of this case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged. *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.06-A STATUTORY PRESUMPTION OF INTENT TO DEFRAUD - KNOWLEDGE OF INSUFFICIENT FUNDS

There is a presumption that defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with a (bank) (credit union) (savings and loan association) (depository) where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds and:

1. Defendant failed to pay the holder of the (check) (order) (draft) the amount due thereon and a lawful service charge for each (check) (order) (draft) within seven days after defendant received notice that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository); or
2. Defendant postdated the (check) (order) (draft) without the knowledge and consent of the payee.

[There is a presumption that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds where the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (order) (draft).]

The presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with the (bank) (credit union) (savings and loan association) (depository). This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-3707(b). If an issue exists as to the receipt of

PATTERN INSTRUCTIONS FOR KANSAS 3d

written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

Comment

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973), upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(b) which enables the State to establish a *prima facie* case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions, see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment to PIK 3d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976), recognizes that K.S.A. 21-3707(b) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant, is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(b). *State v. Calhoun*, *supra*.

Haremza is cited for the proposition that the statutory presumption created by K.S.A. 21-3707(b) can be rebutted by defendant's knowing that he or she had a reasonable expectation that the check would be paid on presentation. *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.07 WORTHLESS CHECK - DEFENSES

A. It is a defense to the charge of giving a worthless (check) (order) (draft) if it was postdated and was presented for payment prior to the postdated date.

OR

B. It is a defense to the charge of giving a worthless (check) (order) (draft) if it was given to (name of payee) who had knowledge or had been informed when (name of payee) accepted the (check) (order) (draft), that (name of maker) did not have sufficient funds in the hands of (name of drawee) to pay such (check) (order) (draft) upon presentation, and the (check) (order) (draft) was presented for payment prior to the date (name of maker) informed the payee there would be sufficient funds.

Notes on Use

For authority for "A", see K.S.A. 21-3707(c)(1); for authority for "B", see K.S.A. 21-3707(c)(2). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.08 HABITUALLY GIVING A WORTHLESS CHECK
WITHIN TWO YEARS**

The statute upon which this instruction was based
(K.S.A. 21-3708) has been repealed effective July 1, 1993.
See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.09 HABITUALLY GIVING WORTHLESS CHECKS - ON
SAME DAY**

**The statute upon which this instruction was based
(K.S.A. 21-3708) has been repealed effective July 1, 1993.
See L. 1992, ch. 298, § 97.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.10 CAUSING AN UNLAWFUL PROSECUTION FOR WORTHLESS CHECK

The defendant is charged with the crime of causing an unlawful prosecution for worthless check. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (filed a complaint before a judge upon which _____ was charged with the crime of giving a worthless check) (gave information upon which _____ was charged with the crime of giving a worthless check);
2. That the defendant knew when (he)(she) accepted it that the (check) (order) (draft) was dated later than the date on which it was actually accepted and defendant presented it for payment prior to the date on the (check) (order) (draft); and
or
That the defendant knew when (he) (she) accepted the (check) (order) (draft) that (name of maker) did not have (any) (sufficient) funds on deposit; and yet defendant presented the (check) (order) (draft) for payment prior to the date (name of maker) informed defendant there would be sufficient funds; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3709. Causing an unlawful prosecution is a class A, nonperson misdemeanor and any person convicted of the violation of this statute shall pay the taxable cost of the prosecution.

Act as used in Element No. 3 refers to the complaint that was filed or the information that was given as stated in Element No. 1.

Comment

See K.S.A. 21-3707.

59.11 FORGERY - MAKING OR ISSUING A FORGED INSTRUMENT

The defendant is charged with the crime of forgery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly made, altered or endorsed a _____ so it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);

or

That the defendant issued or delivered a _____ which (he)(she) knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (with different provisions) (by the authority of _____, who did not give such authority);

2. That the defendant did this act with the intent to defraud; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3710(a)(1) and (2). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(3).

For a definition of "intent to defraud", see K.S.A. 21-3110(9).

K.S.A. 21-3710(c) provides that in any prosecution under 21-3710 it may be alleged in the complaint or information that it is not known whether a purported person is real or fictitious, and in such case there shall be a rebuttable presumption that such purported person is fictitious.

The PIK Committee recommends that whenever this presumption is applied in a forgery case, the jury be instructed in regard to the presumption as follows:

PATTERN INSTRUCTIONS FOR KANSAS 3d

"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 its burden of proof. This burden never shifts to the defendant." See generally, *State v. Colbert*, 26 Kan. App. 2d 177, 987 P.2d 1110 (1999), and *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983).

Comment

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a)(1) and (2) were held to be constitutional against a claim of being vague and indefinite.

In *State v. Hicks*, 11 Kan. App. 2d 76, 714 P.2d 105 (1986), the Court said that although the forgery instruction given was not clearly erroneous, it would have been preferable if the trial court had relied upon the substance of PIK 2d 59.11 to define the elements of forgery.

In *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991), the Court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The Court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

A valid debt or claim against the person whose name is forged is not a defense to a charge of forgery. *State v. Meyer*, 17 Kan. App. 2d 59, 832 P.2d 357 (1992).

In *State v. Colbert*, 26 Kan. App. 2d 177, 987 P.2d 1110 (1999), the defendant was charged in the information with forgery under K.S.A. 21-3710, alleging that David T. Mangione is "either a real or a fictitious person." Instruction No. 6 stated that it must be proved that the defendant issued or delivered a bank check which he knew had been made, altered or endorsed so that it appeared to have been made by David T. Mangione, a fictitious person. In Instruction No. 7, the jury was instructed, "As to the allegation that David T. Mangione is a fictitious person, you may presume that David T. Mangione is a fictitious person. This presumption may be overcome by evidence to the contrary." The defendant argued that Instruction 7 was erroneous because it did not instruct the jury that the State had the burden of proving that Mangione was a fictitious person. The Court of Appeals reversed the conviction and ordered a new trial, holding that one of the elements of the crime required to be proved by the State was that the maker of the check was a fictitious person and that it was reversible error not to instruct the jury that the State had the burden of proving that Mangione was a fictitious person. This opinion is consistent with *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983), which holds that a rebuttable statutory presumption in a criminal action constitutes a rule of evidence and is constitutional; however, the jury must be clearly instructed as to the nature and extent of the presumption and that it does not shift the burden of proof to the defendant.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.12 FORGERY - POSSESSING A FORGED INSTRUMENT

The defendant is charged with the crime of forgery.
The defendant pleads not guilty.

To establish this charge, each of the following claims
must be proved:

1. That the defendant possessed a _____
which (he)(she) knew had been made, altered or
endorsed so that it appeared to have been (made)
(endorsed) (by _____) (at another time)
(with different provisions) (by the authority of
_____, who did not give such authority);
2. That the defendant intended to issue or deliver the
_____;
3. That the defendant did so with the intent to defraud;
and
4. That this act occurred on or about the ____ day of
_____, _____, in _____
County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3710(a)(3). Forgery is a severity level 8,
nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(1)
or (2).

For a definition of "intent to defraud," see K.S.A. 21-3110(9).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.13 MAKING FALSE INFORMATION

The defendant is charged with the crime of making false information. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (made) (generated) (distributed) (drew) (caused to be [made] [generated] [distributed] [drawn]) (a written instrument) (an electronic data) (an entry in a book of account);**
- 2. That the defendant knew that such information falsely stated or misrepresented some material matter which was not what it purported to be;**
- 3. That the defendant intended to (defraud) (obstruct the detection of a [theft] [_____], a felony offense) (induce official action); and**
- 4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3711. Making false information is a severity level 8, nonperson felony. The optional words and phrases should be used depending on the facts in the particular case. K.S.A. 21-3711 was amended in 1996 and 1997 to change the crime from making a false writing to making false information. The term "false information" was expanded to include electronic data in addition to a written instrument or an entry in a book of account.

Comment

See *Kansas Judicial Council Bulletin*, April 1968, p.71.

In *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990), the Court held that K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing and delivering of any check, order or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order or draft in full upon its presentment. Under the facts of the case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the

PATTERN INSTRUCTIONS FOR KANSAS 3d

general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged.

In a welfare fraud case, prosecution should be pursuant to the specific welfare fraud statute, K.S.A. 39-720, rather than the general statute for the crime of Making a false writing, K.S.A. 21-3711. *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). The implications of *Wilcox* were considered in *State v. Jones*, 246 Kan. 180, 787 P.2d 738 (1990), and the Court held that K.S.A. 39-720 had no application to a situation involving theft (K.S.A. 21-3701) from a program or agency not administered by the Department of Social and Rehabilitation Services.

Making a false writing, K.S.A. 21-3711, as opposed to Forgery, K.S.A. 21-3710, involves a person making a false representation, or causing it to be made, while acting within his or her own identity. Forgery involves making an instrument which appears to have been made by another. *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

Knowledge is an essential element of the offense of making a false writing under K.S.A. 21-3711. Knowledge means actual information that the writing falsely states or represents to some material matter and is intended to defraud or induce some official action. Information is considered material under K.S.A. 21-3711 if a reasonable person would attach importance to the information in choosing a course of action in the transaction in question. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

Intent to defraud, as set forth in K.S.A. 21-3711 and defined by K.S.A. 21-3110(9), requires that the maker of the false writing intended to deceive another person and to induce such person, in reliance upon the deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property. The making of an instrument to cover up a theft, which crime is unknown to the victim, does not come within the statutory definition of "intent to defraud." *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.14 DESTROYING A WRITTEN INSTRUMENT

The defendant is charged with the crime of destroying a written instrument. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly destroyed a _____ by (tearing) (cutting) (burning) (erasing) (obliterating) in whole or in part;
2. That the defendant did so with the intent to defraud; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3712. Destroying a written instrument is a severity level 9, nonperson felony.

See *Kansas Judicial Council Bulletin*, April 1968, p.71.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.15 ALTERING A LEGISLATIVE DOCUMENT

The defendant is charged with the crime of altering a legislative document. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (mutilated) (altered) (changed) _____;
2. That _____ had been introduced into the (House) (Senate) of the State of Kansas;
3. That the defendant had no legal authority to (mutilate) (alter) (change) _____; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3713. Altering a legislative document is a severity level 9, nonperson felony.

The document in question should be referred to specifically (*i.e.*, House Bill 1211, Senate Bill 211, House Concurrent Resolution 1074, etc.).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.16 POSSESSION OF FORGERY DEVICES

The statute upon which this instruction was based (K.S.A. 21-3714) was repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.17 BURGLARY*

The defendant is charged with the crime of burglary.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is a dwelling;

or

That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is not a dwelling;

or

That the defendant knowingly (entered) (remained in) a (motor vehicle) (aircraft) (watercraft) (railroad car) (describe means of conveyance of persons or property);

2. That the defendant did so without authority;

3. That the defendant did so with the intent to commit (a theft) (_____, a felony) (sexual battery) therein; and

4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

*Special Advisory:

In preparing this instruction, the Committee relied on the amendments to K.S.A. 21-3715 contained in 1993 Senate Bill No. 423. The primary purpose of 1993 SB 423 was to reconcile the differences between L. 1992, ch. 239 (sentencing guidelines) and L. 1992, ch. 298 (recodification of criminal code), prior to their effective dates of July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

For the most part, the 1992 sentencing guidelines legislation amended the substantive offenses by conforming the penalty provisions to the new sentencing scheme under the guidelines. In a limited number of instances, new substantive provisions were adopted. These included burglary. L. 1992, ch. 239, New Sec. 114.

The joint recommendation of the Sentencing Commission and the Judicial Council for reconciling the 1992 versions of burglary was adopted by the Legislature in § 74 of 1993 SB 423. However, through inadvertence, New Sec. 114 of L. 1992, ch. 239 was not repealed.

Notes on Use

For authority, see K.S.A. 21-3715. Burglary as described in the first alternative paragraph 1 is a severity level 7, person felony. Burglary as described in the second alternative paragraph 1 is a severity level 7, nonperson felony. Burglary as described in the third alternative paragraph 1 is a severity level 9, nonperson felony.

The phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 3d 59.18, Aggravated Burglary, Notes on Use.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

Comment

It should be noted that the Legislature did not make "breaking" an element of this crime.

A hog pen was held not to be a "structure" within the purview of the burglary statute, K.S.A. 21-3715. *State v. Fisher*, 232 Kan. 760, 658 P.2d 1021 (1983).

The opening of the bay door of a truck and reaching into the bay compartment to remove cases of beer constituted "entry" within the purview of K.S.A. 21-3715. *State v. Zimmerman and Schmidt*, 233 Kan. 151, 660 P.2d 960 (1983).

Where the consent to enter any of the structures or vehicles listed in K.S.A. 21-3715 and 21-3716 is obtained by fraud, deceit or pretense, the entry is not an authorized entry under the statute in that it is based on an erroneous or mistaken consent. Any such entry is unauthorized and when accompanied by the requisite intent is sufficient to support a burglary or aggravated burglary conviction. *State v. Maxwell*, 234 Kan. 393, 672 P.2d 590 (1983).

An information which charges burglary is defective in form unless it specifies the felony intended by an accused in making the unauthorized entry. However, if the felony intended in a burglary is made clear at the preliminary hearing or by the

PATTERN INSTRUCTIONS FOR KANSAS 3d

context of the other charge or charges in the information, the failure to allege the specific intended felony does not constitute reversible error. Such failure cannot result in surprise or be considered prejudicial to the defendant's substantial rights at trial when the intended felony was made clear in advance of trial. *State v. Maxwell*, supra.

In a prosecution for burglary, the manner of the entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if any, are all relevant in determining whether the intruder intended to commit a theft. The intent with which any entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).

In a burglary prosecution, the elements of "intent to commit a felony or theft therein" and "without authority entering into or remaining within" are separate and distinct. The question of whether defendant had authority to enter the premises is to be resolved without reference to his intent at the time of entry. *State v. Harper*, 246 Kan. 14, 785 P.2d 1341 (1990).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also, *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. The legislature's 1980 amendment to what is now K.S.A. 1993 Supp. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.18 AGGRAVATED BURGLARY

The defendant is charged with the crime of aggravated burglary. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly [(entered) (remained in)] [(a building) (a manufactured home) (a mobile home) (a tent) (describe type of structure) (a motor vehicle) (an aircraft) (a watercraft) (a railroad car) (describe means of conveyance of persons or property)];
2. That the defendant did so without authority;
3. That the defendant did so with the intent to commit (a theft) (_____, a felony) (sexual battery) therein;
4. That at the time there was a human being in (describe structure or conveyance); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a severity level 5, person felony.

As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App. 2d 556, 630 P.2d 731 (1981). See also, *State v. Mogenson*, 10 Kan. App. 2d 470, 473, 701 P.2d 1339 (1985), which cites this note with approval. When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

It should be noted that the Legislature did not make "breaking" an element of this crime.

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

In *State v. Walters*, 8 Kan. App. 2d 237, 655 P.2d 947 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

The crime of aggravated burglary occurs whenever a human being is present in a building during the course of the burglary. An information that charges the offense of aggravated burglary need not specify the point in time at which a victim was present, so long as it alleges that a human being was present sometime during the course of the burglary. *State v. Reed*, 8 Kan. App. 2d 615, 663 P.2d 680 (1983).

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson*, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985).

In *State v. Holcomb*, 240 Kan. 715, 732 P.2d 1272 (1987), the Court held that it was not multiplicitous to charge the defendant with aggravated burglary and aggravated robbery arising from a single transaction because each offense requires proof of facts not required to prove the other. See *State v. Higgins*, 243 Kan. 48, 755 P.2d 12 (1988).

The aggravated burglary requirement under K.S.A. 21-3716 that a burglarized building be occupied should be broadly interpreted to include multi-unit structures in which there is a possibility of contact between the victim and the burglar. *State v. Dorsey*, 13 Kan. App. 2d 286, 769 P.2d 38, *rev. denied* 244 Kan. 739 (1989).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994) and *State v. Richmond*, 258 Kan. 449, 904 P.2d 981 (1995).

Criminal trespass is not a lesser included offense of burglary because "criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.19 POSSESSION OF BURGLARY TOOLS

The statute upon which this instruction was based (K.S.A. 21-3717) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.20 ARSON

The defendant is charged with the crime of arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosion);

or

That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (an explosion);

2. That the defendant did so without the consent of _____; and
3. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(a)(1). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This instruction should not be used for crimes charged under K.S.A. 21-3718(a)(2). If the amount of damages is in issue, include PIK 3d 59.70 in the jury instructions and use PIK 3d 68.11, Verdict Form.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

Under K.S.A. 21-3718(a)(1), the State must prove that the defendant knowingly damaged a building and that another person had some interest in that building. The State is not required to prove the defendant knew who owned the building. *State v.*

PATTERN INSTRUCTIONS FOR KANSAS 3d

Powell, 9 Kan. App. 2d 748, 687 P.2d 1375 (1984).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872, *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" as used in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.21 ARSON - DEFRAUD AN INSURER OR LIENHOLDER

The defendant is charged with the crime of arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged _____ by means of (fire) (an explosion);
2. That _____ was an insurer of the (building) (property); or
That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____; and
4. That the property damage was (\$50,000 or more) (at least \$25,000 but less than \$50,000) (less than \$25,000); and
5. That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3718(a)(2). Arson is a severity level 5, nonperson felony if the damage is \$50,000 or more. If the damage is at least \$25,000 but less than \$50,000, it is a severity level 6, nonperson felony. If the damage is less than \$25,000, it is a severity level 7, nonperson felony. This section should not be used for K.S.A. 21-3718(a)(1).

If the amount of damage is in issue, include PIK 3d 59.70 in the jury instructions, and use PIK 3d 68.11, Verdict Form.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.22 AGGRAVATED ARSON

The defendant is charged with the crime of aggravated arson. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosion);

or

That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (explosion);

2. That the defendant did so without the consent of _____;

OR

1. That the defendant intentionally damaged _____ by means of (fire) (an explosion);
2. That _____ was an insurer of the (building) (property);

or

That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;

3. That the defendant did so with the intent to (injure) (defraud) _____;
- (3.) or (4.) That at the time there was a human being in the (building) (property); and
- (4.) or (5.) That the [(fire) (explosion)] [(resulted) (did not result)] in a substantial risk of bodily harm; and
- (5.) or (6.) That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3719. Aggravated arson resulting in a substantial risk of bodily harm is a severity level 3, person felony. Aggravated arson not

PATTERN INSTRUCTIONS FOR KANSAS 3d

resulting in substantial risk of bodily harm is a severity level 6, person felony.

When defendant has been charged with aggravated arson resulting in a substantial risk of bodily harm and there is an issue as to the seriousness of the risk, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

A dead person is not a "human being" within the meaning of K.S.A. 21-3719. *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872 *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.23 CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ (was the owner of property described as _____) (had an interest as a _____ in property described as _____);
2. That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosion;
3. That the defendant did so without the consent of _____;
4. That the property was damaged to the extent of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(a)(1). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$500 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$500 or is of the value of \$500 or more and is damaged to the extent of less than \$500.

Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

PATTERN INSTRUCTIONS FOR KANSAS 3d

See PIK Civil 3d, Chapter 171 for instructions as to property damage and value.

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than \$500, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than \$50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemaker*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(a)(1) is a lesser included offense of arson. Where the cause of damage is in issue, a charge in the alternative may be appropriate. Cases supporting this view are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

The sole distinction between Criminal damage to property, K.S.A. 21-3720 and Arson, K.S.A. 21-3718, is that arson proscribes knowingly damaging another person's property by means of fire or explosive and criminal damage to property proscribes willfully damaging another person's property by means other than by fire or explosive. That the damages to property of another was brought about by means other than by fire or explosive is an essential element of Criminal damage to property K.S.A. 21-3720. *Zapata v. State*, 14 Kan. App. 2d 94, 782 P.2d 1251 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Jones*, 247 Kan. 537, 802 P.2d 533 (1990), the criminal damage to property involved the breaking of windows in a 1977 Dodge car. The Supreme Court held that, for purposes of determining if the offense was a felony or misdemeanor, the value of damage was the cost of replacement plus installation, not to exceed the total value of the car. Since the State failed to present evidence to establish the value of the car, the Supreme Court reversed the felony convictions of criminal damage to property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.24 CRIMINAL DAMAGE TO PROPERTY - WITH INTENT TO DEFRAUD AN INSURER OR LIENHOLDER

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (damaged) (defaced) _____ by means other than by fire or explosion;
2. That _____ was an insurer of the property;
or
That _____ had an interest in the property because (he)(she) had a lien thereon;
3. That the defendant did so with the intent to (injure) (defraud) _____;
4. That the property was damaged to the extent of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3720(a)(2). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of \$25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least \$500 but less than \$25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than \$500 or is of the value of \$500 or more and is damaged to the extent of less than \$500.

Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

This instruction should not be used for K.S.A. 21-3720(a)(1).

See PIK Civil 3d, Chapter 171 for instructions as to property damage and value.

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate nor required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-

PATTERN INSTRUCTIONS FOR KANSAS 3d

3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than \$500, then the defendant cannot be convicted of a felony. The preceding two sentences may be the basis for an instruction, if needed.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 1993 Supp. 21-3718) to mean "explosion."

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.25 CRIMINAL TRESPASS

The defendant is charged with criminal trespass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry);

or

That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;

or

That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;

or

That the defendant had been personally served with a restraining order prohibiting defendant from (entering into) (remaining on) the property;

2. That the defendant intentionally, without authority, (entered into) (remained on) the property; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3721. Criminal trespass is a class B, nonperson misdemeanor. Property under this section can be any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft other than railroad property. Criminal trespass on railroad property is a separate offense covered by K.S.A. 21-3761 and PIK 3d 59.25-B, Criminal Trespass on Railroad Property.

Comment

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires a proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. The Legislature's 1980 amendment

PATTERN INSTRUCTIONS FOR KANSAS 3d

to what is now K.S.A. 1993 Supp. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 859 P.2d 387 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.25-A CRIMINAL TRESPASS - HEALTH CARE FACILITY

The defendant is charged with criminal trespass involving a health care facility. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant entered or remained (upon) (in) (identify the public or private land or structure involved) in a manner that interfered with access to or from a health care facility;
2. That the defendant knew (he)(she) was not (authorized) (privileged) to do so;
3. That the defendant entered or remained (upon) (in) such (land) (structure) in defiance of an order (not to enter) (to leave) the (land) (structure) personally communicated to defendant by (the owner of the health care facility) (an authorized person); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3721(a)(2). Criminal trespass involving a health care facility is a class B, nonperson misdemeanor.

"Health care facility" means any licensed medical care facility, certificated health maintenance organization, licensed mental health center, or mental health clinic, licensed psychiatric hospital or other facility or office where services of a health care provider are provided directly to patients. K.S.A. 21-3721(b)(1).

"Health care provider" means any person: (A) licensed to practice a branch of the healing arts; (B) licensed to practice psychology; (C) licensed to practice professional or practical nursing; (D) licensed to practice dentistry; (E) licensed to practice optometry; (F) licensed to practice pharmacy; (G) registered to practice podiatry; (H) licensed as a social worker; or (I) registered to practice physical therapy. K.S.A. 21-3721(b)(2).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.25-B CRIMINAL TRESPASS ON RAILROAD PROPERTY

The defendant is charged with criminal trespass on railroad property. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant without the consent of the owner or its agent intentionally (entered) (remained) on railroad property;
2. That defendant knew the property was railroad property; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.]

As used in this instruction, "railroad property" includes any (train) (locomotive) (railroad car) (caboose) (rail mounted work equipment) (rolling stock) (safety device) (switch) (electronic signal) (microwave communication equipment) (connection) (railroad track) (rail) (bridge) (trestle) (right of way) (property owned, leased or possessed by a railroad company).

or

1. That the defendant caused a derailment of a (train) (railroad car) (rail mounted work equipment);
2. That the defendant did so (maliciously) (wantonly); and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.]

Notes On Use

For authority, see K.S.A. 21-3761.

Violation of this section is a class A nonperson misdemeanor, except that, if the violation results in damage or loss in excess of \$1,500, the offense is a severity level 8, nonperson felony.

Subsection (c) of the statute provides that the statute shall not interfere with the lawful use of a private or public crossing.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Subsection (d) provides that nothing in the statute shall be construed as limiting a representative or member of a labor organization which represents or is seeking to represent the employees of the railroad, from conducting such business as provided under the railway labor act (45 U.S.C. 151, et sec.) and under other federal labor laws.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.26 LITTERING - PUBLIC

The defendant is charged with the crime of littering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally or recklessly (deposited) (caused to be deposited) _____ (on) (in) a public _____;
2. That the defendant was acting without the permission of any public officer or public employee who had authority to grant such permission; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(a). Littering is class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.27 LITTERING - PRIVATE PROPERTY

The defendant is charged with the crime of littering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally or recklessly [(deposited) (caused to be deposited)] [object or substance] on private property;
2. That the defendant was acting without the permission of _____, (the owner) (the occupant) of the property; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3722(b). Littering is class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.28 TAMPERING WITH A LANDMARK

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant removed a marker designating a boundary for real estate;
or
That the defendant (defaced) (altered) marks made for the purpose of designating a boundary for real estate;
or
That the defendant (cut down) (removed) _____, which had marks upon it to designate a boundary for real estate;
or
That the defendant (altered) (removed) (damaged) (destroyed) a public land survey corner or accessory and failed to comply with the Land Survey Act by (state act or omission whereby K.S.A. 58-2011 was violated);
2. That the defendant did so willfully and maliciously; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3724(a), (b), (c) and (f). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 21-3724(d) or (e).

When using paragraph four of Element No. 1, the applicable act or omission should be stated.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

K.S.A. 58-2005 to 58-2011 were enacted to provide for the restoration and replacement of certain land survey corners and accessories. K.S.A. 21-3724 was amended by the addition of section (f) to provide criminal sanctions for noncompliance.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.29 TAMPERING WITH A LANDMARK - HIGHWAY SIGN OR MARKER

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (broke) (destroyed) (removed) (defaced) a (milepost) (milestone) (highway sign) (road sign);
or
That the defendant (defaced) (altered) the (words) (marking) on a _____ sign;
2. That the _____ (was) (is) on a public highway or public road;
3. That the _____ was placed there by authority of the law;
4. That the defendant did so willfully and maliciously; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3724(d) and (e). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 21-3724(a), (b), (c) and (f).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.30 TAMPERING WITH A TRAFFIC SIGNAL

The defendant is charged with the crime of tampering with a traffic signal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manipulated) (altered) (destroyed) (removed) a _____;
2. That the _____ was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3725. Tampering with a traffic signal is a class C misdemeanor.

Comment

K.S.A. 21-3725 was amended to include railroad switching devices in 1975.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.31 AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL

The defendant is charged with the crime of aggravated tampering with a traffic signal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manipulated) (altered) (destroyed) (removed) a _____;
2. That the _____ was for the purpose of controlling or directing the movement of (motor vehicles) (railroad trains) (aircraft) (watercraft);
3. That the act of the defendant resulted in an accident (causing the death of _____) (causing great bodily injury to _____);

or

That the act of the defendant could have resulted in an accident which would have caused death or great bodily injury to a human being; and

4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3726. Aggravated tampering with a traffic signal is a severity level 7, nonperson felony.

Comment

The resulting accident need not now be a "traffic" accident, as formerly required. K.S.A. 21-3726.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.32 INJURY TO A DOMESTIC ANIMAL

The defendant is charged with the crime of injuring a domestic animal. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant willfully and maliciously administered a poison to a _____, a domestic animal;

or

That the defendant willfully and maliciously exposed a poison in such a way that it could be taken or swallowed by any domestic animal;

or

That the defendant willfully and maliciously (killed) (maimed) (wounded) a _____, a domestic animal;

2. That the owner of the domestic animal was _____ and that the owner did not consent to the defendant's acts; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3727. Injury to a domestic animal is a class A, nonperson misdemeanor.

The cruelty or neglect of animals in custody may be prosecuted under K.S.A. 21-4310. See PIK 3d 65.15, Cruelty to Animals.

Comment

The exceptions under K.S.A. 21-4310(g) do not apply to a prosecution under K.S.A. 21-3727. *State v. Jones*, 229 Kan. 528, 625 P.2d 503 (1981).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.33 CRIMINAL HUNTING

The defendant is charged with criminal hunting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant [(hunted) (shot) (trapped) (pursued a bird or animal) (fished)] [(upon the land) (on a nonnavigable body of water) of another] [(upon) (from)] [(a public road or road right-of-way that adjoins occupied or improved land) (from a railroad right-of-way that adjoins occupied or improved land)];
2. That the defendant did not have permission of _____, the (owner) (person in possession) of the land in question; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3728. Criminal hunting is a class C misdemeanor.

It is a defense to criminal hunting if a person licensed to hunt follows or pursues a wounded game bird or animal on to the land of another. See PIK 3d 59.33-B, Criminal Hunting - Defense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.33-A UNLAWFUL HUNTING - POSTED LAND

The defendant is charged with the crime of hunting on posted land. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant ([shot] [hunted] [pursued]) ([a bird] [an animal]) upon the land of another;
2. That _____ was (the owner) (the person lawfully in possession) of the land, and had posted the land with signs stating that hunting on the land shall be by written permission only;
3. That the defendant did not have in (his)(her) possession written permission to ([shoot] [hunt] [pursue]) ([a bird] [an animal]) from _____, (the owner) (the person in possession) of the land in question; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 32-1013(a). Unlawful hunting upon posted land is a class C misdemeanor.

It is a defense to a charge of unlawful hunting on posted land if a person licensed to hunt follows a wounded bird or animal on the posted land.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.33-B CRIMINAL HUNTING - DEFENSE

It is a defense to the charge of criminal hunting that the defendant went upon the land of another while following or pursuing a wounded (bird) (animal).

Notes on Use

For authority, see K.S.A. 21-3721 and K.S.A. 21-3728. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

The defense of pursuit of a wounded bird or animal is permitted in situations involving criminal hunting, as well as unlawful hunting on posted land.

It is not a defense to the charge if a person fails to leave such land when so instructed by the landowner or person in lawful possession. K.S.A. 32-1013(b).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.34 CRIMINAL USE OF FINANCIAL CARD OF ANOTHER

The defendant is charged with criminal use of a financial card of another. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant used a _____ financial card;**
- 2. That the cardholder, _____, had not consented to the use of the financial card by the defendant;**
- 3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);**
- 4. That the defendant did so with the intent to defraud;**
- 5. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between _____, _____, and _____, _____; and**
- 6. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3729(a)(1). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$500.

PATTERN INSTRUCTIONS FOR KANSAS 3d

If value is in issue, use PIK 3d 68.11, Verdict Forms - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

Comment

Using the number taken off a stolen financial card constitutes criminal use of a financial card as prohibited by K.S.A. 21-3729(a)(1). PIK 59.34 cited *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.35 CRIMINAL USE OF FINANCIAL CARD -
CANCELLED**

The defendant is charged with criminal use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly used _____, a financial card or number which had been revoked or cancelled;
2. That the defendant had received written notice that the financial card was revoked or cancelled;
3. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);
4. That the defendant did so with the intent to defraud;
5. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between _____, _____, and _____; and
6. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(a)(2). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services

PATTERN INSTRUCTIONS FOR KANSAS 3d

obtained *within a 7-day period* are of the value of less than \$500.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.36 CRIMINAL USE OF FINANCIAL CARD - ALTERED OR NONEXISTENT

The defendant is charged with criminal use of a financial card which had been (altered) (nonexistent). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant used a _____ financial card that had been (falsified) (mutilated) (altered);
or
That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);
3. That the defendant did so with the intent to defraud;
4. That the financial card was unlawfully used in the total amount of (\$25,000 or more) (at least \$500 but less than \$25,000) (less than \$500) between _____, _____, and _____, _____; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3729(a)(3). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of \$25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least \$500 but less than \$25,000. Criminal use of a financial card is a class A, nonperson

PATTERN INSTRUCTIONS FOR KANSAS 3d

misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than \$500.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.37 UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS

The defendant is charged with the crime of unlawful manufacture or disposal of false tokens. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (manufactured for sale) (offered for sale) (gave away) false _____ calculated to be used in a coin-operated machine or equipment;
2. That the defendant did so with the intent to cheat the operator of a coin-operated machine or equipment; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3730. Unlawful manufacture or disposal of false tokens is a class B, nonperson misdemeanor.

The use of a false token to obtain goods or services is theft, PIK 3d 59.01, and does not fall within the purview of this section.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.38 CRIMINAL USE OF EXPLOSIVES

The defendant is charged with criminal use of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (had in [his][her] possession) (manufactured) (transported) _____, which the defendant intended to use to commit a crime;**
or
That the defendant delivered _____ to _____ knowing that _____ intended to commit a crime;
- 2. That _____ is an explosive; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority and types of explosives, see K.S.A. 21-3731(a) which was amended in 1999 to add as an additional explosive any completed explosive devices commonly known as pipe bombs or molotov cocktails. Criminal use of explosive is a severity level 8, person felony, except that it is a severity level 6, person felony if: (a) the possession, manufacture or transportation is intended to be used to commit a crime or is delivered to another with knowledge that it is intended to be used by the deliverer to commit a crime, (b) a public safety officer is placed at risk to defuse the explosive, or (c) the explosive is placed in a building in which there is another human being.

Note that PIK Chapter 64.00, Crimes Against the Public Safety, contains instructions relating to several crimes dealing with explosives.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.39 POSSESSION OR TRANSPORTATION OF
INCENDIARY OR EXPLOSIVE DEVICE**

The statute on which this instruction was based (K.S.A. 21-3732) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97. The substance of the repealed statute now appears in K.S.A. 21-4201(a)(9).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.40 CRIMINAL USE OF NOXIOUS MATTER

The statute on which this instruction was based (K.S.A. 21-3733) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.41 IMPAIRING A SECURITY INTEREST -
CONCEALMENT OR DESTRUCTION**

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (damaged) (destroyed) (concealed) _____;
2. That _____ was security for a debt owed to _____;
3. That the defendant did so with the intent to defraud the secured party;
4. That the property subject to the security interest (is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more) (is of the value of at least \$500 and either the value of the property or the security interest is less than \$25,000) (is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a)(1). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least \$500 and is subject to a security interest of at least \$500 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(2) or (3).

In the prosecution for impairing a security interest by concealment or destruction, it is necessary to provide the jury with the alternative of finding misdemeanor impairing security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

Comment

For a discussion of the history and purpose of K.S.A. 21-3734, see *State v. Ferguson*, 221 Kan. 103, 558 P.2d 1092 (1976).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.42 IMPAIRING A SECURITY INTEREST - SALE OR EXCHANGE

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (exchanged) (disposed of) _____;
2. That the defendant knew _____ was security for a debt owed to _____;
3. That the security agreement did not authorize the (sale) (exchange) (disposal) of _____;
4. That _____ did not consent in writing to the (sale) (exchange) (disposal) of _____;
5. That the property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$500 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
6. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a)(2). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least \$500 and is subject to a security interest of at least \$500 and either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (3).

In the prosecution for impairing a security interest by sale or exchange, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

Also, see Comment to PIK 3d 59.41, Impairing a Security Interest - Concealment or Destruction.

Prior to its amendment July 1, 1987, K.S.A. 21-3734 did not require proof of an intent to defraud. In *State v. Jones*, 11 Kan. App. 2d 612, 731 P.2d 881 (1987), the Court held that absent an intent to defraud, the statute violated the prohibition against imprisonment for a debt under Section 16 of the Bill of Rights of the Kansas Constitution. The Court also noted that this element was absent from the corresponding PIK 2d instructions 59.42 and 59.43. The Supreme Court reversed the Court of Appeals in *State v. Jones*, 242 Kan. 385, 748 P.2d 839 (1988). The Supreme Court held that an agreement which creates a security interest under the Uniform Commercial Code does not create a debt within the prohibition of Section 16 and that the creditor retains title to the property and in its proceeds until payment is made. The Court then discussed the statutory distinction between general intent crimes and specific intent crimes. The Court held that violations of K.S.A. 21-3734 are general intent crimes. The Court concluded K.S.A. 21-3734 "does not punish for a *debt* in the form of a theft -- it punishes for a *willful act to deprive a secured party of its property* and, thus, is not unconstitutional imprisonment for debt." 242 Kan. at 392. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.43 IMPAIRING A SECURITY INTEREST - FAILURE TO ACCOUNT

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ had a security interest in _____;
2. That the defendant (sold) (exchanged) (disposed of) _____ and received _____;
3. That the security agreement required that in the event of the (sale) (exchange) (disposal) of _____, the proceeds were to be given to _____;
4. That the defendant intentionally failed to account for the ([proceeds] [collateral]) ([within a reasonable time] [as specified in the security agreement]);
5. That the property subject to the security interest (was of the value of \$25,000 or more and was subject to a security interest of \$25,000 or more) (was of the value of at least \$500 and either the value of the property or the security interest was less than \$25,000) (was of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500); and
6. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3734(a)(3). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of \$25,000 or more and is subject to a security interest of \$25,000 or more. Impairment of a security interest is a severity level 9, nonperson felony when the property subject to the security interest is of the value of at least \$500 and is subject to a security interest of at least \$500 and

PATTERN INSTRUCTIONS FOR KANSAS 3d

either the value of the property or the security interest is less than \$25,000. Impairing a security interest is a class A, nonperson misdemeanor if the property subject to a security interest is of the value of less than \$500, or of the value of \$500 or more but subject to a security interest of less than \$500.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (2).

See K.S.A. 84-1-204 which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

Comment

See Comment to PIK 3d 59.42, Impairing a Security Interest - Sale or Exchange.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.44 FRAUDULENT RELEASE OF A SECURITY AGREEMENT

The statute upon which this instruction was based (K.S.A. 21-3735) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.45 WAREHOUSE RECEIPT FRAUD - ORIGINAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);

2. That the defendant (made) (drew) (issued) (delivered) a warehouse receipt for goods;

or

That the defendant caused or directed a warehouse receipt to be (made) (drawn) (issued) (delivered) for goods;

3. That the defendant knew that the goods shown on the receipt had not been received by (him)(her) at the time (he)(she) issued the receipt;

or

That the defendant knew that the goods shown on the receipt were not under (his)(her) actual control at the time (he)(she) issued the receipt;

or

That the defendant knew that the receipt contained a false statement; and

4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736(a)(1) and (2). Warehouse receipt fraud is a severity level 10, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.46 WAREHOUSE RECEIPT FRAUD - DUPLICATE OR ADDITIONAL RECEIPT

The defendant is charged with the crime of warehouse receipt fraud. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant (made) (drew) (issued) (delivered) a duplicate or additional warehouse receipt for goods without placing on its face the word "duplicate";

or

That the defendant caused or directed a duplicate or additional warehouse receipt to be (made) (drawn) (issued) (delivered) for goods without placing on its face the word "duplicate";

3. That the defendant knew that there was an uncanceled and outstanding receipt for the same goods; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3736(a)(3). Warehouse receipt fraud is a severity level 10, nonperson felony.

K.S.A. 21-3736(a)(3) provides for an exception in the case of a lost, stolen or destroyed receipt after proceedings as provided in K.S.A. 34-257 or 84-7-601(1). Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, § 2, it would appear that the statute referred to is K.S.A. 34-257a.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.47 UNAUTHORIZED DELIVERY OF STORED GOODS

The defendant is charged with the crime of unauthorized delivery of stored goods. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a (warehouseman) ([officer] [agent] [employee] of a warehouseman);
2. That the defendant delivered goods to _____;
3. That the defendant knew that there was a negotiable receipt for the goods outstanding and uncanceled;
4. That the defendant did not have possession of the receipt at the time (he)(she) delivered the goods; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3737. Unauthorized delivery of stored goods is a class A, nonperson misdemeanor.

Comment

K.S.A. 21-3737(a) lists five exceptions which are:

- (1) In case of lost, stolen or destroyed receipts, after proceedings have been had as provided in K.S.A. 84-7-601(1), or
- (2) In the case of delivery in good faith as provided in K.S.A. 84-7-601(2), or
- (3) In the case of optional termination of storage as provided in K.S.A. 84-7-206, or
- (4) In the case of a lost or destroyed receipt, after proceedings have been had as provided in K.S.A. 34-257, or
- (5) In case of sale as provided in K.S.A. 34-276.

Note that in subparagraph (4) above, reference is made to K.S.A. 34-257. Since K.S.A. 34-257 was repealed, L. 1967, ch. 235, § 2, it would appear that the statute referred to is K.S.A. 34-257a.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Where a criminal statute sets forth an exception which is not a part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden is on the accused to show the applicability of the exception. Accordingly, the prosecution owes no duty to prove in its case in chief that the accused is not within the exception. This is a mere rule of procedure and does not relieve the State of its burden of proving guilt. *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932); *7 Fifths Old Grand-Dad Whiskey v. United States*, 158 F.2d 34 (1946).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.48 AUTOMOBILE MASTER KEY VIOLATION

The defendant is charged with the crime of automobile master key violation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (sold) (offered to sell) a motor vehicle master key to _____;
or
That the defendant possessed a motor vehicle master key;**
- 2. That the defendant knew that the master key was designed to fit the ignition switch of more than one motor vehicle; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3738. Automobile master key violation is a class C misdemeanor.

Comment

The exceptions in subparagraph (2) should be considered. This subparagraph provides that it shall not be unlawful for the owner of two or more vehicles to possess a motor vehicle master key for any or all of the motor vehicles so owned, nor shall sale of such master keys to such owner be unlawful. The burden of claiming a status of exemption and introducing evidence that the defendant was exempt is upon the defendant.

In general, the accused has the burden of introducing evidence as a matter of defense that he or she is within an exception in the statute creating the offense where such exception is not a part of the description of the offense. Accordingly, the prosecution owes no duty to prove in its case-in-chief that the accused is not within the exception. This is a mere rule of procedure and does not relieve the State of its burden of proving guilt. *State v. Wilson*, 62 Kan. 621, 64 Pac. 23 (1901); *State v. Huff*, 75 Kan. 585, 599, 90 Pac. 279 (1907); *State v. Driscoll*, 134 Kan. 671, 8 P.2d 335 (1932).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.49 POSTING OF POLITICAL PICTURES OR ADVERTISEMENTS

The defendant is charged with the crime of posting political (pictures) (advertisements). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant attached a political (picture) (advertisement) to a (telegraph) (utility) pole; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3739. Posting of political material is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.50 OPENING, DAMAGING OR REMOVING COIN-OPERATED MACHINES

The statute upon which this instruction was based (K.S.A. 21-3740) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.51 POSSESSION OF TOOLS FOR OPENING,
DAMAGING OR REMOVING COIN-OPERATED
MACHINES**

The statute upon which this instruction was based (K.S.A. 21-3741) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.52 CASTING AN OBJECT ONTO A STREET OR ROAD -
DAMAGE TO VEHICLE, RESULTING IN BODILY
INJURY**

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]);
2. That (a vehicle) (an engine) (a car) (a train) (a locomotive) (a railroad car) (a caboose) (rail-mounted work equipment) (rolling stock) was damaged;
3. That _____ was injured as a result of the (cast or thrown object) (damage to the vehicle in which [he] [she] was a passenger); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(d). Casting an object causing damage to a vehicle which results in bodily injury is a severity level 6, person felony.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.53 CASTING AN OBJECT ONTO A STREET OR ROAD -
BODILY INJURY**

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast [(an object) (objects)] from a bridge or overpass (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]);
2. That _____ was on the (street) (road) (highway) (railroad right-of-way);
3. That _____ was injured as a result of the cast or thrown object; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(c). Casting an object causing bodily injury is a severity level 7, nonperson felony.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.54 CASTING AN OBJECT ONTO A STREET OR ROAD - VEHICLE DAMAGE

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock]) on a [street] [road] [highway] [railroad right-of-way]);
2. That (a vehicle) (an engine) (a car) (a train) (a locomotive) (a railroad car) (a caboose) (rail-mounted work equipment) (rolling stock) on the (street) (highway) (railroad right-of-way) was damaged by the thrown or cast object; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(b). Casting an object causing damage to a vehicle, railroad car or other equipment is a class A, nonperson misdemeanor.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.55 CASTING AN OBJECT ONTO A STREET OR ROAD - NO DAMAGE

The defendant is charged with the crime of casting (an object) (objects) onto a _____. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally cast [(an object) (objects)] (onto a [street] [highway] [road] [railroad right-of-way]) (upon [a vehicle] [an engine] [a car] [a train] [a locomotive] [a railroad car] [a caboose] [rail-mounted work equipment] [rolling stock] on a [street] [road] [highway] [railroad right-of-way]); and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3742(a). Casting an object without injury to a person or vehicle is a class B, nonperson misdemeanor.

Comment

The requirement that the object be thrown from a bridge or overpass was eliminated by the legislature in 1996.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.56 SALE OF RECUT TIRES

The defendant is charged with the crime of (selling) (offering to sell) recut or regrooved tires intended for use on a passenger vehicle or of (selling) (offering to sell) a passenger vehicle equipped with recut or regrooved tires. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (sold) (offered for sale) recut or regrooved tires for a passenger vehicle; or
That the defendant intentionally (sold) (offered for sale) a passenger vehicle equipped with recut or regrooved tires; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Recut or regrooved tires are unretreaded or unrecapped tires into which new grooves have been cut or burned.

Passenger vehicle means any vehicle which is designed primarily to carry 10 or fewer passengers, and which is not used as a truck.

Notes on Use

For authority, see K.S.A. 21-3743 and 21-3744. Sale of recut tires is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.57 THEFT OF CABLE TELEVISION SERVICES

The statute on which this instruction was based (K.S.A. 21-3752) was repealed, effective July 1, 1988. See L. 1988, ch. 113, § 3.

For an instruction on the current statute, see PIK 3d 59.03, Theft of Services.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.58 PIRACY OF RECORDINGS

The defendant is charged with the crime of piracy of recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was the owner of the recordings;

2. That the defendant knowingly (duplicated) (caused to be duplicated) sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded);

or

That the defendant knowingly (recorded) (caused to be recorded) any live performance;

3. That _____ did not consent to the defendant (duplicating) (causing to be duplicated) the recordings;

or

That _____ did not consent to the recording of the live performance;

4. That the defendant (duplicated) (caused to be duplicated) the recordings with the intent to (sell) (rent) (cause to be sold or rented) (give away as part of a promotion for any product or service) such duplicated sounds or any such recorded performance; and

5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3748. Piracy of recordings is a severity level 9, nonperson felony.

Defenses to the charge of piracy of recordings are set forth in PIK 3d 59.59, Piracy of Recordings - Defenses.

In the event that there is a dispute or issue as to ownership, then refer to the statutory definition of "owner," K.S.A. 21-3748.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.58-A DEALING IN PIRATED RECORDINGS

The defendant is charged with the crime of dealing in pirated recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]), any sounds recorded on (a phonograph record) (a disc) (a wire) (a tape) (a film) (an article on which sounds are recorded);

or

That the defendant (sold) (offered for sale) (distributed) (possessed for the purpose of [sale] [distribution]) a recording of any live performance;

2. That the defendant knew or had reasonable grounds to know that such recording was produced in violation of law;
3. That the offense involved [(less than seven) (seven or more) audio visual recordings] [(less than 100) (100 or more) sound recordings] during a 180-day period; and
4. That this offense occurred between the ____ day of _____, _____, and the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3749. Dealing in pirated recordings is a class A, nonperson misdemeanor if the offense involves less than seven audio visual recordings or less than 100 sound recordings during a 180-day period or a severity level 9, nonperson felony if the offense involves seven or more audio visual recordings or 100 or more sound recordings during a 180-day period.

When defendant has been charged with a felony and the number of audio or sound recordings is in issue, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.59 PIRACY OF RECORDINGS - DEFENSES

It is a defense to the charge of piracy of recordings if the duplication of the sound or live performance occurs (by any person in connection with or as part of a radio or television broadcast or cable television or for the purpose of archival preservation) (by any person who duplicated [such sounds] [such recording] for personal use and without compensation for such duplication);

OR

It is a defense to the charge of piracy of recordings if the duplication is (of any sounds initially fixed in a tangible medium of expression after February 15, 1972) (of any computer program or any audio or visual recording that is part of any computer program).

Notes on Use

For authority, see K.S.A. 21-3748(c). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.60 NON-DISCLOSURE OF SOURCE OF RECORDINGS

The defendant is charged with the crime of non-disclosure of source of recordings. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (rented) (offered for sale or rental) ([possessed] [transported] [manufactured] for the purpose of [selling] [renting]) any (phonograph record) (audio or video disc) (wire) (audio or video tape) (film) (other article [known] [later developed]) on which (sounds) (images) (both sounds and images) are (recorded) (stored);
2. That the (outside cover) (box) (jacket) of the (insert type of recording) did not clearly and conspicuously disclose the name and address of the manufacturer of such article;
3. That the offense involved ([less than seven] [seven or more] audio visual recordings) ([less than 100] [100 or more] sound recordings) during a 180-day period; and
4. That this offense occurred between the ____ day of _____, _____, and the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3750. Non-disclosure of source of recordings is a class A, nonperson misdemeanor if the offense involves less than seven audio visual recordings or less than 100 sound recordings during a 180-day period, or a severity level 9, nonperson felony if the offense involves seven or more audio visual recordings or 100 or more sound recordings during a 180-day period.

When defendant has been charged with a felony and the number of audio or sound recordings is in issue, PIK 3d 68.09, Lesser Included Offenses, should be given together with PIK 3d 68.10, Verdict Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.61 DEFRAUDING AN INNKEEPER

The statute upon which this instruction was based (K.S.A. 36-206) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97. See PIK 3d 59.03, Theft of Services.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.62 GRAIN EMBEZZLEMENT

The statute upon which this instruction was based (K.S.A. 21-3753) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.63 MAKING FALSE PUBLIC WAREHOUSE RECORDS
AND STATEMENTS**

The statute upon which this instruction was based
(K.S.A. 21-3754(a)) was repealed effective July 1, 1993.
L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.63-A MAKING FALSE PUBLIC WAREHOUSE REPORTS

The statute upon which this instruction was based (K.S.A. 21-3754(b)) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.63-B ADDING DOCKAGE OR FOREIGN MATERIAL TO GRAIN

The defendant is charged with adding dockage or foreign material to grain. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly added (insert description of type of dockage) or (insert description of foreign material) to (insert type of grain);

or

That the defendant knowingly recombined (insert description of type of dockage) or (insert description of foreign material) once removed from grain with (insert type of grain);

2. That the defendant intended the grain to be marketed; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3756. Adding dockage or foreign material to grain is a severity level 9, nonperson felony.

The Court must determine, as a matter of law, from the regulations promulgated by the United States Secretary of Agriculture whether the material added constitutes dockage or foreign material. Dockage means that definition given to it by the United States Secretary of Agriculture as of July 1, 1987, under the Federal Grain Quality Improvement Act of 1986. K.S.A. 21-3156 defines "foreign material" as dirt, rock, sand, sticks, or manure, or any combination of such material defined as foreign material by the United States Secretary of Agriculture as of July 1, 1987 under the Federal Grain Quality Improvement Act of 1986.

PATTERN INSTRUCTIONS FOR KANSAS 3d

The Secretary has provided a definition for dockage or foreign material for each of several types of grain. See 7 C.F.R. § 810 *et seq.* Official United States Standards for Grain (1988).

| | | |
|--------------------------|------------------|------------------------|
| Subpart B barley | dockage | 7 C.F.R. § 810.202(e) |
| | foreign material | 7 C.F.R. § 810.202(f) |
| Subpart C corn | dockage | none |
| | foreign material | 7 C.F.R. § 810.402(e) |
| Subpart D flaxseed | dockage | 7 C.F.R. § 810.602(b) |
| | foreign material | none |
| Subpart F oats | dockage | none |
| | foreign material | 7 C.F.R. § 810.1002(b) |
| Subpart G rye | dockage | 7 C.F.R. § 810.1202(b) |
| | foreign material | 7 C.F.R. § 810.1202(c) |
| Subpart H sorghum | dockage | 7 C.F.R. § 810.1402(e) |
| | foreign material | 7 C.F.R. § 810.1402(f) |
| Subpart I soybeans | dockage | none |
| | foreign material | 7 C.F.R. § 810.1602(c) |
| Subpart J sunflower seed | dockage | none |
| | foreign material | 7 C.F.R. § 810.1802(d) |
| Subpart K triticale | dockage | 7 C.F.R. § 810.2002(c) |
| | foreign material | 7 C.F.R. § 810.2002(d) |
| Subpart L wheat | dockage | 7 C.F.R. § 810.2202(e) |
| | foreign material | 7 C.F.R. § 810.2202(f) |

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.64 COMPUTER CRIME

The defendant is charged with computer crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally and without authority gained access to and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (_____, which is computer related property);
or
1. That the defendant used a (computer) (computer system) (computer network) (_____, which is computer related property) for the purpose of (devising) (executing) a (scheme) (artifice) with the intent to defraud or for the purpose of obtaining (money) (property) (services) or any other thing of value by means of false or fraudulent pretense or representation;
or
1. That defendant intentionally exceeded the limits of authorization and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (_____, which is computer related property);
and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3755(b)(1)(B). Computer crime is now a severity level 8, nonperson felony, without regard to the amount of loss suffered by the victim.

PATTERN INSTRUCTIONS FOR KANSAS 3d

The optional words and phrases should be used as required in the particular case.

If warranted, PIK 3d 59.64-A, Computer Crime - Defense, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.64-A COMPUTER CRIME - DEFENSE

It is a defense if the defendant appropriated the property or services openly and under a claim of title made in good faith.

Notes on Use

For authority, see K.S.A. 21-3755(b)(3). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.64-B COMPUTER TRESPASS

The defendant is charged with computer trespass. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (accessed) (attempted to access) a (computer) (computer system) (computer network) (computer software) (computer program) (computer documentation) (computer data) (computer property contained in a computer, computer system or computer network);**
- 2. That the defendant did so intentionally and without authorization; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3755(d). Computer trespass is a class A, nonperson misdemeanor. Prior to 1997, this crime was called Criminal Computer Access.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-A VIOLATION OF THE KANSAS ODOMETER ACT -
TAMPERING, ETC.**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (tampered with) (adjusted) (altered) (changed) (set back) (disconnected) (failed to connect) the odometer of a motor vehicle so as to reflect a lower mileage than the true mileage the motor vehicle had been driven; and
or

That the defendant knowingly caused the odometer of a motor vehicle to (be tampered with) (be adjusted) (be altered) (be changed) (be set back) (be disconnected) (remain disconnected) by another so as to reflect a lower mileage than the true mileage driven by the motor vehicle; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(b). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-B VIOLATION OF THE KANSAS ODOMETER ACT -
CONSPIRING**

The defendant is charged with the crime of conspiring to violate the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant agreed with (another person) (others) to (commit) (assist in the commission of) the crime of violation of the Kansas Odometer Act by (describe the specific violation of the Act to which the defendant conspired);
2. That the defendant did so agree with the intent that a violation of the Kansas Odometer Act be committed;
3. That the defendant or any party to the agreement acted in furtherance of the agreement by (describe the overt act); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(c). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-C VIOLATION OF THE KANSAS ODOMETER ACT -
OPERATING A VEHICLE**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant operated a motor vehicle on a (street) (highway) knowing that the odometer was (disconnected) (nonfunctional);
2. That defendant did so with the intent to defraud; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(d). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.65-D VIOLATION OF THE KANSAS ODOMETER ACT - UNLAWFUL DEVICE

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (advertised for sale) (sold) (used) (installed on a motor vehicle) (installed on an odometer in a motor vehicle) a device which causes the odometer to register mileage other than the true mileage; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(e). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**59.65-E VIOLATION OF THE KANSAS ODOMETER ACT -
UNLAWFUL SALE**

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sold) (offered to sell) a motor vehicle knowing that the odometer on the motor vehicle (was tampered with) (was adjusted) (was altered) (was changed) (was set back) (was disconnected) (had not been connected) so as to reflect a lower mileage than the true mileage of the motor vehicle;
2. That the defendant did so with the intent to defraud; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(f). Violation of the Kansas Odometer Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.65-F VIOLATION OF THE KANSAS ODOMETER ACT - UNLAWFUL SERVICE, REPAIR OR REPLACEMENT

The defendant is charged with the crime of violation of the Kansas Odometer Act. The defendant pleads not guilty.

The Kansas Odometer Act provides that, if in the service, repair, or replacement of an odometer, the odometer is (made) (found) incapable of registering the same mileage as before the service, repair, or replacement of the odometer, it shall be adjusted to read zero and a notice shall be attached permanently to the left door frame of the vehicle specifying the mileage prior to repair or replacement of the odometer, the date on which it was repaired or replaced, and the vehicle identification number.

To establish this charge, each of the following claims must be proved:

1. That the defendant failed to (adjust) (affix a notice regarding the adjustment of) the odometer of a motor vehicle; and
or
That the defendant (removed) (altered) the notice affixed to a motor vehicle as required by the Kansas Odometer Act; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3757(g). Violation of the Act is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.66 PROMOTING A PYRAMID PROMOTIONAL SCHEME

The defendant is charged with the crime of promoting a pyramid promotional scheme. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

1. That the defendant (established) (operated) (advertised) (promoted) a pyramid promotional scheme.
2. That the defendant did so intentionally; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

As used in this instruction, "pyramid promotional scheme" means any plan or operation by which a participant gives consideration for the opportunity to receive compensation which is derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services or intangible property by the participant or other persons introduced into the plan or operation.

[(A limitation as to the number of persons who may participate or the presence of additional conditions affecting eligibility for the opportunity to receive compensation under the plan or operation does not change the identity of the scheme as a pyramid promotional scheme) (It is not a defense that a participant, on giving consideration, obtains any goods, services or intangible property in addition to the right to receive compensation).]

Notes on Use

For authority, see K.S.A. 21-3762, enacted in 1997.

Violation of the Act is a severity level 9, nonperson felony.

The bracketed paragraph should be used only if the issue is raised.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.67 - 59.69 RESERVED FOR FUTURE USE.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

| | PIK Number |
|--|---------------|
| Treason | 60.01 |
| Sedition | 60.02 |
| Practicing Criminal Syndicalism | 60.03 |
| Permitting Premises To Be Used For Criminal Syndicalism | 60.04 |
| Perjury | 60.05 |
| Corruptly Influencing A Witness | 60.06 |
| Intimidation Of A Witness Or Victim | 60.06-A |
| Aggravated Intimidation Of A Witness Or Victim | 60.06-B |
| Unlawful Disclosure Of Authorized Interception Of Communications | 60.06-C |
| Compounding A Crime | 60.07 |
| Obstructing Legal Process | 60.08 |
| Obstructing Official Duty | 60.09 |
| Escape From Custody | 60.10 |
| Aggravated Escape From Custody | 60.11 |
| Aiding Escape | 60.12 |
| Aiding A Felon Or Person Charged As A Felon | 60.13 |
| Aiding A Person Convicted Of Or Charged With Committing A Misdemeanor | 60.14 |
| Failure To Appear Or Aggravated Failure To Appear | 60.15 |
| Attempting To Influence A Judicial Officer | 60.16 |
| Interference With The Administration Of Justice | 60.17 |
| Corrupt Conduct By Juror | 60.18 |
| Falsely Reporting A Crime | 60.19 |
| Performance Of An Unauthorized Official Act | 60.20 |
| Simulating Legal Process | 60.21 |
| Tampering With A Public Record | 60.22 |
| Tampering With Public Notice | 60.23 |
| False Signing Of A Petition | 60.24 |
| False Impersonation | 60.25 |
| Aggravated False Impersonation | 60.26 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|---|-------|
| Traffic In Contraband In A Correctional Institution | 60.27 |
| Criminal Disclosure Of A Warrant | 60.28 |
| Interference With The Conduct Of Public Business | |
| In A Public Building | 60.29 |
| Dealing In False Identification Documents | 60.30 |
| Harassment Of Court By Telefacsimile | 60.31 |
| Aircraft Registration | 60.32 |
| Fraudulent Registration Of Aircraft | 60.33 |
| Fraudulent Aircraft Registration - Supplying False Information | 60.34 |
| Aircraft Identification - Fraudulent Acts | 60.35 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.01 TREASON

**The defendant is charged with the crime of treason.
The defendant pleads not guilty.**

**To establish this charge, each of the following claims
must be proved:**

- 1. That the defendant intentionally levied war against
the State of Kansas; and
or
That the defendant intentionally adhered to the
enemies of the State of Kansas; and
or
That the defendant intentionally gave aid and
comfort to the enemies of the State of Kansas; and**
- 2. That this act occurred on or about the ____ day of
_____, _____, in _____
County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3801(a). Treason is an off-grid person felony.
K.S.A. 21-3801(b) provides that no person shall be convicted of treason unless
on the evidence of two witnesses to the overt act or confession in open court.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.02 SEDITION

The defendant is charged with the crime of sedition. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and**

or

That the defendant knowingly (published) (sold) (distributed) a document which advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

or

That the defendant intentionally became the member of an organization knowing that the purpose of such organization was to advocate the overthrow or reformation of the State of Kansas by violence or unlawful means; and

- 2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3802. Sedition is a severity level 7, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.03 PRACTICING CRIMINAL SYNDICALISM

The statute on which this instruction was based (K.S.A. 21-3803) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.04 PERMITTING PREMISES TO BE USED FOR
CRIMINAL SYNDICALISM**

The statute on which this instruction was based (K.S.A. 21-3804) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.06 CORRUPTLY INFLUENCING A WITNESS

Prior editions of PIK Criminal contained instruction 60.06. The statute on which such instruction was based (K.S.A. 21-3806) was repealed effective July 1, 1983. The crime of corruptly influencing a witness has been replaced with the crimes of intimidation of a witness or a victim and aggravated intimidation of a witness or victim. See PIK 3d 60.06-A and 60.06-B for instructions on these offenses.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.06-A INTIMIDATION OF A WITNESS OR VICTIM

The defendant is charged with the crime of intimidation of a (witness) (victim). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) _____, from attending or giving testimony at a (trial) (preliminary hearing) (other proceeding or inquiry authorized by law);

OR

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade _____, from:
 - (a) making a report of a (crime) (attempted crime) or (civil injury or loss) against an individual, _____, to any law enforcement, probation, parole, correctional, community correction services or judicial officer;
or
 - (b) causing a complaint, indictment or information to be sought and prosecuted and assisting in its prosecution;
or
 - (c) causing a probation or parole violation to be reported and prosecuted and assisting in its prosecution;
or
 - (d) causing a civil action to be filed and prosecuted and assisting in its prosecution;
or
 - (e) arresting or causing or seeking the arrest of any person in connection with a (crime) (attempted crime) or (civil injury or loss) against an individual, _____;

PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant did so knowingly and maliciously; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Maliciously means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

Notes On Use

For authority, see K.S.A. 21-3832. Intimidation of a witness or victim is a class B, person misdemeanor.

Insert name of witness, victim or person acting on behalf of a victim in blank space in Element No. 1.

Insert type of "other proceeding or inquiry" in blank space in Element No. 1.

Insert name of individual in blank spaces.

Comment

It was held in *State v. Reed*, 213 Kan. 557, 559-562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806 (repealed L. 1983). The expressed reasoning would appear applicable in prosecutions under K.S.A. 21-3832 and K.S.A. 21-3833.

In *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998), the court notes that the proper test to determine the reaction of an alleged victim in an intimidation or aggravated intimidation charge is objective, not subjective, i.e., that of a reasonable person. There are exceptions to this rule, such as where the perpetrator has knowledge of a particular vulnerability of the victim and then acts with full knowledge of the victim's vulnerability.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.06-B AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM

The defendant is charged with the crime of aggravated intimidation of a (witness) (victim). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) (person acting on behalf of a victim), _____, from (cite appropriate violation listed in PIK 3d 60.06-A); and
2. That the act was accompanied by an expressed or implied threat of force or violence against the (person) (property) of a (witness) (victim) (other person);
or
That the act was in furtherance of a conspiracy;
or
That the defendant had been previously convicted of _____;
or
That the (witness) (victim), _____, was under 18 years of age;
or
That the act was committed for (pecuniary gain) (other consideration) by the defendant acting upon the request of another person;
3. That the defendant did so knowingly and maliciously; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Maliciously means with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes On Use

For authority, see K.S.A. 21-3833. Aggravated intimidation of a witness or victim is a severity level 6, person felony.

Conspiracy should be defined when the State alleges the act was committed in furtherance of a conspiracy. See PIK 3d 55.05, Conspiracy - Defined, for definition.

Whether a prior conviction of defendant was for a crime included within the provision of subsection (a)(3) of K.S.A. 21-3833 is a question of law for the Court. Where found to be included, insert the crime in the blank space. Insert name of witness, victim or person acting on behalf of a victim in blank space.

Comment

See Comment to PIK 3d 60.06-A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.06-C UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS

The defendant is charged with the crime of unlawful disclosure of authorized interception of (wire) (oral) (electronic) communications. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant communicated to a person or made public in any way the existence of an application or order for the interception of (wire) (oral) (electronic) communications;
2. That the act was done with the intent to obstruct, impede or prevent an authorized interception; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Intercept means the hearing or otherwise learning of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.

Notes On Use

For authority, see K.S.A. 21-3838. Unlawful disclosure of an authorized interception of communications is a severity level 10, nonperson felony.

Definitions of wire communication, oral communication and electronic communication are found in K.S.A. 22-2514.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.07 COMPOUNDING A CRIME

**The defendant is charged with compounding a crime.
The defendant pleads not guilty.**

**To establish this charge, each of the following claims
must be proved:**

- 1. That the defendant knew _____ had
committed a crime;**
- 2. That the defendant intentionally (accepted) (agreed
to accept) anything of value as consideration for a
promise [not to (initiate) (aid in) the prosecution of
_____] [to (conceal evidence of a crime)
(destroy evidence of a crime)]; and**
- 3. That this act occurred on or about the ____ day of
_____, _____, in _____
County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3807. Compounding a felony is a severity level 8, nonperson felony. Compounding a misdemeanor is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3808. If the state charges obstruction in the service or execution of process or order of a court by an officer not in uniform, PIK 60.08 should be used. If the state charges obstruction of an officer in the discharge of official duty or if the officer is in uniform, PIK 60.09 should be used. *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998); *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

It was held in *State v. Timley*, 25 Kan. App. 2d at 786, that a felony arrest without a warrant is not legal process as defined in K.S.A. 21-3808.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), the court held that obstructing the execution of a search warrant is a misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3808. If the state charges obstruction in the service or execution of process or order of a court by an officer not in uniform, PIK 60.08 should be used. If the state charges obstruction of an officer in the discharge of official duty or if the officer is in uniform, PIK 60.09 should be used. *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998); *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 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.

It was held in *State v. Timley*, 25 Kan. App. 2d at 786, that a felony arrest without a warrant is not legal process as defined in K.S.A. 21-3808.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), the court held that obstructing the execution of a search warrant is a misdemeanor.

60.10 ESCAPE FROM CUSTODY

The defendant is charged with the crime of escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was being held in custody (on a written charge of a misdemeanor) (following defendant's conviction of a misdemeanor) (on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a misdemeanor) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a misdemeanor offense);
2. That the defendant intentionally departed from custody without lawful authority from _____; and

or

That the defendant intentionally failed to return to custody (following temporary leave lawfully granted) (following a court order authorizing temporary leave); and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a misdemeanor offense) (here insert any other detention for law enforcement purposes).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes On Use

For authority, see K.S.A. 21-3809. Escape from custody is a class A, nonperson misdemeanor.

The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the Court to determine. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-3809(b)(1).

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1969), the Court discusses and defines "escape" and states what constitutes "escape." The Court, in this case, also stated when a person is in "lawful custody."

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the Court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes K.S.A. 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the State is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The Court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.11 AGGRAVATED ESCAPE FROM CUSTODY

The defendant is charged with the crime of aggravated escape from custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

A. 1. That the defendant was being held in custody

- [(a) on a written charge or conviction of a felony]**
- [(b) upon a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony]**
- [(c) prior to or upon a finding of probable cause for evaluation as a sexually violent predator]**
- [(d) upon commitment to a treatment facility as a sexually violent predator]**
- [(e) upon commitment to a state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a felony]**
- [(f) by a person 18 years of age or over who is being held on an adjudication of a felony] or**
- [(g) upon incarceration at a state correctional institution while in the custody of the secretary of corrections]**

2. That the defendant intentionally departed from custody without lawful authority from _____; and

or

That the defendant intentionally failed to return to custody following (temporary leave authorized by law) (temporary leave granted by a court order); and

OR

B. 1. That the defendant was being held in custody

- [(a) on a charge or conviction of any crime]**

PATTERN INSTRUCTIONS FOR KANSAS 3d

- [(b) on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony]
 - [(c) prior to or upon a finding of probable cause for evaluation as a sexually violent predator]
 - [(d) upon commitment to a treatment facility as a sexually violent predator]
 - [(e) upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect]
 - [(f) by a person 18 years of age or over who is being held on a charge or adjudication of any crime] or
 - [(g) upon incarceration at a state correctional institution while in the custody of the secretary of corrections]
2. That the defendant intentionally departed from custody by use of violence or the threat of violence against any person; and
 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Custody as used in this instruction means (here insert legal basis for custody).

Notes on Use

For authority, see K.S.A. 21-3810 and 21-3809. The legal basis for custody to be inserted in the body of the instruction may come from the list provided in K.S.A. 21-3809 or from the circumstances delineated in K.S.A. 21-3810. Aggravated escape from custody as described in subsection A.1.(a), A.1.(c), A.1.(d), A.1.(e) or A.1.(f) is a severity level 8, nonperson felony. Aggravated escape from custody as described in subsection A.1.(b) or A.1.(g) is a severity level 5, nonperson felony. Aggravated escape from custody as described in subsection B.1.(a), B.1.(c), B.1.(d), B.1.(e) or B.1.(f) is a severity level 6, person felony. Aggravated escape from custody as described in subsection B.1.(b) or B.1.(g) is a severity level 5, person felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine. Custody does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-3809(b)(1).

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

See Comment to PIK 3d 60.10, Escape from Custody.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.12 AIDING ESCAPE

The defendant is charged with the crime of aiding escape. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

A. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

2. That the defendant intentionally assisted _____ in escape from custody; and

OR

B. 1. That _____ was in lawful custody (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

2. That the defendant supplied to _____, an object or thing adapted or designed for _____'s use in making an escape;

3. That the defendant did so with intent to assist _____ in making an escape; and

OR

C. 1. That _____ was confined in an institution (charged with a crime) (after conviction of a crime) (upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect);

2. That the defendant (brought) (introduced) into the institution an object or thing adapted or designed for _____'s use in making an escape;

3. That the defendant did so with intent to assist _____ in making an escape; and

[3] or [4]. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Custody includes (arrest) (detention in a facility for holding persons charged with or convicted of crimes) (detention for extradition or deportation) (detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program) (commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect) (here insert any other detention for law enforcement purposes).

Notes On Use

For authority, see K.S.A. 21-3811 and 21-3809. Aiding escape is a severity level 8, nonperson felony.

K.S.A. 21-3809(b)(1), "lawful custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. Lawful custody is initially a question of law for the Court to determine.

For a definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.13 AIDING A FELON OR PERSON CHARGED AS A FELON

The defendant is charged with the crime of (aiding a felon) (aiding a person charged as a felon). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew _____ (had committed _____, a felony) (had been charged with having committed _____, a felony);
2. That the defendant knowingly harbored, concealed or aided _____;
3. That the defendant did so with the intent that _____ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3812(a) and (b). Aiding a felon or person charged as a felon is a severity level 8, nonperson felony.

For venue, see K.S.A. 22-2607 and 22-2616.

If the person allegedly aided had not been charged at the time aid was given, an issue may arise as to whether or not the person aided had in fact committed a crime. A separate instruction should be given setting forth the elements of the crime alleged to have been committed by the person aided.

Comment

In *State v. Rider, Edens & Lemons*, 229 Kan. 394, 401, 625 P.2d 425 (1981), the Court held that three conditions were required to render one guilty as an accessory after the fact and the same conditions are required to render one guilty of aiding a felon under K.S.A. 21-3812(a): The felony must be complete, the accused must have knowledge that the principal committed the felony, and the

PATTERN INSTRUCTIONS FOR KANSAS 3d

accused must act with the intent to enable the principal to avoid or escape from arrest, trial, conviction or punishment for the felony. In the same case, the Court further stated, "Generally, any assistance or relief given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to render the person giving such assistance guilty for aiding a felon."

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.14 AIDING A PERSON CONVICTED OF OR CHARGED WITH COMMITTING A MISDEMEANOR

The defendant is charged with the crime of aiding a person (convicted of committing a misdemeanor) (charged with committing a misdemeanor). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew _____ (had been convicted of committing a misdemeanor) (had been charged with committing _____, a misdemeanor);
2. That the defendant knowingly harbored, concealed, or aided _____;
3. That the defendant did so with intent that _____ would avoid or escape from (arrest) (trial) (conviction) (punishment); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3812(c). Aiding a person convicted of or charged with committing a misdemeanor is a class C misdemeanor.

If an issue arises in the case being tried as to whether or not the particular misdemeanor has been committed by the person allegedly aided, an instruction should be given setting forth the elements of that offense. If the person allegedly aided has been convicted, such an instruction is not necessary.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.15 FAILURE TO APPEAR OR AGGRAVATED FAILURE TO APPEAR

The defendant is charged with the crime of (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had been charged with a (misdemeanor) (felony) and released on an appearance bond to appear before a court;
2. That the defendant intentionally failed to appear before the court at the time requested;
3. That the defendant's appearance bond was forfeited;
4. That the defendant intentionally (failed to surrender within 30 days following the forfeiture of appearance bond) (failed to surrender within 30 days after conviction of a [misdemeanor] [felony] had become final); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3813 and 21-3814. Failure to appear is a class B, nonperson misdemeanor. Aggravated failure to appear is a severity level 10, nonperson felony.

The provisions of K.S.A. 21-3813(a) do not apply to any person who forfeits a cash bond supplied pursuant to law upon an arrest for a traffic offense.

For venue, see K.S.A. 22-2615.

The 30-day period following forfeiture is a question of law.

It is the opinion of the Committee that all the elements essential to an instruction for K.S.A. 21-3813, Failure to appear, and K.S.A. 21-3814, Aggravated failure to appear, are contained in this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness, it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers*, 225 Kan. 242, 245, 589 P.2d 981 (1979).

Failure to appear is "aggravated" only if the charge involved is a felony. When applicable, this element should be included in the trial court's instruction. See *State v. DeAtley*, 11 Kan. App. 2d 605, 731 P.2d 318 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER

The defendant is charged with the crime of attempting to influence a judicial officer. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was a judicial officer;
2. That the defendant knew _____ was a judicial officer;
3. That the defendant communicated with _____ relative to a matter which (was before) (might have been brought before) _____;
4. That such act was done by the defendant with the intent to improperly influence _____; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3815. Attempting to influence a judicial officer is a severity level 9, nonperson felony.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

Comment

In *State v. Torline*, 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the Court stated, "The phrase with intent improperly to influence a judicial officer as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above-cited case, the Court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.17 INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE

The defendant is charged with the crime of interference with the administration of justice. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew _____ was a (judicial officer)(prosecuting attorney);
2. That the defendant (communicated a threat of violence to _____) (harassed _____ by repeated abusive and defamatory communication) (picketed, paraded or demonstrated in or near a building housing _____) (picketed, paraded or demonstrated in or near the residence or place of abode of _____);
3. That such act was done with intent to influence, impede or obstruct the findings, decision, ruling, order, judgment or decree of _____ on any matter then pending before (him)(her); and
4. That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3816. Interference with the administration of justice is a class A, nonperson misdemeanor.

Comment

Nothing in K.S.A. 21-3816 shall limit or prevent the exercise by any court in this state of its power to punish for contempt.

Judicial officer is defined in K.S.A. 21-3110(19)(c). Prosecuting attorney is defined in K.S.A. 22-2202.

The Committee believes that the words "defamatory" and "abusive" are more understandable to a jury than "vituperative" as used in this statute.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.18 CORRUPT CONDUCT BY JUROR

The defendant is charged with the crime of corrupt conduct by a juror. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had been (summoned) (sworn) as a juror;
2. (a) That the defendant intentionally promised or agreed to give a verdict for or against a party in a (civil) (criminal) proceeding; and

OR

2. (a) That the defendant without authority of the court or officer received evidence or information relative to a case defendant (was) (would be) sworn to try;
- (b) That the defendant did not immediately disclose the evidence or information to the (court) (officer); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3817. Corrupt conduct by a juror is a severity level 9, nonperson felony.

Comment

See K.S.A. 22-3413, Juror's knowledge of material fact.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.19 FALSELY REPORTING A CRIME

The defendant is charged with the crime of falsely reporting a crime. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knew that _____ was a (law enforcement officer) (state investigative agency);
2. That the defendant informed _____ that a crime had been committed;
3. That the defendant knew the information given _____ was false;
4. That the defendant intended that _____ would act on the false information given; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3818. Falsely reporting a crime is a class A, nonperson misdemeanor.

Law enforcement officer is defined in K.S.A. 21-3110(10).

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.20 PERFORMANCE OF AN UNAUTHORIZED OFFICIAL ACT

The defendant is charged with the crime of performance of an unauthorized official act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant, knowing that (he)(she) had no lawful authority, (conducted a marriage ceremony) (certified an acknowledgement of the execution of a document which by law might be recorded); and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3819. Performance of an unauthorized official act is a class B, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.21 SIMULATING LEGAL PROCESS

The defendant is charged with the crime of simulating legal process. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sent) (delivered) to _____ a document which (he)(she) knew purported to be or simulated those used in courts;
2. That the defendant knew this document was not issued by a court;
3. That the defendant intended that this act would induce payment of a claim; and

OR

1. That the defendant printed, distributed, or offered for sale documents which (he)(she) knew purported to be or simulated those used in courts;
 2. That the defendant knew such documents would not be used by any court for any purpose; and
- [3.] or [4]. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3820. Simulating legal process is a class A, nonperson misdemeanor.

K.S.A. 21-3820 does not apply to the printing, distribution, or sale of blank forms of legal documents intended for actual use in judicial proceedings.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.22 TAMPERING WITH A PUBLIC RECORD

The defendant is charged with the crime of tampering with a public record. 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 (altered) (destroyed) (defaced) (removed) (concealed) a public record; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3821. Tampering with a public record is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.23 TAMPERING WITH PUBLIC NOTICE

The defendant is charged with the crime of tampering with public notice. 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 (altered) (defaced) (destroyed) (removed) (concealed) a public notice;
2. That the notice had been legally posted;
3. That the defendant did this act during the time the notice was required or authorized to remain posted; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3822. Tampering with public notice is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.24 FALSE SIGNING OF A PETITION

The defendant is charged with the crime of false signing of a petition. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally affixed (a fictitious) (an unauthorized) signature to a (petition) (memorial) (remonstrance);
2. That it was intended that such (petition) (memorial) (remonstrance) be presented to the (Legislature of the State of Kansas) (House of Representatives of the State of Kansas) (Senate of the State of Kansas) (_____, [an agency] [an officer] [a political subdivision] of the State of Kansas); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3823. False signing of a petition is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.25 FALSE IMPERSONATION

The defendant is charged with the crime of false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly and falsely represented (himself) (herself) to be a (public officer) (public employee) (_____), licensed to practice in the State of Kansas); and**
- 2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3824. False impersonation is a class B, nonperson misdemeanor.

The profession or vocation which the defendant falsely represented himself or herself to be a member of should be placed in the blank space, such as attorney, medical doctor, or certified public accountant.

Public employee and public officer are defined in K.S.A. 21-3110.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.26 AGGRAVATED FALSE IMPERSONATION

The defendant is charged with the crime of aggravated false impersonation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant falsely (impersonated) (represented [himself][herself] to be) _____;
2. That the defendant, while falsely (impersonating) (representing [himself][herself] to be) _____, (became bail or surety) (acknowledged any recognizance) (executed a bond or other instrument as bail or surety for a party in a proceeding before a court or person authorized to take bail or surety) (confessed a judgment) (acknowledged the execution of an instrument which by law may be recorded) (affected the rights or interests of _____ in a legal proceeding); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3825. Aggravated false impersonation is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.27 TRAFFIC IN CONTRABAND IN A CORRECTIONAL INSTITUTION

The defendant is charged with the crime of traffic in contraband in a correctional institution. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally

[(took) (attempted to take) (sent) (attempted to send)] [name of (contraband) (firearms) (ammunition) (explosives) (controlled substance)] [(into) (upon the grounds of) (from)]

or

[possessed name of (contraband) (firearms) (ammunition) (explosives) (controlled substance) in]

or

[distributed name of (contraband) (firearms) (ammunition) (explosives) (name of controlled substance) within]

a correctional institution;

2. That the defendant did so without the consent of the administrator of the correctional institution; [and]

- [3. That the defendant was an employee of a correctional institution; and]

[3.] or [4.] That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.

"Correctional institution" means any (state correctional institution or facility) (conservation camp) (state security hospital) (juvenile correctional facility) (community correction center or facility used for detention or confinement) (juvenile detention facility) (jail).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-3826. Under this statute, any item may be considered contraband. The particular item(s) should be designated in the instruction. Traffic in any contraband in a correctional institution is a severity level 6, nonperson felony, unless the offense is committed by an employee of a correctional institution, in which case it is a severity level 5, nonperson felony. In addition, if the contraband is firearms, ammunition, explosives, or a controlled substance, as defined in subsection (e) of K.S.A. 65-4101, it is a severity level 5, nonperson felony.

Optional paragraph 3 should be used when the state has charged a severity level 5, nonperson felony based solely on the defendant's status as an employee of a correctional institution at the time of commission of the charged act.

In cases where the state has charged a severity level 5, nonperson felony and there is an issue of fact regarding the type of contraband involved or the defendant's status as an employee of the correctional institution, an alternative verdict form should be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.28 CRIMINAL DISCLOSURE OF A WARRANT

The defendant is charged with criminal disclosure of a warrant. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally disclosed the fact that a (search warrant) (warrant for arrest) had been (applied for) (issued);
or
That the defendant intentionally disclosed the content of the (affidavit) (testimony) upon which a (search warrant) (warrant for arrest) had been (applied for) (issued);
2. That such disclosure was made before the execution of the warrant and was not made at the request of a law enforcement officer for the purpose of assisting in the execution thereof; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 21-3827. Criminal disclosure of a warrant is a class B, nonperson misdemeanor.

Comment

Criminal sanctions of this section may not be imposed for publishing information obtained from public records. *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 541, 543, 545, 548, 592 P.2d 891 (1979).

Disclosure by personnel of a law enforcement agency for the purpose of encouraging the person named in the warrant to voluntarily surrender is not prohibited by this statute.

A 1986 legislative amendment excepted warrants issued in child abduction cases from the application of this statute, unless the Court issuing such warrant specifically prohibited such disclosure.

60.29 INTERFERENCE WITH THE CONDUCT OF PUBLIC BUSINESS IN A PUBLIC BUILDING

The defendant is charged with the crime of interference with the conduct of public business in a public building. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally engaged in conduct at or in a public building so as to deny to any (public official) (public employee) (invitee) on such premises (his)(her) right to enter, to use the facilities, or to leave such public building;**

or

That the defendant intentionally impeded any (public official) (public employee) in the lawful performance of duties or activities through the use of (restraint) (abduction) (coercion) (intimidation) (force and violence) or any threat thereof;

or

That the defendant intentionally refused or failed to leave a public building upon being requested to do so by (the chief administrative officer) (one charged with maintaining order in such public building) at a time when the defendant was (committing) (threatening to commit) (inciting others to commit) any act which did or would if completed, disrupt, impair, interfere with, or obstruct the lawful functions being carried on in such public building;

or

That the defendant intentionally impeded, disrupted or hindered the normal proceedings of any meeting conducted by any (judicial body) (legislative body) (official at any public building) by any act of intrusion into the chamber or other areas designated for the use of the body, or official conducting such meeting or session by any act designed to intimidate, coerce or hinder any members of such body, or any

PATTERN INSTRUCTIONS FOR KANSAS 3d

official engaged in the performance of duties at such meeting or session;

or

That the defendant intentionally impeded, disrupted or hindered by any act of intrusion into the chamber or other areas designated for the use of any executive body or official, the normal proceedings of such body or official;

- 2. That the defendant did so when in possession of (a firearm) (_____, a weapon); and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3828.

For authority in the case of aggravated interference with the conduct of public business in a public building, see K.S.A. 21-3829.

Interference with the conduct of public business in a public building is a class A, nonperson misdemeanor. Aggravated interference with the conduct of public business in a public building when in possession of any firearm or weapon is a severity level 6, person felony. The element of the instruction designated (2) should be deleted or included depending upon whether or not the State charges defendant with a misdemeanor or felony offense.

Weapons are restricted to those described in K.S.A. 21-4201.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

The defendant is charged with the crime of dealing in false identification documents. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manufactured) (sold) (offered for sale) a _____ which (simulated) (purported to be) (was designed so as to cause others reasonably to believe it to be) an identification document;
2. That such _____ bore a fictitious name or other false information; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3830. Dealing in false identification documents is a severity level 10, nonperson felony.

The document which the defendant is charged with manufacturing, selling or offering for sale should be described with particularity in the blank spaces.

For unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

Comment

The 1986 Legislature amended K.S.A. 21-3830 by expanding the definition of "identification documents" beyond those issued by a governmental agency.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.31 HARASSMENT OF COURT BY TELEFACSIMILE

The defendant is charged with the crime of harassment of court by telefacsimile communication. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly used electronic equipment to transmit a copy of a document via a telephone line to a court in the State of Kansas for a use other than court business; and**
- 2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3839. Harassment of court by telefacsimile communication is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.32 AIRCRAFT REGISTRATION

The defendant is charged with the crime of failure to register an aircraft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly possessed an aircraft;**
- 2. That the aircraft was not registered in accordance with the regulations of the Federal Aviation Administration with the Secretary of Transportation; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3840. Failure to register an aircraft is a severity level 8, nonperson felony.

Registration of aircraft must be in accord with regulations of the Federal Aviation Administration. Those regulations are presently in Title 14, Chapter 1, parts 47-49 of the Code of Federal Regulations and an instruction defining eligibility for registration should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.33 FRAUDULENT REGISTRATION OF AIRCRAFT

The defendant is charged with the crime of fraudulent aircraft registration. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly (possessed) (operated) an aircraft;**
- 2. That the aircraft was registered to a (nonexistent [person] [firm] [business] [corporation]) ([firm] [business] [corporation] which is no longer a legal entity); and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3841. Fraudulent registration of an aircraft is a severity level 8, nonperson felony. See PIK 3d 60.34 for fraudulent registration by providing false information.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**60.34 FRAUDULENT AIRCRAFT REGISTRATION -
SUPPLYING FALSE INFORMATION**

The defendant is charged with the crime of supplying false information regarding ownership of an aircraft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly supplied false information to a government entity regarding the (name) (address) (business name) (business address) of the owner of an aircraft (in) (operated in) Kansas;
or

That the defendant knowingly supplied false information to a government entity regarding ownership by (the defendant) (a firm) (a business) (a corporation) (another) of an aircraft (in) (operating in) Kansas;

or

2. That the (firm) (business) (corporation) is not, or has never been, a legal entity in any state;

or

That the (firm) (business) (corporation) has lapsed into a state of no longer being a legal entity in Kansas and no documented attempt has been made to correct such information with the government entity for a period of 90 days after the date on which such lapse took effect with the Kansas Secretary of State;

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3841. Supplying false information regarding an aircraft is a severity level 8, nonperson felony. See PIK 3d 60.33 for fraudulent registration.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60.35 AIRCRAFT IDENTIFICATION - FRAUDULENT ACTS

The defendant is charged with the crime of fraudulent acts relating to aircraft identification numbers. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly [(bought) (sold) (offered for sale) (received) (disposed of) (concealed) (possessed) (operated)] [(attempted to buy) (attempted to sell) (attempted to offer for sale) (attempted to receive) (attempted to dispose of) (attempted to conceal) (attempted to possess) (attempted to operate)] an aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations; and

or

That the defendant knowingly (possessed) (manufactured) (sold) (exchanged) (offered for sale or exchange) (supplied in blank) (gave away) a counterfeit manufacturer's aircraft identification number plate or decal used for the identification of an aircraft; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3842. Fraudulent acts regarding aircraft identification numbers is a severity level 8, nonperson felony. See Title 14, Chapter 1, parts 47.15 and 47.16 of the Code of Federal Regulations for requirements of the Federal Aviation Administration as to assigned identification numbers. The trial judge will need to draft an appropriate instruction as to the relevant requirements based upon the evidence.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

| | PIK Number |
|---|---------------|
| Bribery | 61.01 |
| Official Misconduct | 61.02 |
| Compensation For Past Official Acts | 61.03 |
| Compensation For Past Official Acts - Defense | 61.04 |
| Presenting A False Claim | 61.05 |
| Permitting A False Claim | 61.06 |
| Discounting A Public Claim | 61.07 |
| Unlawful Interest In Insurance Contract | 61.08 |
| Unlawful Procurement Of Insurance Contract | 61.09 |
| Unlawful Collection By A Judicial Officer | 61.10 |
| Misuse Of Public Funds | 61.11 |
| Unlawful Use Of State Postage | 61.12 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.01 BRIBERY

The defendant is charged with the crime of bribery.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant offered, gave, or promised to give directly or indirectly to _____ a public (officer) (employee) a benefit or consideration;
2. That _____ was not legally entitled to such benefit or consideration;
3. That the defendant did so with intent to influence _____ with respect to the performance of (his)(her) powers or duties; and

OR

1. That the defendant was a public (officer) (employee);
2. That the defendant (requested) (received) (agreed to receive) from _____ directly or indirectly a benefit or consideration;
3. That the benefit or consideration was (requested) (received) (agreed upon) with the intent that the defendant be influenced with respect to the performance of (his)(her) powers or duties; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3901. Bribery is a severity level 7, nonperson felony.

The first part of the instruction is applicable when the crime charged is that of offering or giving a bribe. The name of the officer or employee sought to be influenced should be inserted in the blanks. The second part of the instruction is applicable when the crime charged is soliciting a bribe. A public officer or employee convicted of bribery forfeits his or her office or employment and,

PATTERN INSTRUCTIONS FOR KANSAS 3d

notwithstanding expungement, is forever disqualified from holding public office or employment. For sports bribery, see PIK 3d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 3d 61.03, Compensation for Past Official Acts.

Comment

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780, 539 P.2d 329 (1975).

61.02 OFFICIAL MISCONDUCT

Defendant is charged with the crime of official misconduct. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant was a public (officer)(employee);**
- 2. That the defendant knowingly and willfully used or authorized the use of ([an aircraft] [a vehicle] [a vessel]) ((under the defendant's control or direction) [in the defendant's custody]) exclusively for the private benefit or gain of (the defendant) (another);**

or

That the defendant knowingly and willfully failed to serve civil process when required by law;

or

That the defendant knowingly and willfully used information confidential by law acquired in the course of and related to the defendant's office or employment (for the private benefit or gain of [the defendant][another])(to cause harm maliciously to another);

or

That the defendant knowingly and willfully and with the intent to reduce or eliminate competition among bidders or prospective bidders on any contract or proposed contract (disclosed confidential information regarding proposals or communications from bidders or prospective bidders on any contract or proposed contract) (accepted any bid or proposal on a contract or proposed contract after the deadline for acceptance of such bid or proposal) (altered any bid or proposal submitted by a bidder on a contract or proposed contract);

or

That the defendant knowingly and willfully (destroyed) (tampered with) (concealed) evidence of a crime;

or

That the defendant knowingly and willfully

PATTERN INSTRUCTIONS FOR KANSAS 3d

submitted to a governmental entity a claim for expenses which (was false) (duplicated expenses for which a claim was submitted to [such governmental entity] [another governmental entity] [a private entity]); and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

As used in this instruction, knowingly and willfully means acting purposefully and intentionally and not accidentally.

Notes on Use

For authority, see K.S.A. 21-3902, amended L. 1995, ch. 184, § 2. For definitions of an aircraft, a vehicle and a vessel, see respectively K.S.A. 3-102, 8-1485 and 32-1102. For purposes of 21-3902, vehicle does not mean only a motor vehicle but it also does not mean a human-powered vehicle or railroad train.

Confidential information is defined for purposes of K.S.A. 21-3902 as any information not subject to mandatory disclosure pursuant to K.S.A. 45-221. The latter statute sets forth at length (in 38 paragraphs, many with subparagraphs) the records which a public agency is not required to disclose to the public. Whether a particular record falls within the definitions of that statute is a question of law.

K.S.A. 21-3902 also provides that respecting the use of aircraft, vehicles and vessels, defined in paragraph (a)(1) as a crime if unauthorized, the statute does not apply to use authorized by law or by formal government policy, in which case it would not be for the private benefit or gain of defendant or another. Such authorization would be a legal issue if the question were whether the law or policy authorized the particular use. Also respecting paragraph (a)(1), it does not apply if the use constitutes misuse of public funds as defined in K.S.A. 21-3910. That is a third question of law under the statutes involved.

The definition of "knowingly and willfully" is adapted from 21-3201(b).

Official misconduct committed by the acts defined in the first four alternatives of Element No. 2 of the instruction is a class A, nonperson misdemeanor. If the crime is committed by destroying, tampering with or concealing evidence of a crime, it is a severity level 8, nonperson felony if the evidence is of a felony, and a class B misdemeanor if the evidence is of a misdemeanor. If the crime is committed by submitting a false or duplicate claim, it is a severity level 7, nonperson felony if the claim is for \$25,000 or more; a level 9, nonperson felony if the claim is for at least \$500 but less than \$25,000; and a class A, nonperson misdemeanor if the claim is for less than \$25,000.

Upon conviction of official misconduct, a public officer or employee shall forfeit his or her office or employment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.03 COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was a public (officer) (employee);
2. That _____ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;
or
That _____ performed an act of official misconduct, as follows: _____;
_____;
3. That the defendant (gave) (offered to give) to _____ any benefit, reward or consideration intending it to be compensation for the act; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 3d 61.04, Compensation for Past Official Acts - Defense.

In Element No. 2, designate the act alleged to constitute "official misconduct."

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.04 COMPENSATION FOR PAST OFFICIAL ACTS -
DEFENSE**

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were conferred on account of kinship or other personal, professional or business relationships independent of the official status of the receiver.

OR

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were trivial benefits incidental to personal, professional, or business contacts and involved no substantial risk of undermining official impartiality.

Notes on Use

For authority, see K.S.A. 21-3903. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.05 PRESENTING A FALSE CLAIM

The defendant is charged with the crime of presenting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was a (public officer) (public body) authorized to allow or pay a claim;
2. That the defendant knowingly presented to _____ a claim which was false in whole or in part;
3. That the defendant did so with intent to defraud;
4. That the amount of the false claim presented was (less than \$500) (more than \$500 but less than \$25,000) (more than \$25,000); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Intent to defraud means an intention to induce another by deception to assume, create, transfer, alter, or terminate a right or obligation with reference to property.

Notes on Use

For authority, see K.S.A. 21-3904. Presenting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Presenting a false claim for at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Presenting a false claim for less than \$500 is a class A, nonperson misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim and PIK 3d 59.70, Value In Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value In Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

Intent to defraud is defined in K.S.A. 21-3110(9).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In *State v. Wilson*, 11 Kan. App. 2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.06 PERMITTING A FALSE CLAIM

The defendant is charged with the crime of permitting a false claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a public (officer) (employee);
2. That the defendant (approved by audit) (allowed or paid) a claim made upon _____;
3. That the defendant knew such claim was false or fraudulent in whole or in part;
4. That the amount of the false claim presented was (less than \$500) (more than \$500 but less than \$25,000) (\$25,000 or more); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3905. Permitting a false claim for \$25,000 or more is a severity level 7, nonperson felony. Permitting a false claim for at least \$500 but less than \$25,000 is a severity level 9, nonperson felony. Permitting a false claim for less than \$500 is a class A, nonperson misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his or her public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim, and PIK 3d 59.70, Value in Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value in Issue.

In Element No. 2, designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.07 DISCOUNTING A PUBLIC CLAIM

The statute upon which this instruction was based (K.S.A. 21-3906) has been repealed, effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.08 UNLAWFUL INTEREST IN INSURANCE CONTRACT

The statute upon which this instruction was based (K.S.A. 21-3907) has been repealed, effective July 1, 1983. See L. 1983, ch. 110, § 1.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**61.09 UNLAWFUL PROCUREMENT OF INSURANCE
CONTRACT**

The statute upon which this instruction was based
(K.S.A. 21-3908) has been repealed, effective July 1, 1983.
See L. 1983, ch. 110, § 1.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.10 UNLAWFUL COLLECTION BY A JUDICIAL OFFICER

The statute upon which this instruction was based (K.S.A. 21-3909) has been repealed, effective July 1, 1993. See L. 1992, ch. 298, § 97.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.11 MISUSE OF PUBLIC FUNDS

The defendant is charged with the crime of misuse of public funds. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant was a (custodian) (person having control) of public money by virtue of (his)(her) official position;**
- 2. That the defendant (used) (lent) (permitted another to use) public money in a manner (he)(she) knew was not authorized by law; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3910. Misuse of public funds is a severity level 8, nonperson felony.

K.S.A. 21-3910 was amended L. 1995, ch. 184, § 3 to provide that upon conviction of misuse of public funds, the convicted person shall forfeit the person's official position.

PATTERN INSTRUCTIONS FOR KANSAS 3d

61.12 UNLAWFUL USE OF STATE POSTAGE

The defendant is charged with the crime of unlawful use of State postage. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally used United States postage for (his)(her) personal benefit;

or

That the defendant intentionally permitted _____ to use United States postage for the personal benefit of _____;

2. That the postage was paid for with funds of the State of Kansas; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3911. Unlawful use of State postage is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF
PERSONAL RIGHTS

| | PIK Number |
|---|---------------|
| Eavesdropping | 62.01 |
| Eavesdropping - Defense Of Public Utility Employee | 62.02 |
| Breach Of Privacy - Intercepting Message | 62.03 |
| Breach Of Privacy - Divulging Message | 62.04 |
| Denial Of Civil Rights | 62.05 |
| Criminal Defamation | 62.06 |
| Criminal Defamation - Truth As A Defense | 62.07 |
| Circulating False Rumors Concerning Financial Status | 62.08 |
| Exposing A Paroled Or Discharged Person | 62.09 |
| Hypnotic Exhibition | 62.10 |
| Unlawfully Smoking In A Public Place | 62.11 |
| Failure To Post Smoking Prohibited And Designated Smoking Area Signs | 62.11-A |
| Unlawful Smoking - Defense Of Smoking In Designated Smoking Area | 62.12 |
| Identity Theft | 62.13 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.01 EAVESDROPPING

The defendant is charged with the crime of eavesdropping. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and without lawful authority:
 - (a) entered into a private place with intent to listen secretly to private conversations or to observe the personal conduct of any other person; and
or
 - (b) installed or used a device for hearing, recording, amplifying or broadcasting sounds originating in a private place which would not ordinarily be audible or comprehensible outside, without the consent of the person entitled to privacy therein; and
or
 - (c) installed or used a device for the interception of a (telephone) (telegraph) communication without the consent of the person in possession or control of the facilities for such communication; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Private place means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a public place.

Notes on Use

For authority, see K.S.A. 21-4001. Eavesdropping is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

62.05 DENIAL OF CIVIL RIGHTS

The defendant is charged with the crime of denial of civil rights. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally denied to _____ on account of the (race) (color) (ancestry) (national origin) (religion) of _____:

(a) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any institution, department or agency of (the state) (any political subdivision of the state) (any municipality); and

or

(b) the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of (any establishment which provides lodging to transient guests for hire) (any establishment which is engaged in selling food or beverages to the public for consumption upon the premises) (any place of recreation, amusement, exhibition or entertainment which is open to the public); and

or

(c) the full and equal use and enjoyment of services, privileges and advantages of any facilities for the public transportation of persons or goods; and

or

(d) the full and equal use and enjoyment of the services, facilities, privileges and advantages of any establishment which offers personal or professional services to members of the public; and

or

PATTERN INSTRUCTIONS FOR KANSAS 3d

- (e) the full and equal exercise of the right to vote in any election held pursuant to Kansas law; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4003. Denial of civil rights is a class A, nonperson misdemeanor.

Comment

For comment, see *Kansas Judicial Council Bulletin*, April 1968, p. 97. See annotation, Participation of Student in Demonstration on or near Campus as Warranting Expulsion or Suspension from School or College, 32 A.L.R. 864.

It was held in *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (1985) that the portion of the statute quoted in paragraph 1(d) of the instruction was not applicable under the facts to an ordained minister operating a wedding chapel who refused on grounds of his religious beliefs to perform a marriage ceremony for a black person and a white person.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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 _____, _____, 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

62.10 HYPNOTIC EXHIBITION

The defendant is charged with the crime of hypnotic exhibition. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant used or attempted to use a hypnotic exhibition, demonstration or performance for entertainment; and

or

That the defendant permitted (himself)(herself) to be exhibited while in a state of hypnosis; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Hypnosis means a condition of altered attention brought about by an individual through the use of certain physical or psychological manipulations of one person by another.

Notes on Use

For authority, see K.S.A. 21-4007. Hypnotic exhibition is an unclassified misdemeanor punishable by fine not to exceed \$50.

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE

The defendant is charged with the crime of unlawfully smoking in a public place. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant possessed a lighted (cigarette) (cigar) (pipe) (other lighted smoking equipment) other than in a designated smoking area in ([a restaurant] [a retail store] [a public means of transportation] [a passenger elevator] [a health care institution] [a place where health care services are provided to the public] [an educational facility] [a library] [a courtroom] [a (state) (county) (municipal) building] [a restroom] [a grocery store] [a school bus] [a museum] [a theater] [an auditorium] [an arena] [a recreational facility] [other enclosed indoor area]) ([open to the public] [used by the general public]); and

or

That the defendant possessed a lighted (cigarette) (cigar) (pipe) (other lighted smoking equipment) other than in a designated smoking area at a meeting open to the public; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. The prior statute, K.S.A. 21-4008, (repealed L. 1987, ch. 110, § 7, July 1), prohibited smoking tobacco. The definition of "smoking" in K.S.A. 21-4009 does not identify a particular substance. Smoking in a public place is an unclassified misdemeanor punishable by a fine of not more than \$20 for each violation.

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.11-A FAILURE TO POST SMOKING PROHIBITED AND DESIGNATED SMOKING AREA SIGNS

The defendant is charged with the crime of failure to post signs in a (public place stating that smoking is prohibited by state law) (designated smoking area in a public place stating that smoking is permitted). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the (proprietor) (person in charge) of ([a restaurant] [a retail store] [a public means of transportation] [a passenger elevator] [a health care institution] [a place where health care services are provided to the public] [an educational facility] [a library] [a courtroom] [a (state) (county) (municipal) building] [a restroom] [a grocery store] [a school bus] [a museum] [a theater] [an auditorium] [an arena] [a recreational facility] [other enclosed indoor area]) ([open to the public] [used by the general public]);
2. That the defendant failed to post or cause to be posted in a conspicuous place signs stating clearly that smoking is prohibited by state law; and
or
That the defendant failed to post or cause to be posted in a designated smoking area signs stating that smoking is permitted in such room or area; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4009 to 21-4012. Failure to post signs stating smoking is prohibited by state law or to post signs stating smoking is permitted in a designated area is an unclassified misdemeanor punishable by a fine of not more than \$50.

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.12 UNLAWFUL SMOKING - DEFENSE OF SMOKING IN DESIGNATED SMOKING AREA

It is a defense to the charge of unlawful smoking that defendant smoked tobacco in a public place in an area designated and posted as a smoking area by the person in control of the premises.

Notes on Use

For authority, see K.S.A. 21-4008. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 3d 62.11, Failure to Post Smoking Prohibited and Designated Smoking Area Signs.

PATTERN INSTRUCTIONS FOR KANSAS 3d

62.13 IDENTITY THEFT

The defendant is charged with the crime of identity theft. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly and with intent to defraud for economic benefit (obtained) (possessed) (transferred) (used) (attempted to obtain, possess, transfer, or use) one or more identification documents or personal identification numbers of another person other than that issued lawfully for the use of the possessor.
2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Identification documents means any card, certificate or document which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be drivers' licenses, non-drivers' identification cards, birth certificates, social security cards and employee identification cards.

Notes on Use

For authority, see K.S.A. 21-4018. Identity theft is a class A person misdemeanor. Intent to defraud is defined in K.S.A. 21-3110(9).

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) engaged in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others;
or
 - (d) used offensive, obscene or abusive language that 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 _____, _____, in _____ County, Kansas.

(The language and words used by the defendant must be "fighting words" in that they must be of such a nature that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace.)

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 last paragraph, a definitional paragraph for "fighting words," should be used when the defendant's

PATTERN INSTRUCTIONS FOR KANSAS 3d

speech is alleged to be the disorderly conduct. See *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983).

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.

In *State v. Beck*, 9 Kan. App. 2d 459, 461, 682 P.2d 137 (1984), the court stated that "there is no requirement in the statute that the general public be disturbed or that there be a danger of public disturbance." The court stated that "disorderly conduct is an offense which may be committed either in a public or private place." The court went on to state, "Unless it can be said that defendant's words were not fighting words as a matter of law, . . . the ultimate determination [is] a question of fact for the finder of fact." 9 Kan. App. 2d at 463.

State v. Beck, supra, also discussed the issue of just how thick skinned police officers have to be when confronted with disorderly conduct. The *Beck* court quoted with approval the Minnesota Supreme Court in *City of St. Paul v. Morris*, 258 Minn. 467, 468-69, 104 N.W.2d 902 (1960), stating that:

"While it is obvious that not every abusive epithet directed toward police officers would be sufficiently disturbing or provocative to justify arrest for disorderly conduct, there is no sound reason why officers must be subjected to indignities such as present here, indignities that go far beyond what any other citizen might reasonably be expected to endure." 9 Kan. App. 2d at 462.

The *Beck* court further went on to say that the fact that the addressee is a police officer is only one factor to be considered when determining if fighting words were present. There is no *per se* rule for police officers.

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 _____, _____, 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 _____, _____, 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 _____, _____, 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 _____, _____, 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 _____, _____, 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

63.07 PERMITTING A PUBLIC NUISANCE

The defendant is charged with the crime of permitting a public nuisance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That some person or persons intentionally _____
_____;
2. That this act or omission endangered the public health, safety or welfare;
3. That the defendant knowingly permitted this condition on property under (his)(her) control; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4107 and 21-4106. Permitting 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. If the defendant committed the act or omission constituting the nuisance, the crime is Maintaining a Public Nuisance, PIK 3d 63.06.

Comment

For examples of public nuisances, see *Kansas Judicial Council Bulletin*, April 1968, p.100.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.08 VAGRANCY

**The statute upon which this instruction was based
(K.S.A. 21-4108) was repealed, effective July 1, 1993.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.09 PUBLIC INTOXICATION

**The statute upon which this instruction was based
(K.S.A. 21-4109) was repealed in 1977.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.10 GIVING A FALSE ALARM

The defendant is charged with the crime of giving a false alarm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant transmitted in any manner to the fire department of any (city) (township) (other municipality) an alarm of fire;

or

That the defendant made a call in any manner for (police) (fire) (medical) (specify other emergency service from K.S.A. 12-5301 et seq.) emergency service assistance;

2. That the defendant did so knowing that there was no reasonable ground to believe (a fire existed) (emergency service assistance was needed); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4110. Giving a false alarm is a class A, nonperson misdemeanor. See PIK 3d 56.23, Criminal Threat, and 56.23-B, Aggravated Criminal Threat, which concern threats of violence communicated with the intent to terrorize or to cause evacuation of buildings or transportation facilities.

Comment

State v. Long, 234 Kan. 580, 675 P.2d 832 (1984) distinguishes a lesser included offense from a lesser degree of the same crime. The Committee does not believe that giving a false alarm is either a lesser included offense or a lesser degree of the crime of criminal threat.

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.11 CRIMINAL DESECRATION - FLAGS

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, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) the (flag) (ensign) (_____, a symbol) of (the United States) (Kansas) in which another, _____, had a property interest without the consent of such other person; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4111. Criminal desecration as used herein is a class A nonperson misdemeanor. The Committee ventures no opinion as to the significance of "ensign" or "symbol." For other kinds of criminal desecration, see PIK 3d 63.12, Criminal Desecration - Monuments/Cemeteries/Places of Worship, and 63.13, Criminal Desecration - Dead Bodies.

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 _____, _____, 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 _____, _____, 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

63.14 HARASSMENT BY TELEPHONE

The defendant is charged with the crime of harassment by telephone. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (used a telephone) (knowingly permitted a [telephone] [telefacsimile communication machine] under [his][her] control to be used) (knowingly transmitted a telefacsimile communication) to:

(a) (make) (transmit) any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent with the intent to harass; and

or

(b) intentionally abuse, threaten or harass any person at the called number, whether or not conversation ensues; and

or

(c) cause the telephone of another to ring repeatedly with intent to harass any person at the called number; and

or

(d) make repeated (telephone calls during which conversation ensued) (transmissions of telefacsimile communications), solely to harass any person at the (called) (receiving) number; and

or

(e) play any recording on a telephone, except recordings such as weather information or sports information, when the number thereof is dialed, unless the person or group playing the recording be identified and state that it is a recording; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-4113. Harassment by telephone is a class A nonperson misdemeanor. The statute provides that "telephone communication" includes telefacsimile communication. For a criminal charge of refusal to yield a party line, see PIK 3d 64.13. For criminal threat, see PIK 3d 56.23.

Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

In *State v. Thompson*, 237 Kan. 562, 701 P.2d 694 (1985), intent to harass was determined to be an element of the crime of harassment by telephone under K.S.A. 21-4113(1)(a).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**63.14-A (HARASSMENT OF COURT BY TELEFACSIMILE
previously appeared at this location. It has been moved
to 60.31.)**

PATTERN INSTRUCTIONS FOR KANSAS 3d

63.15 DESECRATION OF FLAGS

The statute upon which this instruction was based (K.S.A. 21-4114) was repealed, effective July 1, 1993.

See PIK 3d 63.11, Criminal Desecration - Flags.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

| | PIK Number |
|---|---------------|
| Criminal Use Of Weapons - Felony | 64.01 |
| Criminal Use Of Weapons - Misdemeanor | 64.02 |
| Criminal Discharge Of A Firearm - Misdemeanor | 64.02-A |
| Criminal Discharge Of A Firearm - Felony | 64.02-A-1 |
| Criminal Discharge Of A Firearm - Affirmative Defense | 64.02-B |
| Aggravated Weapons Violation | 64.03 |
| Criminal Use Of Weapons - Affirmative Defense | 64.04 |
| Criminal Disposal Of Firearms | 64.05 |
| Criminal Possession Of A Firearm - Felony | 64.06 |
| Criminal Possession Of A Firearm - Misdemeanor | 64.07 |
| Possession Of A Firearm (In)(On The Grounds Of) A State Building Or In A County Courthouse | 64.07-A |
| Criminal Possession Of A Firearm By A Juvenile | 64.07-B |
| Criminal Possession Of A Firearm By A Juvenile - Affirmative Defenses | 64.07-C |
| Defacing Identification Marks Of A Firearm | 64.08 |
| Failure To Register Sale Of Explosives | 64.09 |
| Failure To Register Receipt Of Explosives | 64.10 |
| Explosive - Definition | 64.10-A |
| Criminal Disposal Of Explosives | 64.11 |
| Criminal Possession Of Explosives | 64.11-A |
| Criminal Possession Of Explosives - Defense | 64.11-B |
| Carrying Concealed Explosives | 64.12 |
| Refusal To Yield A Telephone Party Line | 64.13 |
| Creating A Hazard | 64.14 |
| Unlawful Failure To Report A Wound | 64.15 |
| Unlawfully Obtaining Prescription-Only Drug | 64.16 |
| Unlawfully Obtaining Prescription-Only Drug For Resale | 64.17 |
| Selling Beverage Containers With Detachable Tabs | 64.18 |
| Unlawfully Exposing Another To A Communicable Disease | 64.19 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.01 CRIMINAL USE OF WEAPONS - FELONY

The defendant is charged with criminal use of weapons. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly (sold) (manufactured) (purchased) (carried) [a shotgun with a barrel less than 18 inches in length] [a firearm (designated to discharge) (capable of discharging) automatically more than once by a single function of the trigger];**

or

That the defendant knowingly (possessed) (manufactured) (caused to be manufactured) (sold) (offered for sale) (lent) (purchased) (gave away) any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight;

or

That the defendant knowingly possessed a device or attachment of any kind (designed) (used) (intended for use) in silencing the report of any firearm; and

- 2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

Authority for the first alternative under claim no. 1 is found in K.S.A. 21-4201(a)(7); authority for the second alternative under claim no. 1 is found in K.S.A. 21-4201(a)(8); and authority for the third alternative is found in K.S.A. 21-4201(a)(6). The offenses of criminal use of weapons under subsections (a)(b), (a)(7) and (a)(8) of K.S.A. 21-4201 are severity level 9, nonperson felonies.

Comment

K.S.A. 21-4201(a)(7) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. It should be noted that the offense under

PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 21-4201(a)(8) does not apply to a governmental laboratory or to solid plastic bullets. The provisions of K.S.A. 21-4201(b) provides that the offense contained in K.S.A. 21-4201(a)(7) does not apply to law enforcement officers or other designated persons.

In *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987), the Court held evidence that the defendant possessed all the pieces of a disassembled shotgun is sufficient to support a conviction. PIK 2d 64.01 is cited with approval.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02 CRIMINAL USE OF WEAPONS - MISDEMEANOR

The defendant is charged with criminal use of weapons.
The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a (bludgeon) (sandclub) (metal knuckles) (throwing star) (switchblade knife); and

or

That the defendant knowingly (carried concealed on defendant's person) (possessed with the intention to use the same unlawfully against another) a (dagger) (dirk) (billy) (blackjack) (slung shot) (dangerous knife) (straight-edged razor) (stiletto) (any dangerous or deadly weapon or instrument); and

or

That the defendant knowingly carried (on defendant's person) (in a [land] [water] [air] vehicle) a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]) with the intent to use the same unlawfully; and

or

That the defendant knowingly carried a (pistol) (revolver) (other firearm) concealed on defendant's person when not on defendant's own land or abode or fixed place of business; and

or

That the defendant knowingly set a spring gun; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4201(a)(1) through (5) and (a)(9). The instruction presents several alternative situations and only the appropriate one should be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

If the weapon is a switchblade knife, the definition given in subsection (a)(1) of the statute should be inserted after the numbered paragraphs of the instruction.

Likewise, under subsection (a)(2), an ordinary pocket knife with no blade more than 4 inches in length shall not be construed to be a dangerous knife, weapon or instrument. If applicable, this exclusionary definition should be included after the numbered paragraphs of the instruction.

It should also be noted under this statute, possession of a shotgun with a barrel less than 18 inches in length is a felony. See PIK 3d 64.01, Criminal Use of Weapons - Felony.

See also, PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defenses, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

Provisions concerning pipe bombs, etc., formerly included in K.S.A. 21-4201 and this instruction are now included in K.S.A. 21-3731 and PIK 3d 59.38 as a result of 1999 Senate Bill 149.

Comment

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 21-4201(a)(2), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976). In *Lassley*, the Court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201(a)(2), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the State to prove that the proscribed act was done willfully or knowingly.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(a)(4) is not a lesser included offense of unlawful possession of a firearm under 21-4204(a)(2). PIK 64.02 is cited.

In *State v. Hargis*, 5 Kan. App. 2d 608, 609, 611, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of the individual's commission as a special deputy or school security guard.

In *City of Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the Court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

PATTERN INSTRUCTIONS FOR KANSAS 3d

State v. Hunt, 8 Kan. App. 2d 162, 164, 651 P.2d 967 (1982), held that a scalpel is a dangerous weapon within the meaning of K.S.A. 21-4201(a)(2).

In *State v. Doile*, 7 Kan. App. 2d 722, 648 P.2d 262 (1982), the constitutionality of subsection (a)(4) was upheld as not an unreasonable exercise of police power or overbroad.

The constitutionality of K.S.A. 21-4201(a)(1) was upheld in *State v. Neighbors*, 21 Kan. App. 2d 824, 908 P.2d 649 (1995), wherein the court found the statute to be neither vague nor overbroad.

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02-A CRIMINAL DISCHARGE OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally discharged a firearm;**
- 2. That the act occurred upon (land) (a nonnavigable body of water) of another;**

or

That the act occurred (upon) (from) any (public road) (public road right-of-way) (railroad right-of-way) that adjoins land of another;

- 3. That the defendant did not have the permission of the owner or person in possession of such land to discharge a firearm; and**
- 4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

Authority for this instruction is K.S.A. 21-4217, a class C misdemeanor.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02-A-1 CRIMINAL DISCHARGE OF A FIREARM - FELONY

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an unoccupied dwelling; and

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

2. That the act resulted in (bodily harm)(great bodily harm) to a person; and

[2.] or [3.] That this act occurred on or about the ___ day of _____, ____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4219. The provisions of K.S.A. 21-4219 were enacted to address the so-called "drive by shootings" and presumably fill a perceived need not provided under K.S.A. 21-3410 and 21-3414.

Criminal discharge of a firearm at an unoccupied dwelling is a severity level 8, person felony. Criminal discharge of a firearm at an occupied building or vehicle is a severity level 7, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in bodily harm to a person during the commission of

PATTERN INSTRUCTIONS FOR KANSAS 3d

the act is a severity level 5, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in great bodily harm to a person during the commission of the act is a severity level 3, person felony.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

See PIK 3d 56.04, Homicide Definitions, for a definition of maliciously.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.02-B CRIMINAL DISCHARGE OF A FIREARM -
AFFIRMATIVE DEFENSE**

It is a defense to the charge of criminal discharge of a firearm that at the time of the commission of the act defendant was a _____ and discharged the firearm while acting (within the scope of [his][her] authority) (in the performance of duties of [his][her] office or employment).

Notes on Use

For authority, see K.S.A. 21-4217(b). Insert in the blank space the applicable description of an exempt person under the applicable statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Ordinarily, whether a person falls within an exempt category is a question of law for the court. This instruction is provided for use in the event a question of fact is presented.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.03 AGGRAVATED WEAPONS VIOLATION

The defendant is charged with the crime of aggravated weapons violation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (allege any of the violations listed in PIK 3d 64.01 and 64.02);
2. That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) within five years prior to the commission of such act; and

or

That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) prior to the commission of such act; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4202. This statute has been amended to include convictions from other jurisdictions which are substantially the same as a Kansas person felony. Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201.

If the prior conviction was a nonperson felony, the first alternative in element 2 should be used; if the prior conviction was a person felony, the second alternative should be used.

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the Court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense

PATTERN INSTRUCTIONS FOR KANSAS 3d

of unlawful possession of a firearm under K.S.A. 21-4204(a)(2).

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

It is a defense to the charge of (criminal use of weapons) (aggravated weapons violation) that at the time of the commission of the act the defendant was a _____ and (used) (possessed) the weapon while acting within the scope of (his)(her) authority.

Notes on Use

For authority, see K.S.A. 21-4201 (b) through (f) which lists persons exempt from the application of the act. There should be inserted in the blank space of the instruction a description of an exempt person under the statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972), which involved a charge of possession of marijuana in violation of K.S.A. 65-2502, it was held that the accused had the burden of introducing evidence as a matter of defense that he was within an exception or exemption in the statute.

State v. Lassley, 218 Kan. 758, 545 P.2d 383 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 21-4201(2). The fact that the knife may have been used in his trade was not a defense to the prescribed act of knowingly carrying a dangerous knife concealed on his person.

In *State v. Hargis*, 5 Kan. App. 2d 608, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of his commission as a special deputy or school security guard.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.05 CRIMINAL DISPOSAL OF FIREARMS

The defendant is charged with criminal disposal of firearms. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

A. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to _____;

2. That _____ was a person under 18 years of age; and

OR

B. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ was both addicted to and an unlawful user of _____, a controlled substance; and

OR

C. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding five years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and

OR

D. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding 10 years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony, and had not had the conviction of the crime [expunged] [pardoned]); and

OR

E. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant knew _____ had been convicted of a felony and had been found to be in possession of a firearm at the time of the commission of the offense; and
3. That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4203. Criminal disposal of firearms is a class A, nonperson misdemeanor. The appropriate alternative situation should be used.

Alternative C concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within five years of the act charged. For the purposes of this alternative, the specified felony conviction is defined as any felony except a felony as defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b; or K.S.A. 65-4160 through 65-4165, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony. It is important to note that there is no longer any barrel length specification.

Alternative D concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within 10 years of the act. The specified felony conviction for this alternative is any felony defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a, 65-4127b; or K.S.A. 65-4160 through 65-4164, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

Alternative C has the proviso that the transferee "was found not to have been in possession of a firearm at the time of the commission of the offense." The specified crimes for alternative D have the proviso that the transferee "was not found to have been in the possession of a firearm at the time of the commission of the offense." The Committee believed it improbable that a court would make those specific findings unless by implication as to alternative D by the fact of conviction of a crime that did not involve the use of a firearm as an element of the charge. It would be hard to imagine a situation in which a court made the specific finding that one was not in possession of a firearm at the time of the commission of the crime. Similarly, in alternative E it presumed that the finding of possession of a firearm at the time of the commission of the offense would be derived from the elements of the charge.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Note that while K.S.A. 21-4203 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicates that they were repealed in 1993. However, the Revisor's notes in K.S.A. 1996 Supp. indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164 which are also referred to in K.S.A. 21-4203.

| <u>Alternative</u> | <u>Status of Transferee</u> | <u>Barrel Length</u> | <u>Prior Crime</u> | <u>Prior Crime Time Limit</u> |
|--------------------|-----------------------------|----------------------|----------------------------------|-------------------------------|
| A. | Less than 18 Years | Less than 12" | N/A | N/A |
| B. | Addict and User | N/A | N/A | N/A |
| C. | Felon | N/A | Specified felony without firearm | Five years |
| D. | Felon | N/A | Specified felony without firearm | Ten years |
| E. | Felon | N/A | Any felony with firearm | No time limit |

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant had been (convicted of _____, [a person felony] [a violation of the Uniform Controlled Substances Act]) (adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]);
3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (person felony) (violation of the Uniform Controlled Substances Act) (act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]); and

OR

- B. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

- C. 1. That the defendant knowingly had possession of a firearm;

PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant within 10 years preceding such possession had been (convicted of _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

- D. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant within 10 years preceding such possession had been (convicted of _____, a nonperson felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a nonperson felony);
3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (nonperson felony) (act which if done by an adult would constitute the commission of a nonperson felony); and

[3.] or [4.] That this act occurred on or about the ____ day of _____, _____ in _____, County, Kansas.

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(2), Alternative B is K.S.A. 21-4204(a)(3), Alternative C is K.S.A. 21-4204(a)(4)(A), and Alternative D is K.S.A. 21-4204(a)(4)(B). Each crime is a severity level 8, nonperson felony.

Alternatives A and D are to be used when the defendant was found to have been in possession of a firearm at the time of the commission of the prior felony. The Committee believes that while such a prior finding may not have been specifically made by the court it may be implied from the elements of the charge upon which the defendant was convicted. Alternatives B and C, however, have the negative statutory requirement that the defendant was found not to have been in possession of a firearm at the time of the commission of the offense. The negative requirements of alternatives B and C are not required to be proved by the

PATTERN INSTRUCTIONS FOR KANSAS 3d

prosecution and have not been included as part of the elements of those alternatives. See *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. __ (July 8, 1998). Likewise, the negative statutory requirement of alternative C, that the defendant did not have the conviction expunged or had not been pardoned for the crime, does not need to be proven as part of the state's case. See *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994).

The prior crime addressed in Alternative A is a person felony or a violation of the Uniform Controlled Substances Act with no time limit. The prior crime addressed in Alternative B is any felony not addressed in Alternative C with a 5-year time limit. The prior crime addressed in Alternative C is specified by statute number in K.S.A. 21-4204(a)(4)(A) with a 10-year time limit. The prior crime addressed in Alternative D is a nonperson felony with a 10-year time limit.

| <u>Alternative</u> | <u>Time Limit</u> | <u>Type Prior Crime</u> | <u>Prior Possession Of Firearm During Prior Crime</u> |
|--------------------|-------------------|--|---|
| A | None | Person Felony or Uniform Controlled Substances Act | Yes |
| B | 5 years | Felony Other Than Alternative C | No |
| C | 10 years | Felony Specified in K.S.A. 21-4204(a)(4)(A) | No |
| D | 10 years | Nonperson Felony | Yes |

Comment

K.S.A. 21-4204 makes "possession" of a firearm by a convicted felon an offense. The word "knowingly" is not used in the statute. The Committee in preparing this instruction has added the requirement that the possession of the firearm be "knowingly." This construction of the word "possession" is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself or herself. For example, see *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). In reaching this conclusion the Committee considered K.S.A. 21-3201 which provides that a criminal intent is an essential element of every crime defined by the code. Willful conduct is conduct that is purposeful and intentional and not accidental. An exception is made in K.S.A. 21-3204 which provides for an absolute criminal liability without criminal intent if the crime is a misdemeanor and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. In view of the case law set forth above

PATTERN INSTRUCTIONS FOR KANSAS 3d

and the statutes just cited, it seems clear that in order to establish the offense of criminal possession of a firearm, it must be proved that the possession was knowing and intentional.

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

In *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994), the Supreme Court sustained the trial court and negated any requirement of the state to prove the statutory negative in alternative C above that the defendant had not been pardoned or had the prior conviction expunged. Likewise, the Kansas Court of Appeals in *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. ___ (July 8, 1998), noted that when a defendant is charged under K.S.A. 21-4204(a)(3), alternative B above, the state has no obligation to present proof that the defendant was found not to have been in possession of a firearm at the time of the commission of the prior felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07 CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- A. 1. That the defendant was both addicted to and an unlawful user of _____, a controlled substance;
- 2. That the defendant knowingly had possession of a firearm; and

OR

- B. 1. That the defendant knowingly had possession of a firearm and was not a law enforcement officer;
- 2. That the defendant was [in or on school (property) (grounds) upon which was located a (building) (structure) used by (a unified school district) (an accredited nonpublic school) for student (instruction) (attendance) (extracurricular activities) for pupils enrolled in (kindergarten) (any of the grades 1 through 12)] [at a regularly scheduled school sponsored activity or event]; and

OR

- C. 1. That the defendant knowingly had possession of a firearm;
- 2. That the defendant refused to (surrender) (immediately remove) the firearm (from school [property] [grounds]) (at a regularly scheduled school sponsored activity or event) when (requested) (directed) by a (duly authorized school employee) (law enforcement officer); and
- 3. That this act occurred on or about the ____ day of _____, _____ in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(1). Authority for Alternative B is K.S.A. 21-4204(a)(5). A violation of Alternative A or B is a class B, nonperson select misdemeanor. Authority for Alternative C is K.S.A. 21-4204(a)(6), a class A, nonperson misdemeanor.

Felony criminal possession of a firearm is proscribed under subsections (a)(2), (3) and (4) of K.S.A. 21-4204 and it is the subject of PIK 3d 64.06, Criminal Possession of a Firearm - Felony. See Comment to PIK 3d 64.06.

As commonly defined, a person is addicted when he or she has a compulsive need for a habit forming drug and has lost the power of self control with reference to this addiction. *Black's Law Dictionary* 37 (6th Ed. 1990).

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07-A POSSESSION OF A FIREARM (IN) (ON THE
GROUNDS OF) A STATE BUILDING OR IN A
COUNTY COURTHOUSE

The defendant is charged with the crime of possession of a firearm ([in] [on the grounds of] a state building) (in a county courthouse). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly had possession of a firearm;
2. That the defendant was ([in] [on the grounds of] the [set forth the name and address of the statutorily named building]) (within the governor's residence) ([on the grounds of] [in a building on the grounds of] the governor's residence) (within [describe building], a [state-owned] [state-leased] building, so designated by the secretary of administration by rules and regulations and with conspicuously placed signs that clearly stated that firearms were prohibited within the building) (within the courthouse of _____ County, Kansas); and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4218. Possession of a firearm on the grounds of or in state buildings or county courthouses is a class B nonperson select misdemeanor.

Subsection (a) of K.S.A. 21-4218 provides that possession of a firearm on the grounds of or in such state buildings does not apply to certain law enforcement officers, or to any person summoned by any such officer to assist in making arrests or preserving the peace while actually engaged in assisting such officer, or to members of military of this state or the United States, when such officers are performing and carrying out official duties. Subsection (a) further provides that the firearms are prohibited in county courthouses, unless by resolution, the

PATTERN INSTRUCTIONS FOR KANSAS 3d

county commissioners authorize the possession of a firearm in the courthouse.

Subsection (b) of K.S.A. 21-4218 provides that it is not a violation of the statute for the governor, the governor's immediate family, or specifically authorized guests of the governor to possess a firearm on the grounds of or in any building on the grounds of the governor's residence.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07-B CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE

The defendant is charged with criminal possession of a firearm by a juvenile. The defendant pleads not guilty.

To establish this crime, each of the following claims must be proved:

- 1. That the defendant knowingly possessed a firearm with a barrel less than 12 inches long;**
- 2. That at the time of the act the defendant was less than 18 years of age; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4204a. Criminal possession of a firearm by a juvenile is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.07-C CRIMINAL POSSESSION OF A FIREARM BY A
JUVENILE - AFFIRMATIVE DEFENSES**

**It is a defense to the charge of criminal possession of a
firearm by a juvenile that at the time of the commission of
the act the defendant was _____.**

Notes on Use

For authority, including the specific affirmative defenses, see K.S.A. 21-4204a. Insert in the blank space the applicable defense as specified by statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses-Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

The defendant is charged with the crime of defacing identification marks of a firearm. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a firearm; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4205. Defacing identification marks of a firearm is a class B nonperson misdemeanor.

Comment

It should be noted that under K.S.A. 21-4205(b) possession of any firearm upon which an identification mark shall have been intentionally altered is *prima facie* evidence that the possessor altered the same. This section does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence; hence, an instruction covering this is not required.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES

The defendant is charged with the crime of failure to register sale of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was the seller of an explosive or detonating substance;
2. That the defendant failed to register the sale or disposition of such explosive; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The register of sales must contain the dates of the sale or other disposition; the name, address, age, and occupation of the person to whom the explosive is sold or delivered; the kind and amount of explosive delivered; the place at which it is to be used; and for what purpose it is to be used.

Notes on Use

For authority, see K.S.A. 21-4207. Failure to register sale of explosives is a class B, nonperson misdemeanor.

See also, PIK 3d 59.38, Criminal Use of Explosives.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.10 FAILURE TO REGISTER RECEIPT OF EXPLOSIVES

The defendant is charged with the crime of failure to register receipt of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That a quantity of explosives or detonating substance was delivered to the defendant;
2. That the defendant failed to sign (his)(her) name in the register of sales of explosives on the page where the record of such delivery is entered; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4208. Failure to register receipt of explosives is a class C misdemeanor.

For form of register of sales, see K.S.A. 21-4207 and PIK 3d 64.09, Failure to Register Sale of Explosives. See also, PIK 3d 59.38, Criminal Use of Explosives.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.10-A EXPLOSIVE - DEFINITION

The term "explosive" is defined as any chemical compound, mixture, or device, of which the primary purpose is to function by explosion, and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

Notes on Use

For authority, see K.S.A. 21-4209b.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

The defendant is charged with criminal disposal of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly ([sold] [gave] [transferred]) ([an explosive substance] [a detonating substance]) to _____;
2. That _____ was a person under 21 years of age; and

or

That the defendant knew _____ was (a person who was both addicted to and an unlawful user of a controlled substance, _____) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been released from imprisonment for a felony); and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4209. Criminal disposal of explosives is a severity level 10, person felony. The applicable bracketed reference in each parentheses mentioned in element nos. 1 and 2 should be selected. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor. See K.S.A. 21-3202.

See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.11-A CRIMINAL POSSESSION OF EXPLOSIVES

The defendant is charged with criminal possession of explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly had possession of any explosive or detonating substance;
2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and
3. That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4209a. Criminal possession of explosives is a severity level 7, person felony.

See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.11-B CRIMINAL POSSESSION OF EXPLOSIVES -
DEFENSE**

**K.S.A. 21-4209a(b) was amended by L. 1992, ch. 298, §
72 by repealing the defense of possession of explosives in
the course of a person's lawful employment.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.12 CARRYING CONCEALED EXPLOSIVES

The defendant is charged with the crime of carrying concealed explosives. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly carried (an explosive substance) (a detonating substance) on (his)(her) person in a wholly or partly concealed manner; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4210. Carrying concealed explosives is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.13 REFUSAL TO YIELD A TELEPHONE PARTY LINE

The defendant is charged with the crime of refusal to yield a telephone party line. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant willfully refused to surrender immediately the use of a party line when informed that the line was needed for (an emergency call to a [fire department] [police department]) (medical aid or ambulance); and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Party line means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

Emergency means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential.

Notes on Use

For authority, see K.S.A. 21-4211. Refusal to yield a telephone party line is a class C misdemeanor.

Harassment by telephone is covered by PIK 3d 63.14, Harassment by Telephone.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.14 CREATING A HAZARD

The defendant is charged with the crime of creating a hazard. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (stored) (abandoned) in a place accessible to children a container having a compartment of more than 1½ cubic feet capacity and a (door) (lid) which (locks) (fastens) automatically when closed and which cannot be easily opened from the inside, and did fail to remove the (door) (lock) (lid) (fastening device) on such container; and

or

That the defendant (was the owner) (had possession) of property upon which a (cistern) (well) (cesspool) was located, and knowingly failed to cover the same with protective covering of sufficient strength and quality to exclude human beings and domestic animals therefrom; and

or

That the defendant ([exposed] [abandoned] [left]) ([an explosive substance] [a dangerous substance]) in a place accessible to children; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4212. Creating a hazard is a class B nonperson misdemeanor.

The appropriate alternative situation should be used. For a similar offense, see maintaining a public nuisance covered by K.S.A. 21-4106 and PIK 3d 63.06, Maintaining a Public Nuisance.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.15 UNLAWFUL FAILURE TO REPORT A WOUND

The defendant is charged with the crime of unlawful failure to report a wound. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant treated _____ for a (bullet wound) (gunshot wound) (powder burn) caused by the discharge of a firearm;
or
That the defendant treated _____ for a wound likely to result in death and apparently inflicted by a (knife) (ice pick) (sharp or pointed instrument);
2. That the defendant failed to report the treatment of the wound to the office of the chief of police of _____ or to the office of the sheriff of _____ County, Kansas; and
3. That this act or omission occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4213. Unlawful failure to report a wound is a class C misdemeanor. The appropriate alternative situation should be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.16 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally made, altered or signed a prescription order and the defendant was not a practitioner or mid-level practitioner at the time of the commission of the act;

or

That the defendant delivered a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant possessed a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant provided false information to a practitioner or mid-level practitioner for the purpose of obtaining a prescription-only drug; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

As used in this instruction, practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

As used in this instruction, mid-level practitioner means an advanced registered nurse practitioner issued a certificate of qualification who has authority to prescribe drugs pursuant to a written protocol with a responsible physician or a registered physician's assistant who also has authority to prescribe drugs pursuant to a written protocol with a responsible physician.

As used in this instruction, prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."

As used in this instruction, prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order. A pharmacist means any natural person registered to practice pharmacy.

Notes on Use

For authority, see K.S.A. 21-4214. Obtaining a prescription-only drug by fraudulent means is a class A, nonperson misdemeanor for the first offense and a severity level 9, nonperson felony for a second or subsequent offense.

A mid-level practitioner is defined in K.S.A. 65-1626 as amended by 1999 House Bill 2168. The authority for a mid-level practitioner to prescribe prescription-only drugs is found in K.S.A. 65-1130, 65-2896a, and 65-2896e. The certification requirement for a mid-level practitioner is found in K.S.A. 65-1131.

K.S.A. 21-4214 specifically provides that if a prosecution for unlawfully obtaining prescription-only drugs may be brought under the provisions of K.S.A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65-4127a, 65-4127b, or 65-4160 through 65-4164 prosecutions may not be brought under this section.

Note that while K.S.A. 21-4214 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicate that they were repealed in 1993. However, the Revisor's notes in K.S.A. 1996 Supp. indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164 which are also referred to in K.S.A. 21-4203.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.17 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG FOR RESALE

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means for resale. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally obtained a prescription-only drug by (making) (altering) (signing) a prescription order at a time when defendant was not a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by delivering a prescription order, knowing it to have been (made) (altered) (signed) by a person other than a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by providing false information to a practitioner;

2. That the defendant (intentionally sold the prescription-only drug so obtained) (intentionally offered for sale the prescription-only drug so obtained) (intentionally possessed with intent to sell the prescription-only drug so obtained); and
3. That this act occurred on or about the ____ day of _____, _____, in _____

County, Kansas.

Pharmacist means any natural person registered to practice pharmacy.

Practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."

Prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order.

Notes on Use

For authority, see K.S.A. 21-4215. Obtaining a prescription-only drug by fraudulent means for resale is a severity level 6, nonperson felony. The appropriate alternative situation should be used.

The provisions of this section are not applicable to prosecutions involving prescription-only drugs which could be brought under the Uniform Controlled Substances Act and to which the provisions of K.S.A. 65-4127a, 65-4127b, or 65-4160 through 65-4164 and amendments thereto, would be applicable. See PIK 3d 67.13-67.16.

Note that while K.S.A. 21-4215 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicate that they were repealed in 1993. However, the Revisor's notes in K.S.A. 1996 Supp. indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164, which are also referred to in K.S.A. 21-4203.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.18 SELLING BEVERAGE CONTAINERS WITH
DETACHABLE TABS**

The defendant is charged with the crime of selling beverage containers with detachable tabs. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally sold or offered for sale at retail in this State a metal beverage container designed and constructed so that a part of the container was detachable in opening the container; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Beverage container means any sealed can containing beer, cereal malt beverages, mineral waters, soda water, and similar soft drinks intended for human consumption.

Notes on Use

For authority, see K.S.A. 21-4216. Selling beverage containers with detachable tabs is a class C misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

| | PIK Number |
|---|---------------|
| Promoting Obscenity | 65.01 |
| Promoting Obscenity To A Minor | 65.02 |
| Promoting Obscenity - Definitions | 65.03 |
| Promoting Obscenity - Presumption Of Knowledge And Recklessness From Promotion | 65.04 |
| Promoting Obscenity - Affirmative Defenses | 65.05 |
| Promoting Obscenity To A Minor - Affirmative Defenses . | 65.05-A |
| Gambling | 65.06 |
| Illegal Bingo Operation | 65.06-A |
| Gambling - Definitions | 65.07 |
| Commercial Gambling | 65.08 |
| Permitting Premises To Be Used For Commercial Gambling | 65.09 |
| Dealing In Gambling Devices | 65.10 |
| Dealing In Gambling Devices - Defense | 65.10-A |
| Dealing In Gambling Devices - Presumption From Possession | 65.11 |
| Possession Of A Gambling Device | 65.12 |
| Possession Of A Gambling Device - Defense | 65.12-A |
| Installing Communication Facilities For Gamblers | 65.13 |
| False Membership Claim | 65.14 |
| Cruelty To Animals | 65.15 |
| Cruelty To Animals - Defense | 65.16 |
| Unlawful Disposition Of Animals | 65.17 |
| Unlawful Conduct Of Dog Fighting | 65.18 |
| Attending An Unlawful Dog Fight | 65.19 |
| Illegal Ownership Or Keeping Of A Dog | 65.20 |
| RESERVED FOR FUTURE USE | 65.21 - 65.29 |
| Conflicts Of Interest - Commission Member Or Employee . | 65.30 |
| Conflicts Of Interest - Retailer Or Contractor | 65.31 |
| Forgery Of A Lottery Ticket | 65.32 |
| Unlawful Sale Of A Lottery Ticket | 65.33 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|---|---------------|
| Unlawful Purchase Of A Lottery Ticket | 65.34 |
| Lottery - Definitions | 65.35 |
| Violations Of The Tribal Gaming Law | 65.36 |
| RESERVED FOR FUTURE USE | 65.37 - 65.50 |
| Violation Of The Kansas Parimutuel Racing Act | 65.51 |
| Parimutuel Racing Act - Definitions | 65.52 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.01 PROMOTING OBSCENITY

The defendant is charged with the crime of promoting obscenity. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly or recklessly (manufactured) (issued) (sold) (gave) (provided) (lent) (mailed) (delivered) (transmitted) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) obscene material or an obscene device; and

or

That the defendant knowingly or recklessly possessed (obscene material) (an obscene device) with intent to (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) such (material) (device); and

or

That the defendant knowingly or recklessly (offered) (agreed) to (manufacture) (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) obscene material or an obscene device; and

or

That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which was obscene or which contributed to its obscenity; and

2. That this act occurred on or about the ____ day of _____, _____ in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-4301. Promoting obscenity is a class A, nonperson misdemeanor for the first conviction. For second and subsequent convictions, this offense is a severity level 9, person felony. For affirmative defenses, see PIK 3d 65.05. For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

For definition of "recklessness", see K.S.A. 21-3201(c).

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304 (1957). In June of 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller*, the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* held that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejected the standard that the work must be utterly without redeeming social value. Additionally, the Court rejected a national standard for obscene material within the context of the First Amendment.

In March, 1976 in *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court, following *Miller*, upheld the constitutionality of the then existing obscenity statute by construing the word "obscenity" as a word of constitutional meaning. In 1976, the Kansas Legislature amended K.S.A. 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself.

In *State v. Allen & Rosebaugh*, 1 Kan. App. 2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 because the definition of "obscene" prior to 1976 was found to be unconstitutionally overbroad. It held that the decision in *State v. A Motion Picture Entitled "The Bet"*, supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974.

In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976), the Court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to

PATTERN INSTRUCTIONS FOR KANSAS 3d

enhance punishment.

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed 2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the Court followed the obscenity standards of *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973). *Ferber* held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301 was upheld against allegations that the statute was unconstitutional as a violation of due process, because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of the police power.

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

In 1993, the Kansas Legislature amended K.S.A. 21-4301(c)(3) to exclude from the definition of "obscene device" such devices "disseminated or promoted for the purpose of medical or psychological therapy."

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.02 PROMOTING OBSCENITY TO A MINOR

The defendant is charged with the crime of promoting obscenity to a minor. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant knowingly and recklessly (allege any of the four violations listed in PIK 3d 65.01, Promoting Obscenity);**
- 2. That _____ (the recipient of the obscene [material] [device]) (a member of the audience of such obscene performance) was a minor child under the age of 18 years; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4301a. Promoting obscenity to a minor is a class A, nonperson misdemeanor, for the first conviction. For second and subsequent convictions, this offense is a severity level 8, person felony. For affirmative defenses, see PIK 3d 65.05-A.

For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 Legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and the decision of the Supreme Court of Kansas in *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The Legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.03 PROMOTING OBSCENITY - DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

(a) **Obscene.**

Any material or performance is "obscene" if the average person, applying contemporary community standards, would find that the material or performance, taken as a whole, appeals to the prurient interest; that the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals; and the material or performance, taken as a whole, lacks serious literary, educational, artistic, political, or scientific value.

(b) **Material.**

Material means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or other manner.

(c) **Obscene device.**

Obscene device means a device, including a dildo or artificial vagina, designed or marketed to be used primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.

(d) **Performance.**

Performance means any play, motion picture, dance, or other exhibition performed before any audience.

(e) **Sexual intercourse.**

Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or

PATTERN INSTRUCTIONS FOR KANSAS 3d

any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

(f) Sodomy.

Sodomy means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal. It does not include penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices, or a body cavity search conducted by law enforcement officers.

(g) Wholesaler.

Wholesaler means a person who sells, distributes or offers for sale or distribution obscene materials or devices only for resale and not to the consumer, and who does not manufacture, publish or produce such materials or devices.

(h) Prurient interest.

Prurient interest means an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex.

Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, and 65.02, Promoting Obscenity to a Minor. This instruction, which defines the term "obscene," complies with the definition of the word "obscenity" as required by *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 71, 547 P.2d 760 (1976). The statutory definition has been expanded somewhat to include the language used in

PATTERN INSTRUCTIONS FOR KANSAS 3d

the cases.

A jury may not understand the meaning of the term "prurient interest." The definition of prurient interest is adopted from *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980).

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

In 1993, the Kansas Legislature amended K.S.A. 21-4301(c)(3) to exclude from the definition of "obscene device" such devices "disseminated or promoted for the purpose of medical or psychological therapy."

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.04 PROMOTING OBSCENITY - PRESUMPTION OF KNOWLEDGE AND RECKLESSNESS FROM PROMOTION

If you find that defendant promoted obscene materials or devices by emphasizing their prurient appeal or sexually provocative aspects or if you find the defendant is not a wholesaler, and promoted the materials or devices in the course of (his)(her) business, there is a presumption that the defendant did so knowingly or recklessly. This presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the required criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4301(b) and 21-4301a.

In the statute, the words "prurient appeal or sexually provocative aspects" are used. See *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word "prurient" is discussed.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.05 PROMOTING OBSCENITY - AFFIRMATIVE DEFENSES

It is a defense to the charge of promoting obscenity that the persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental justification for possessing or reviewing the same.

or

It is a defense to the charge of promoting obscenity that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity that the allegedly obscene material or obscene device was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity that the defendant was a projectionist, or assistant projectionist, having no financial interest in the show or in the place of presentation other than regular employment as a projectionist, or assistant projectionist, and had no personal knowledge of the contents of the motion picture and the motion picture was shown commercially to the general public.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-4301 and 21-4301a.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**65.05-A PROMOTING OBSCENITY TO A MINOR -
AFFIRMATIVE DEFENSES**

It is a defense to the charge of promoting obscenity to a minor that the defendant had reasonable cause to believe that the minor involved was 18 years old or over and such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such minor was 18 years old or more.

or

It is a defense to the charge of promoting obscenity to a minor that the allegedly obscene material or obscene device was purchased, leased, or otherwise acquired by a public, private, or parochial school, college or university, and that such material was either sold, leased, distributed, or disseminated by a teacher, instructor, professor, or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity to a minor that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity to a minor that an exhibition in a state of nudity was for a bona fide scientific or medical purpose or for an educational or cultural purpose for a bona fide school, museum, or library.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-4301 and 21-4301a.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.06 GAMBLING

**The defendant is charged with the crime of gambling.
The defendant pleads not guilty.**

**To establish this charge, each of the following claims
must be proved:**

- 1. That the defendant (made a bet) (entered or
remained in a gambling place with intent to [make a
bet] [participate in a lottery] [play a gambling
device]); and**
- 2. That this act occurred on or about the ____ day of
_____, _____, in _____ County,
Kansas.**

Notes on Use

For authority, see K.S.A. 21-4303. Gambling is a class B, nonperson misdemeanor. PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

Comment

The above instruction was approved in *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.06-A ILLEGAL BINGO OPERATION

The defendant is charged with the crime of illegal bingo operation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (managed) (operated) (conducted) a game of bingo;
2. That the defendant did so in violation of a (statute) (regulation) which provides as follows: (list the specific statute or regulation with which the State contends the defendant failed to comply); and
3. That the act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Bingo means a game in which each participant must pay a charge and a prize or prizes are awarded to the winner or winners in which each participant receives one or more cards each of which is marked off into 25 squares arranged in five horizontal rows of five squares each, and five vertical rows of five squares each, with each square being designated by number, letter or combination of numbers and letters, and only the center square designated with the word "free" with no 2 cards being identical, with the players covering squares as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters, or combinations of numbers and letters corresponding to the system used for designating the squares, with the winner of each game being the player or players first properly covering a predetermined and announced pattern of squares upon the card being used by such player or players.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 21-4303a. An illegal bingo operation is a class A nonperson misdemeanor. The definition of bingo set forth in the instruction is that contained in K.S.A. 79-4701(a).

Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, Element No. 2 of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), the Kansas Supreme Court construed K.S.A. 79-4701 *et seq.*, to permit a class A private club to fall within the definition of a bona fide fraternal organization, thereby making the club eligible for a bingo license.

65.07 GAMBLING - DEFINITIONS

"Bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.

"Consideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.

"Gambling device" is any so-called "slot machine" or any other machine, mechanical device, electronic device or other contrivance an essential part of which is a drum or reel with insignia thereon, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any other machine, mechanical device, electronic device or other contrivance (including, but not limited to, roulette wheels and similar devices) which is equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or is otherwise designed, manufactured or altered primarily for use in connection with gambling, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any subassembly or essential part intended to be used in connection with any such machine, mechanical device, electronic device or other contrivance, but which is not attached to any such machine, mechanical device, electronic device or other contrivance as a constituent part; or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not

PATTERN INSTRUCTIONS FOR KANSAS 3d

automatically paid by the device does not affect its character as a gambling device.

"Gambling place" is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries, or playing gambling devices.

"Lottery" is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. As used in this definition, a lottery does not include a lottery operated by the State pursuant to the Kansas Lottery Act.

"Tribal gaming" means any gaming conducted pursuant to a tribal-state gaming compact.

"Tribal-state gaming compact" means a compact entered into between the State of Kansas and certain native American tribes with respect to the tribe's authority to engage in gaming on the tribe's reservation property in the State of Kansas.

"Tribal gaming commission" means a commission created by a native American tribe in accordance with a tribal-state gaming compact.

Notes on Use

For authority, see K.S.A. 21-4302 and K.S.A. 74-9801 to 74-9809. This instruction contains the statutory definitions applicable to gambling offenses. All statutory definitions are provided, any of which may be used in an appropriate case.

K.S.A. 21-4302(a)(1), (2), (3), (4), (5), (6) and (7) set forth what a bet does not include. A bet does not include: bona fide business transactions which are valid under the law of contracts including but not limited to contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited, to contracts of indemnity or guaranty and life or health and accident insurance; offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such a contest; a lottery as defined in this section; any bingo game by or for participants managed, operated or conducted in accordance with the laws of the State of Kansas by an organization licensed by the State of Kansas to manage, operate or conduct games of bingo; a lottery operated by the State pursuant to the Kansas Lottery Act; and any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act.

K.S.A. 21-4302(b) states a lottery does not include a lottery operated by the State

PATTERN INSTRUCTIONS FOR KANSAS 3d

pursuant to the Kansas Lottery Act.

K.S.A. 21-4302(c) declares that the term "consideration" shall not include sums of money paid by or for participants in any bingo game managed, operated, or conducted in accordance with the laws of the State of Kansas by any bona fide nonprofit religious, charitable, fraternal, educational or veteran organization licensed to manage, operate or conduct bingo games under the laws of the State of Kansas and it shall be conclusively presumed that such sums paid by or for said participants were intended by said participants to be for the benefit of the sponsoring organizations for the use of such sponsoring organizations in furthering the purposes of such sponsoring organizations; sums of money paid by or for participants in any lottery operated by the State pursuant to the Kansas Lottery Act; sums of money paid by or for participants in any system of parimutuel wagering managed, operated and conducted in accordance with the Kansas Parimutuel Racing Act; or sums of money paid by or for a person to participate in tribal gaming. Where such excluded transactions are involved in the particular case, they usually raise pure questions of law to be determined by the Court. Hence, the matters excluded have not been set forth directly in the instruction containing gambling definitions. If issues of fact should arise on these matters, an additional appropriate instruction could be given.

Gambling device does not include any machine, mechanical device, electronic device or other contrivance used or for use by a licensee of the Kansas racing and gaming commission as authorized by law and rules and regulations adopted by the commission or by the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission; any machine, mechanical device, electronic device or other contrivance, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (i) which when operated does not deliver, as a result of chance, any money, or (ii) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money; any so-called claw, crane, or digger machine and similar devices which are designed and manufactured primarily for use at carnivals or county or state fairs; or any machine, mechanical device, electronic device or other contrivance used in tribal gaming.

K.S.A. 21-4302(e) provides that evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places, is admissible on the issue of whether it is a gambling place.

Comment

A television give-away program in which persons were called from the telephone directory and given a prize if they knew a code number and the amount of the jackpot which had been related on a television program does not involve valuable consideration coming directly or indirectly from participants and this is not a "lottery" within the constitutional and statutory provisions. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 473 P.2d 97 (1970).

PATTERN INSTRUCTIONS FOR KANSAS 3d

State v. Finney, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994), defines the terms lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), K.S.A. 79-4701 was construed to bring a class A private club within the definition of a bona fide fraternal organization; thus, making the club eligible for a bingo license.

In *State v. Thirty-six Pinball Machines*, 222 Kan. 416, 565 P.2d 236 (1977), the Court construed the term "gambling devices" in K.S.A. 21-4302(d) and held that a pinball machine which is played by means of a spring-loaded plunger and metallic balls and which "pays off" only in free replays is capable of innocent use and is not a gambling device *per se*. The Court stated that it is the actual use to which a pinball machine is put which determines whether it is possessed and used as a gambling device.

In *Games Management, Inc. v. Owens*, 233 Kan. 444, 662 P.2d 260 (1983), the Court named three requirements for "gambling devices" in K.S.A. 21-4302(d) and held that the video games known as "Double-Up" and "Twenty-One" which gave only free replays as a prize were not gambling devices. The replays, as they could not be exchanged for money or property, were not considered something of value. The Court did state that the games were games of chance and thus represented gambling devices if something of value were received as a reward for winning.

See also, *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), where the same principle was applied to electronic video card games.

In *Lambeth v. Levens*, 237 Kan. 614, 623, 702 P.2d 320 (1985), K.S.A. 25-3108, providing for breaking a tie vote in an election by lot, was held not a form of an unconstitutional lottery because campaign expenses were not included in the definition of "consideration" contained in K.S.A. 21-4302(c).

K.S.A. 21-4302(e) "contains no requirement that the premises must have been used previously as a gambling place before it is rendered a gambling place. The statute does not expressly require that the place have as 'one of its principal uses' the making and settling of bets." *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.08 COMMERCIAL GAMBLING

The defendant is charged with the crime of commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally (operated) (received all or part of the earnings of) a gambling place; and
or
That the defendant intentionally (received, recorded, or forwarded bets or offers to bet) (possessed facilities with intent to receive, record, or forward bets); and
or
That the defendant, for gain, intentionally became a custodian of anything of value bet or offered to be bet; and
or
That the defendant intentionally (conducted a lottery) (possessed facilities with intent to conduct a lottery); and
or
That the defendant intentionally (set up for use) (collected the proceeds of) a gambling device; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4304. Commercial gambling is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.09 PERMITTING PREMISES TO BE USED FOR COMMERCIAL GAMBLING

The defendant is charged with the crime of permitting premises to be used for commercial gambling. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant intentionally granted the use or allowed the continued use of a place as a gambling place; and**

or

That the defendant intentionally permitted another to set up a gambling device for use in a place under the defendant's control; and

- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4305. Permitting premises to be used for commercial gambling is a class B nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.10 DEALING IN GAMBLING DEVICES

The defendant is charged with the crime of dealing in gambling devices. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally (manufactured) (transferred) (possessed with intent to transfer) a gambling device or sub-assembly or essential part thereof; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4306. Dealing in gambling devices is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.10-A DEALING IN GAMBLING DEVICES - DEFENSE

It is a defense to this charge that:

- (1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950;
or**
- (2) The gambling device or sub-assembly or essential part thereof was manufactured, transferred or possessed by a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171 *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:
 - (a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;**
 - (b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;**
or
 - (c) In a state other than the State of Kansas.****

Notes on Use

For authority, see K.S.A. 21-4306(d). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.11 DEALING IN GAMBLING DEVICES - PRESUMPTION FROM POSSESSION

If you find that the defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, there is a presumption that the defendant had possession with the intent to transfer the same. The presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4306(b).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.12 POSSESSION OF A GAMBLING DEVICE

The defendant is charged with the crime of possession of a gambling device. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. The defendant knowingly possessed or had custody or control as (owner) (lessee) (agent) (employee) (bailee) (other) of a gambling device; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4307. Possession of a gambling device is a class B, nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

Comment

In *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), the State sought to sell or destroy confiscated electronic video card games. The Kansas Supreme Court held the State may not seek sale or destruction of property under K.S.A. 22-2512 without a notice or hearing for those having a property interest in the machines.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.12-A POSSESSION OF A GAMBLING DEVICE - DEFENSE

It is a defense to this charge that:

- (1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.**
or
- (2) The gambling device is possessed or under custody or control of a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171, *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:**
 - (a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;**
 - (b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;**
or
 - (c) In a state other than the State of Kansas.**

Notes on Use

For authority, see K.S.A. 21-4307. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.13 INSTALLING COMMUNICATION FACILITIES FOR GAMBLERS

The defendant is charged with the crime of installing communication facilities for gamblers. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant installed communication facilities in a place which the defendant knew was a gambling place; and

or

That the defendant installed communication facilities knowing that they would be used principally for the purpose of transmitting information to be used in making or settling bets; and

or

That the defendant, knowing that communication facilities were being used principally for the purpose of transmitting information to be used in making or settling bets, allowed their continued use; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4308. Installing communication facilities for gamblers is a severity level 8, nonperson felony. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.14 FALSE MEMBERSHIP CLAIM

The defendant is charged with the crime of false membership claim. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally misrepresented (himself) (herself) to be a member of _____ a (fraternal) (veteran's) organization; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4309. False membership is a class C misdemeanor. Insert the name of the organization in which the defendant claimed membership in the blank space in the first element of this instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.15 CRUELTY TO ANIMALS

The defendant is charged with the crime of cruelty to animals. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant:

**(a) intentionally (killed) (injured) (maimed) (tortured) (mutilated) (the animal); and
or**

**(b) (abandoned) (left) _____ without making provisions for its proper care; and
or**

(c) had physical custody of _____ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) (other care) as needed for the health or well-being of that kind of animal; and

2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4310. Cruelty to animals is a class A, nonperson misdemeanor. The act or acts of cruelty specified in (1)(a), (b) or (c) appropriate to the case, should be used in the instruction.

Comment

K.S.A. 21-4313 defines "animal." K.S.A. 21-4311 provides for the taking into custody and disposition of a mistreated animal. K.S.A. 47-1701 provides other definitions such as food, water, etc.

It was held in *State, ex rel. v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973), that cockfighting does not constitute cruelty to animals under the former statute K.S.A. 21-4310.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.16 CRUELTY TO ANIMALS - DEFENSE

It is a defense to the charge of cruelty to animals that (list here any relevant exceptions contained in K.S.A. 21-4310).

Notes on Use

K.S.A. 21-4310(b) provides eight specific exceptions to the crime of cruelty to animals which may be available as a defense, if relevant. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.17 UNLAWFUL DISPOSITION OF ANIMALS

The defendant is charged with the crime of unlawful disposition of animals. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (raffled) (gave as a prize or premium) (used as an advertising device or promotional display) living (rabbits) (chickens) (ducklings) (goslings); and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Unlawful disposition of animals does not include the giving of the described animals to minors for use in agricultural projects under the supervision of commonly recognized youth farm organizations.

Notes on Use

For authority, see K.S.A. 21-4312. Unlawful disposition of animals is a class C misdemeanor. In each case, the appropriate act and animal should be selected depending on the facts. The exception is contained in the statute and, if applicable, should be included in the instruction.

65.18 UNLAWFUL CONDUCT OF DOG FIGHTING

The defendant is charged with the crime of unlawful conduct of dog fighting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant caused for (amusement) (gain) a dog to (fight with) (injure) another dog; and**

or

That the defendant knowingly permitted a dog to (fight with) (injure) another dog for (amusement) (gain) on premises under the defendant's (ownership) (charge) (control); and

or

That the defendant (trained) (owned) (kept) (transported) (sold) any dog (for the purpose) (with the intent) of having it fight with or injure another dog; and

- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4315. Unlawful conduct of dog fighting is a severity level 10, nonperson felony.

Comment

For a definition of dog, see K.S.A. 47-1701(g).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.19 ATTENDING AN UNLAWFUL DOG FIGHT

The defendant is charged with the crime of attending an unlawful dog fight. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly attended a dog fight;
and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Dog fight means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.

Notes on Use

For authority, see K.S.A. 21-4315. Attending an unlawful dog fight is a class B, nonperson misdemeanor.

Comment

For a definition of dog, see K.S.A. 47-1701(g).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.20 ILLEGAL OWNERSHIP OR KEEPING OF A DOG

The defendant is charged with the crime of illegal ownership or keeping of a dog. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (owned) (kept) on (his)(her) premises a dog;
2. That the defendant has been convicted of unlawful conduct of dog fighting under K.S.A. 21-4315 and amendments thereto within the last five years; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4317. Illegal ownership or keeping of a dog is a class B nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.21 to 65.29 RESERVED FOR FUTURE USE.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.30 CONFLICTS OF INTEREST - COMMISSION MEMBER OR EMPLOYEE

The defendant is charged with the crime of conflicts of interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was (the executive director) (a member of the commission) (an employee) (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery;
2. That the defendant had either directly or indirectly an interest in a business knowing that such business contracts with the Kansas Lottery for a major procurement, whether such interest is as (a natural person) (partner) (member of an association) (a stockholder or director or officer of the corporation); and

or

That the defendant (accepted) (agreed to accept) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year from a person knowing that such person contracts or seeks to contract with the State to supply (gaming equipment) (materials) (tickets) (consulting services) for use in the lottery or is a lottery retailer or an applicant for lottery retailer; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes On Use

For authority, see K.S.A. 74-8716(a). Conflicts of interest is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

In addition to the provisions of K.S.A. 74-8716(a), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas lottery. K.S.A. 74-8716(e).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.31 CONFLICTS OF INTEREST - RETAILER OR CONTRACTOR

The defendant is charged with the crime of conflicts of interest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant is (a lottery retailer) (an applicant for lottery retailer) (a person who contracts or seeks to contract with the State to supply [gaming equipment] [materials] [tickets] [consulting services] for use in the lottery);
2. That the defendant (offered) (paid) (gave) (made) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of \$20 or more in any calendar year to a person knowing such person is (the executive director) (a member of the commission) (an employee) of the Kansas Lottery (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8716(b). Conflicts of interest is a class A, nonperson misdemeanor.

Comment

In addition to the provisions of K.S.A. 74-8716(b), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas lottery. K.S.A. 74-8716(e).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.32 FORGERY OF A LOTTERY TICKET

The defendant is charged with the crime of forgery of a lottery ticket. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a lottery ticket issued or purported to have been issued by the Kansas Lottery; or

That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a share or receipt for the purchase of a lottery ticket issued or purported to have been issued by the Kansas Lottery;

2. That the defendant did this act with the intent to defraud; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8717. Forgery of a lottery ticket is a severity level 8, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.33 UNLAWFUL SALE OF A LOTTERY TICKET

The defendant is charged with the crime of unlawful sale of a lottery ticket. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant sold a lottery ticket or share at a price other than the price fixed by the rules and regulations adopted pursuant to the Kansas Lottery Act; and**

or

That the defendant (sold) (resold) a lottery ticket or share and was not a lottery retailer as authorized by the Kansas Lottery Act; and

or

That the defendant sold a lottery ticket or share to _____ knowing that _____ was a person under 18 years of age; and

- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 74-8718. Unlawful sale of a lottery ticket is a class A, nonperson misdemeanor upon conviction for a first offense, and a severity level 9, nonperson felony upon conviction for a second or subsequent offense.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.34 UNLAWFUL PURCHASE OF A LOTTERY TICKET

The defendant is charged with the crime of unlawful purchase of a lottery ticket. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was an (officer) (employee) of a business which was currently engaged in supplying equipment, supplies or services used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ knowing _____ was a (spouse) (child) (stepchild) (brother) (stepbrother) (sister) (stepsister) (parent or stepparent) of (the executive director) (a member of the commission) (an employee) of the Kansas Lottery; an (officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or services) used directly in the operations of any lottery conducted pursuant to the Kansas Lottery Act; and

or

That the defendant (purchased a lottery ticket or a share therein from) (paid a prize to) _____ _____ knowing _____ was a person who resided in the same household as (the executive

PATTERN INSTRUCTIONS FOR KANSAS 3d

- director) (a member of the commission) (an employee) of the Kansas Lottery; an (officer) (employee) of a business which was currently engaged in supplying (equipment) (supplies or services) used directly in the operation of any lottery conducted pursuant to the Kansas Lottery Act; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 74-8719. Unlawful purchase of a lottery ticket is a class A, nonperson misdemeanor upon conviction of the first offense, and a severity level 9, nonperson felony upon conviction of a second or subsequent offense.

For applicable definitions, see PIK 3d 65.35, Lottery Definitions.

Comment

K.S.A. 74-8719(f) states that each person who purchases a lottery ticket or share thereby agrees to be bound by the rules and regulations adopted by the commission and the provisions of the Kansas Lottery Act.

It is a defense to a charge of unlawful purchase of a lottery ticket that the executive director of the Kansas Lottery authorized, in writing, any employee of the Kansas Lottery and any employee of a lottery vendor to purchase a lottery ticket.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.35 LOTTERY DEFINITIONS

"Commission" means the Kansas Lottery Commission.

"Executive Director" means the executive director of the Kansas Lottery.

"Gaming Equipment" means any electric, electronic or mechanical device or other equipment unique to the Kansas Lottery used directly in the operation of any lottery and in the determination of winners pursuant to this Act.

"Kansas Lottery" means the state agency created by the Kansas Lottery Act to operate a lottery or lotteries pursuant to this Act.

"Lottery Retailer" means any person with whom the Kansas Lottery has contracted to sell lottery tickets or shares, or both, to the public.

"Lottery or State Lottery" means the lottery or lotteries operated pursuant to the Kansas Lottery Act.

"Major Procurement" means any gaming product or service including, but not limited to, facilities, advertising and promotional services, annuity contracts, prize payment agreements, consulting services, equipment, tickets and other products and services unique to the Kansas Lottery, but not including materials, supplies, equipment and services common to the ordinary operations of state agencies.

"Person" means any natural person, association, corporation or partnership.

"Prize" means any prize paid directly by the Kansas Lottery pursuant to its rules and regulations.

"Returned ticket" means any ticket which was transferred to a lottery retailer, which was not sold by the lottery retailer and which was returned to the Kansas Lottery for refund by issuance of a credit or otherwise.

"Share" means any intangible manifestation authorized by the Kansas Lottery to prove participation in a lottery game.

"Ticket" means any tangible evidence issued by the Kansas Lottery to prove participation in a lottery game.

"Vendor" means any person who has entered into a major procurement contract with the Kansas Lottery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 74-8702.

Comment

For a discussion of the definition of lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution, see *State v. Finney*, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994).

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.36 VIOLATIONS OF THE TRIBAL GAMING LAW

The defendant is charged with the crime of violation of the Tribal Gaming Act. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

- [1.] **That the defendant (status of the defendant, if applicable);**
- [1.] or [2.] **That the defendant (describe the prohibited act);**
- [2.] or [3.] **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 74-9801 et seq., which covers a multitude of violations which involve the Tribal Gaming Oversight Act.

K.S.A. 74-9809(a), (b) and (c) describe conflicts of interest violations pertaining to the executive director or an employee or relative of an employee of the state gaming agency. These offenses are class A, nonperson misdemeanors. Subsections (b)(3) and (c)(2) provide for certain affirmative defenses to these violations.

K.S.A. 74-9809(d) prohibits the holder of a license issued pursuant to a tribal-state gaming compact from allowing persons between the ages of 18 and 21 to participate in tribal gaming. This offense is a class A, nonperson misdemeanor. Subsection (g) forbids a person between 18 and 21 from tribal gaming. This is a class A, nonperson misdemeanor. Persons under 18 are adjudicated as juvenile offenders. Subsection (f).

K.S.A. 74-9809 (e), (h), (j), (k), (l) and (m) describe various felony crimes connected with tribal gaming. These crimes are all level 8, nonperson felonies. However, the act described in subsection (h)(3) is a class A, nonperson misdemeanor if the value involved is less than \$100.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.37 - 65.50 RESERVED FOR FUTURE USE

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.51 VIOLATION OF THE KANSAS PARIMUTUEL RACING ACT

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (status of the defendant, if applicable);**
- [1.] or [2.] That the defendant (describe the prohibited act); and**
- [2.] or [3.] That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 74-8810 which covers a multitude of prohibited acts involving persons having varying status under the provisions of the Kansas Parimutuel Racing Act.

K.S.A. 74-8810(a) applies to members of the Racing Commission, certain directors and members of an organization licensee. Violation of 74-8810(a) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(b) applies to any member, employee or appointee of the Racing Commission, including stewards and racing judges. Violation of 74-8810(b) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(c) applies to any members, employees or appointees of the Racing Commission, and certain of their relatives. Violation of 74-8810(c) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(d) applies to any officers, directors and members of organizational licensees. Violation of 74-8810(d) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(e) applies to facility owners or manager licensees. Violation of 74-8810(e) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(f) applies to licensees and officers, directors, members or employees of licensees. Violation of 74-8810(f) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(g), (h) and (i) apply to any person. Violation of 74-8810(g)

PATTERN INSTRUCTIONS FOR KANSAS 3d

is a class B, nonperson misdemeanor. Violation of 74-8810(h) is a class A, nonperson misdemeanor. Violation of 74-8810(i) is a severity level 8, nonperson felony.

K.S.A. 74-8810(j) applies to any person less than 18 years of age. Violation of 74-8810(j) makes the person subject to adjudication as a juvenile offender pursuant to the Kansas Juvenile Offenders Code.

The suggested pattern instruction should be completed to show the status of the defendant, if applicable, and the particular act which is prohibited by the statute as set forth in the complaint or information. Element No. 1 is not applicable and need not be used when the prohibited act can be committed by any person under subsections (g), (h) and (i) of K.S.A. 74-8810.

The following is a sample instruction which assumes a member of the Racing Commission is charged with placing a wager on an entry in a horse race conducted by an organization licensee:

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a member of the Kansas Racing Commission;
2. That the defendant knowingly placed a wager on an entry in a horse race conducted by an organization licensee; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

For applicable definitions, see PIK 3d 65.52, Parimutuel Racing Act - Definitions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65.52 PARIMUTUEL RACING ACT - DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

Breakage means the odd cents by which the amount payable on each dollar wagered in a parimutuel pool exceeds:

1. A multiple of \$.10, for parimutuel pools from races conducted in this state; and
2. A multiple of such other number of cents as provided by law of the host jurisdiction, for interstate combined wagering pools.

Commission means the Kansas Racing Commission created by this Act.

Concessionaire licensee means a person, partnership, corporation or association licensed by the commission to utilize a space or privilege within a racetrack facility to sell goods.

Dual racetrack facility means a racetrack facility for the racing of both horses and greyhounds or two immediately adjacent racetrack facilities, owned by the same licensee, one for racing horses and one for racing greyhounds.

Executive Director means the executive director of the commission.

Facility manager licensee means a person, partnership, corporation or association licensed by the commission and having a contract with an organization licensee to manage a racetrack facility.

Facility owner licensee means a person, partnership, corporation or association, or the State of Kansas or any political subdivision thereof, licensed by the commission to construct or own a racetrack facility but does not mean an organization licensee which owns the racetrack facility in which it conducts horse or greyhound racing.

Fair association means an association organized pursuant to Kansas Law (see 2-125 *et seq.*) or a nonprofit association determined by the commission to be otherwise organized to conduct fair activities pursuant to findings of

PATTERN INSTRUCTIONS FOR KANSAS 3d

fact entered by the commission in a license order.

Financial interest means an interest that could result directly or indirectly in receiving a pecuniary gain or sustaining a pecuniary loss as a result of ownership or interest in a business entity or activity or as a result of a salary, gratuity or other compensation or remuneration from any person.

Greyhound means any greyhound breed of dog properly registered with the National Greyhound Association of Abilene, Kansas.

Horsemen's association means any association or corporation:

- 1. All officers, directors, members and shareholders of which are licensed owners of horses or licensed trainers of horses, or both;**
- 2. which is applying for or has been issued a facility owner license authorizing ownership of Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities; and**
- 3. none of the officers, directors, members or shareholders of which holds another facility owner license or is an officer, director, member or shareholder of another facility owner licensee.**

Horsemen's nonprofit organization means any nonprofit organization:

- 1. All officers, directors, members or shareholders of which are licensed owners of horses or licensed trainers of horses, or both; and**
- 2. which is applying for or has been issued an organization license authorizing the conduct of horse races at Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities.**

Host facility means the racetrack at which the race is run or, if the race is run in a jurisdiction which is not participating in the interstate combined wagering pool, the racetrack or other facility which is designated as the host

PATTERN INSTRUCTIONS FOR KANSAS 3d

facility.

Host jurisdiction means the jurisdiction where the host facility is located.

Interstate combined wagering pool means a parimutuel pool established in one jurisdiction which is combined with comparable parimutuel pools from one or more racing jurisdictions for the purpose of establishing the amount of money returned on a successful wager in the participating jurisdictions.

Intertrack wagering means wagering on a simulcast race at a licensed racetrack facility or at a facility which is licensed in its racing jurisdiction to conduct live races.

Intrastate combined wagering pool means a parimutuel pool which is combined with comparable parimutuel pools from one or more racetrack facilities for the purpose of establishing the amount of money returned on a successful wager at the participating racetrack facilities.

Kansas-whelped greyhound means a greyhound whelped and raised in Kansas for the first six months of its life.

Minus pool means a parimutuel pool in which, after deducting the takeout, not enough money remains in the pool to pay the legally prescribed minimum return to those placing winning wagers, and in which the organization licensee would be required to pay the remaining amount due.

Nonprofit organization means:

1. A corporation which is incorporated in Kansas as a not-for-profit corporation pursuant to Kansas general corporation code and the net earnings of which do not inure to the benefit of any shareholder, individual member or person; or
2. a fair association.

Occupation licensee means a person licensed by the commission to perform an occupation or provide services which the commission has identified as requiring a license pursuant to this Act.

Off-track wagering means wagering on a simulcast race at a facility which is not licensed in its jurisdiction to

PATTERN INSTRUCTIONS FOR KANSAS 3d

conduct live races.

Organization licensee means a nonprofit organization licensed by the commission to conduct races pursuant to this Act and, if the license so provides, to construct or own a racetrack facility.

Parimutuel pool means the total money wagered by individuals on one or more horses or greyhounds in a particular horse or greyhound race to win, place or show, or combinations thereof, as established by the commission, and held by the organization licensee pursuant to the parimutuel system of wagering. There is a separate parimutuel pool for win, for place, for show and for each of the other forms of betting provided for by the rules and regulations of the commission.

Parimutuel wagering means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denomination on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are paid prizes from such pool in amounts proportional to the total receipts in the pool.

Race meeting means the entire period of time for which an organization licensee has been approved by the commission to hold horse or greyhound races at which parimutuel wagering is conducted, including such additional time as designated by the Commission for the conduct of official business before or after the races.

Racetrack facility means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials and such additional areas as designated by the commission.

Racing jurisdiction or jurisdiction means a governmental authority which is responsible for the regulation of live or simulcast racing in its jurisdiction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Racing or wagering equipment or services licensee means any person, partnership, corporation or association licensed by the commission to provide integral racing or wagering equipment or services, as designated by the commission, to an organization licensee.

Recognized greyhound owners' group means the duly recognized group elected by a majority of the Kansas licensed greyhound owners at the racetrack facility.

Recognized horsemen's group means the duly recognized group, representing the breeds of horses running at a racetrack facility, elected by a majority of the licensed owners and trainers at the racetrack facility. If the licensee does not have a recognized horsemen's group, the Commission shall designate as the recognized horsemen's group one that serves another organization licensee, but not one that serves a county fair association organization licensee.

Simulcast means a live audio-visual broadcast of an actual horse or greyhound race at the time it is run.

Takeout means the total amount of money withheld from each parimutuel pool for the payment of purses, taxes and shares to be kept by the organization licensee. Takeout does not include the breakage. The balance of each pool less the breakage is distributed to the holders of winning parimutuel tickets.

Notes on Use

For authority, see K.S.A. 74-8802.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 66.00

CRIMES AFFECTING BUSINESS

| | PIK Number |
|--|---------------|
| Racketeering | 66.01 |
| Debt Adjusting | 66.02 |
| Deceptive Commercial Practices | 66.03 |
| Tie-In Magazine Sale | 66.04 |
| Commercial Bribery | 66.05 |
| Sports Bribery | 66.06 |
| Receiving A Sports Bribe | 66.07 |
| Tampering With A Sports Contest | 66.08 |
| Knowingly Employing An Alien Illegally Within The United States | 66.09 |
| Equity Skimming | 66.10 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.01 RACKETEERING

The defendant is charged with the crime of racketeering. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That _____ was (the owner of) (the proprietor of) (a person having a financial interest in) a business;**
- 2. That the defendant (demanded) (solicited) (received) from _____ a thing of value by means of an express or implied (threat) (promise) that the defendant would (cause the competition of _____ to be diminished or eliminated) (cause the price of goods or services [purchased] [sold] in the business of _____ to be increased, decreased, or maintained at a stated level) (protect the [property used in the business of _____] [person of _____] [family of _____] from injury by violence or other unlawful means); and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4401. Racketeering is a severity level 7, nonperson felony. The name of the victim should be placed in the blank spaces in paragraphs (1) and (2). Where there is an issue as to the making of a "threat" or "promise" the jury should be informed that the threat or promise may be express or implied.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.02 DEBT ADJUSTING

The defendant is charged with the crime of debt adjusting. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in the business of making express or implied contracts with a debtor whereby said debtor agreed to pay defendant a certain amount of money periodically; and
2. That the defendant agreed for a consideration to distribute such money among certain creditors of the debtor; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4402. Debt adjusting is a class B, nonperson misdemeanor.

The statute does not apply to debt adjusting incidental to the practice of law in the State of Kansas.

Comment

Constitutionality of statute upheld in *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); cf. *Blue v. McBride*, 252 Kan. 894, 850 P.2d 852 (1993); *State ex rel. v. Koscot Interplanetary, Inc.*, 212 Kan. 668, 512 P.2d 416 (1973).

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.03 DECEPTIVE COMMERCIAL PRACTICES

The defendant is charged with the crime of deceptive commercial practices. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant (used deception) (knowingly misrepresented a material fact) in connection with the sale of merchandise as follows: _____
_____;**
- 2. That the defendant intended that _____
_____ should rely on such false representations whether or not such person was misled, deceived or damaged thereby; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____
County, Kansas.**

Merchandise means any object, wares, goods, commodities, intangibles, real estate or services.

Sale means any sale, offer for sale, or attempt to sell any merchandise for any consideration.

Notes on Use

For authority, see K.S.A. 21-4403. Deceptive commercial practices is a class B nonperson misdemeanor.

The term "person" is defined in section (b)(2) of the statute and has not been included in the instruction since the status of the person deceived would normally be a question of law. The section excludes application of the act to owners or publishers of newspapers, magazines, or other printed matter or owners or operators of radio or television stations where they had no knowledge of the intent, design or purpose of the advertisement.

In paragraph (1), the deceptive commercial practice should be described with particularity.

In paragraph (2), the name of the victim should be placed in the blank space.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

It was held in *State v. Kliever*, 210 Kan. 820, 504 P.2d 580 (1972), that where a person is charged with unlawfully turning back the odometer on a motor vehicle as defined in K.S.A. 8-611(b), he cannot also be charged with a deceptive commercial practice under K.S.A. 21-4403 for the same wrongdoing.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.04 TIE-IN MAGAZINE SALE

The defendant is charged with the crime of tie-in magazine sale. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was a wholesaler of magazines or other periodicals;
2. That the defendant (sold) (delivered on consignment for sale) magazines or other periodicals to a retailer;
3. That such (sale) (delivery) was conditioned on the requirement that such retailer agree to (purchase) (receive on consignment for sale) magazines or periodicals of another kind or name; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Retailer means a person who sells magazines or periodicals at retail.

Wholesaler means a person who sells or distributes or delivers on consignment for sale or who offers to sell or distribute or deliver on consignment for sale magazines or other periodicals to a retailer.

Sell, in addition to its ordinary meaning, means offer to sell, distribute, deliver or sell on consignment.

Notes on Use

For authority, see K.S.A. 21-4404. Tie-in magazine sale is a class B nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.05 COMMERCIAL BRIBERY

The defendant is charged with the crime of commercial bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was (an agent or employee of _____) (a person acting in a fiduciary capacity as _____) ([a lawyer] [a physician] [an accountant] [an appraiser] [a professional advisor] employed by _____) (an [officer] [director] [partner] [manager] of _____, a [corporation] [partnership] [unincorporated association]) (an [arbitrator] [adjudicator] [referee]);
2. That the defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) a benefit as consideration for (knowingly violating) (agreeing to violate) a duty of fidelity or trust; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4405. Commercial bribery is a severity level 8, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.06 SPORTS BRIBERY

The defendant is charged with the crime of sports bribery. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ was a (sports participant) (sports official);
2. That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) not to give (his)(her) best efforts as a sports participant in a sports contest; and

or

That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) to improperly perform (his)(her) duties as a sports official; and

3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4406. Sports bribery is a severity level 9, nonperson felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.07 RECEIVING A SPORTS BRIBE

The defendant is charged with the crime of receiving a sports bribe. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant, a sports participant (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that defendant would thereby be influenced not to give (his)(her) best efforts in a sports contest; and
or
That the defendant, a sports official, (accepted) (agreed to accept) (solicited) a benefit from _____ upon an understanding that the defendant would improperly perform (his)(her) duties as a sports official; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4407. Receiving a sports bribe is a class A, nonperson misdemeanor. The definitions contained in the instruction are the same as those in K.S.A. 21-4406 and as set forth in PIK 3d 66.06, Sports Bribery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.08 TAMPERING WITH A SPORTS CONTEST

The defendant is charged with the crime of tampering with a sports contest. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (sought to influence _____, a [sports participant] [sports official]) (tampered with an animal or equipment involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages governing such contest);
2. That the defendant did so with the intent to influence the outcome of such contest; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4408. Tampering with a sports contest is a severity level 9, nonperson felony. The definitions contained in the instruction are the same as those in K.S.A. 21-4406 and as set forth in PIK 3d 66.06, Sports Bribery.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**66.09 KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY
WITHIN THE UNITED STATES**

The defendant is charged with the crime of knowingly employing an alien illegally within the United States. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant employed _____ who performed work for the defendant within the State of Kansas;
2. That during the time _____ was so employed (he)(she) was an alien illegally within the United States;
3. That during the time of the employment the defendant knew _____ was illegally within the United States; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

(The statute making the employment of an alien illegally within the United States an offense is not applicable to aliens who have entered the United States illegally and thereafter have been permitted to remain within the United States, temporarily or permanently, pursuant to federal law.)

Notes on Use

For authority, see K.S.A. 21-4409. Knowingly employing an alien illegally within the United States is a class C misdemeanor.

If it becomes applicable under the evidence, the last paragraph may be given.

The statute does not state what constitutes permission to remain within the United States. The Committee is of the opinion that the statute should be liberally construed to include cases where an alien has been permitted to remain within the United States by inaction of federal immigration authorities in addition to cases where the immigration authorities have affirmatively acted to permit the alien to remain in the United States.

PATTERN INSTRUCTIONS FOR KANSAS 3d

66.10 EQUITY SKIMMING

The defendant is charged with the crime of equity skimming. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant engaged in (a pattern) (the practice) of (purchasing) (acquiring an interest in) one family to four family dwellings (including condominiums and cooperatives) which are subject to a loan secured by a mortgage;
2. That the loan was (in default at the time of purchase) (in default within one year subsequent to the purchase);
3. That the defendant failed to deliver to the (holder of the mortgage) (holder of the certificate of purchase) all rent proceeds received from rental of the property not to exceed the monthly payment of principal and interest required by the note and mortgage;
4. That the defendant (applied) (authorized the application of) rents from such dwellings for the defendant's own use; and
5. That the defendant did so with the intent to defraud; and
6. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4410. Equity skimming is a class A, nonperson misdemeanor.

The statute requires that the rent proceeds be delivered to the holder of the mortgage before sheriff's sale or, after sheriff's sale during the period of redemption, to the holder of a certificate of purchase.

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, Drug Paraphernalia, And Anhydrous Ammonia - 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 (After July 1, 1999) | 67.21 |
| Unlawfully Manufacturing A Controlled Substance (Before July 1, 1999) | 67.21-A |
| 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 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

| | |
|--|-------|
| 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 |
| Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Possession | 67.27 |
| Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Marketing, Sale, Etc. | 67.28 |

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 _____, _____, 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 _____, ____, 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

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).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.17 SIMULATED CONTROLLED SUBSTANCES, DRUG PARAPHERNALIA, AND ANHYDROUS AMMONIA - 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, drug paraphernalia, or anhydrous ammonia]. 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 simulated 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
or
 - (d) anhydrous ammonia for the illegal production of a controlled substance in a container not approved for that chemical by the Kansas Department of Agriculture; and
2. That this act occurred on or about the ___ day of _____, _____, 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) or 1(d) is a

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

**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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, ____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.21 UNLAWFULLY MANUFACTURING A CONTROLLED SUBSTANCE (AFTER JULY 1, 1999)

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; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4159. This instruction is for use where conduct occurred on or after July 1, 1999. Where conduct occurred prior to July 1, 1999, use PIK 3d 67.21-A.

If a controlled substance analog is involved, see PIK 3d 67.26.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.21-A UNLAWFULLY MANUFACTURING A CONTROLLED SUBSTANCE (BEFORE JULY 1, 1999)

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 _____, _____, 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. This instruction is for use where conduct occurred prior to July 1, 1999. Where conduct occurred on or after July 1, 1999, use PIK 3d 67.21. 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

definition of "school" should be included in the instruction.

If a controlled substance analog is involved, see PIK 3d 67.26.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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 _____, _____, 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.)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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 _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

_____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**67.27 EPHEDRINE, PSUEDOEPHEDRINE OR
PHENYLPROPANOLAMINE - POSSESSION**

The defendant is charged with the crime of possession of (ephedrine) (pseudoephedrine) (phenlypropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above) with intent to use the product as a precursor to any illegal substance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly possessed (ephedrine) (pseudoephedrine) (phenlypropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above) with intent to use the product as a precursor to any illegal substance; and
2. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see L. 1999, ch. 170, § 12. A violation of this section is a drug severity level 1 felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.28 EPHEDRINE, PSUEDOEPHEDRINE OR PHENYLPROPANOLAMINE - MARKETING, SALE, ETC.

The defendant is charged with the crime of unlawfully (marketing) (selling) (distributing) (advertising) (labeling) a drug product containing (ephedrine) (pseudoephedrine) (phenlypropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly (marketed) (sold) (distributed) (advertised) (labeled) a drug product containing (ephedrine) (pseudoephedrine) (phenlypropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above); and
2. That the defendant knew or should have known that the purchaser would use the product as the precursor to any illegal substance,
or
That the product was sold for stimulation, mental alertness, weight loss, appetite control, energy (or other use) not approved by federal law; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see L. 1999, ch. 170, § 12. A violation of this section is a drug severity level 1 felony.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS**

| | PIK Number |
|---|---------------|
| Concluding Instruction | 68.01 |
| Concluding Instruction - Capital Murder - Sentencing Proceeding | 68.01-A |
| Guilty Verdict - General Form | 68.02 |
| Not Guilty Verdict - General Form | 68.03 |
| Punishment - Class A Felony | 68.04 |
| Verdicts - Class A Felony | 68.05 |
| Not Guilty Because Of Mental Disease Or Defect | 68.06 |
| Multiple Counts - Verdict Instruction | 68.07 |
| Multiple Counts - Verdict Forms | 68.08 |
| Lesser Included Offenses | 68.09 |
| Alternative Charges | 68.09-A |
| Multiple Acts | 68.09-B |
| Lesser Included Offenses - Verdict Forms | 68.10 |
| Verdict Form - Value In Issue | 68.11 |
| Deadlocked Jury | 68.12 |
| Post-Trial Communication With Jurors | 68.13 |
| Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 15 Years | 68.14 |
| Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 40 Years | 68.14-A |
| Capital Murder - Verdict Form For Sentence Of Death | 68.14-A-1 |
| Capital Murder - Verdict Form For Sentence Of Death (Alternative Verdict) | 68.14-B-1 |
| Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Instruction | 68.15 |
| Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Form | 68.16 |
| Capital Murder - Sentence Of Death - Verdict Form For Sentence As Provided By Law | 68.17 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.01 CONCLUDING INSTRUCTION

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

Notes on Use

For authority, see K.S.A. 22-3421. Absent special circumstances, this concluding instruction should be used in every criminal trial.

Comment

"The authority for this instruction is based on the fundamental right of any accused to a trial by jury, §§ 5 and 10 of the Kansas Constitution Bill of Rights, and K.S.A. 22-3403, together with our statute requiring a unanimous verdict under K.S.A. 22-3421." *State v. Cheek*, 262 Kan. 91, 108, 936 P.2d 749 (1997).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.01-A CONCLUDING INSTRUCTION - CAPITAL MURDER -
SENTENCING PROCEEDING**

Your Presiding Juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____ , _____

Notes on Use

For authority, see K.S.A. 21-4624(b) which provides in part that "... The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable."

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.02 GUILTY VERDICT - GENERAL FORM

We, the jury, find the defendant guilty of _____.

Presiding Juror

Notes on Use

The form should be completed by the Court by specifying the particular offense with which defendant is charged. If two or more defendants are tried jointly, separate verdict forms must be provided by adding the name of each defendant to the form. For forms for separate counts, see PIK 3d 68.08, Multiple Counts - Verdict Forms. For forms for lesser included offenses, see PIK 3d 68.10, Lesser Included Offenses - Verdict Forms.

K.S.A. 22-3421 provides that the verdict shall be written, signed by the presiding juror, and read by the clerk, and inquiry made as to whether it is their verdict. If the verdict is defective in form only, it may be corrected by the Court with the assent of the jury.

Comment

A typewritten verdict form which merely requires that it be signed and dated by the presiding juror must conform to the evidence and the offense charged. *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961).

If a verdict is not in proper form when returned by the jury, the Court may direct the jury to correct the verdict and may send them back to the jury room for that purpose. *State v. Carrithers*, 79 Kan. 401, 99 Pac. 614 (1909).

In *State v. Osburn*, 211 Kan. 248, 505 P.2d 742 (1973), the Supreme Court considered the question of whether or not special questions could be submitted to the jury in a criminal case. The Court held that in view of the differences in our civil and criminal statutes relating to verdicts, it is apparent that the Legislature intended to preserve the power of a jury to return a verdict in a criminal prosecution in the teeth of the law and the facts. The case held that special questions may not be submitted to the jury in a criminal prosecution. The only proper verdicts are "guilty" or "not guilty" of the charges.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 64, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with

PATTERN INSTRUCTIONS FOR KANSAS 3d

both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilty based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose." To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); and *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.03 NOT GUILTY VERDICT - GENERAL FORM

We, the jury, find the defendant not guilty of

_____.

Presiding Juror

Notes on Use

See Notes on Use and Comment to PIK 3d 68.02, Guilty Verdict - General Form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.04 PUNISHMENT - CLASS A FELONY

Comment

The jury choice of a sentence of death or life imprisonment in a class A felony under K.S.A. 21-4501(a) is no longer constitutionally permissible. *State v. Randol*, 212 Kan. 461, 513 P.2d 248 (1973).

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.05 VERDICTS - CLASS A FELONY

Comment

See PIK 3d 68.14, 68.14-A, 68.14-B, 68.15 and 68.16 for verdict forms that are applicable when the mandatory minimum 40 year sentence is sought for premeditated murder occurring before July 1, 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.08 MULTIPLE COUNTS - VERDICT FORMS

- 1. We, the jury, find the defendant guilty of (. . . crime charged Count 1 . . .).**

Presiding Juror

We, the jury, find the defendant not guilty of (. . . crime charged Count 1 . . .).

Presiding Juror

- 2. We, the jury, find the defendant guilty of (. . . crime charged Count 2 . . .).**

Presiding Juror

We, the jury, find the defendant not guilty of (. . . crime charged Count 2 . . .).

Presiding Juror

Notes on Use

This form may be used when the defendant is charged with multiple counts in the same information. The verdict form may be expanded for additional counts and should be completed by specifying the crime charged in each count. The Committee recommends that the verdicts as to each count be submitted on a separate form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

Each count of an indictment is a separate offense; hence, consistency in the verdicts is not necessary. *Speers v. United States*, 387 F.2d 698 (10th Cir. 1967).

A trial court may properly retry an accused on a theft charge, where the original trial on theft and burglary charged in two separate counts in the same information resulted in an acquittal of the burglary charge and a mistrial on the theft charge due to the inability of the jury to reach a verdict; not double jeopardy; jury verdicts need not be consistent. *In re Shotwell & Grades*, 4 Kan. App. 2d 382, 607 P.2d 83 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

of first degree murder. However, absent evidence to support recklessness, there is no duty to instruct. *State v. Pierce*, 260 Kan. 859, 865, 927 P.2d 929 (1996).

2. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied* 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986). *State v. Arteaya*, 257 Kan. 874, 896 P.2d 1035 (1995). The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).
3. **Second Degree Murder** - The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987). The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).
4. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
5. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987). Because an attempt requires a specific intent to commit the crime charged, there is no such crime as attempted involuntary manslaughter, an unintentional killing. *State v. Collins*, 257 Kan. 408, 418, 893 P.2d 217 (1995).
6. **Attempted Murder** - Aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977). The offenses of attempted second degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). There is no such crime as attempted felony murder. *State v. Robinson*, 256 Kan. 133, 136, 883 P.2d 764 (1994).
7. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837

PATTERN INSTRUCTIONS FOR KANSAS 3d

- P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
8. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974).
 9. **Aggravated Robbery** - Robbery is a lesser included offense only where there is no issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required. Theft by threat, or extortion, is not a lesser included offense of aggravated robbery. *State v. McCloud*, 257 Kan. 1, 15, 891 P.2d 324 (1995).
 10. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Hollaman*, 214 Kan. 636, 522 P.2d 364 (1974). However, theft by threat, or extortion, is not a lesser included offense of robbery. *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994).
 11. **Aggravated Assault** - Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976); *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
 12. **Aggravated Battery** - Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976). Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). Aggravated battery classified as a severity level 4 felony includes the lesser offenses of the same crime classified as severity level 5, 7 or 8 felonies. *State v. Ochoa*, 20 Kan. App. 2d 1014, 895 P.2d 198 (1995). Under evidence that the victim had suffered bodily harm which was either the result of intentional or reckless conduct, the court held it was not error to give a lesser included instruction for a level 8 aggravated battery when the defendant is charged in the information with committing a level 7 aggravated battery. *State v. Jackson*, 262 Kan. 119, 142-43, 936 P.2d 761 (1997).
 13. **Aggravated Assault on Law Enforcement Officer** - Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

PATTERN INSTRUCTIONS FOR KANSAS 3d

14. **Aggravated Battery on Law Enforcement Officer** - Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
15. **Aggravated Burglary** - Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
16. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984). Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
17. **Theft** - Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), reversing *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980). Theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are forms of the same crime of larceny and the former is a lesser included offense of the latter (assuming, of course, that the property is of a value of at least \$500.) *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992).
18. **Theft by Deception** - Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991).
19. **Sale of Narcotics** - "Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976). "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilbanks*, 224 Kan. 66, 579 P.2d 132 (1978). *State v. Collins, infra*.
20. **Possession With Intent to Sell** - "Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
21. **Rape** - Indecent liberties with a minor is a lesser included offense. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Aggravated sexual battery. *State v. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974). Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987). In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), aggravated sexual battery was held not to be a lesser included offense of aggravated kidnapping, attempted aggravated sodomy or attempted aggravated rape because of the additional elements of a nonspousal relationship and intent to arouse or satisfy sexual desires. The dissent argued the rationale that single act of force cannot provide the basis for multiple convictions, which was the basis of the findings that aggravated battery and aggravated robbery were

PATTERN INSTRUCTIONS FOR KANSAS 3d

multiplicitous in *State v. Warren*, 252 Kan. 159, 843 P.2d 244 (1992). Aggravated indecent liberties with a child is a lesser included offense of rape under the information/evidence prong of the *Fike* test. *State v. Burns*, 23 Kan. App. 2d 352, 358-60, 931 P.2d 1258 (1997).

22. **Attempted Rape** - Battery is not a lesser included offense. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).
23. **Indecent Liberties With a Child** - Aggravated sexual battery is not a lesser included offense. *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988); *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989).
24. **Aggravated Sodomy** - Lewd and lascivious behavior is not a lesser included offense. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).
25. **Unlawful Possession of Firearm** - Carrying a concealed weapon and aggravated weapons violation are not lesser included offenses. *State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977).
26. **DUI** - Reckless driving is not a lesser included offense. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983).

68.09-A ALTERNATIVE CHARGES

The Committee recommends that an alternative charge instruction not be given. If the defendant is charged in the alternative with multiplicitous charges, the jury should be free to enter a verdict upon each of the alternatives and PIK 3d 68.07, Multiple Counts-Verdict Instruction, is adequate.

However, the defendant cannot be convicted of multiplicitous crimes. *State v. Dixon*, 252 Kan. 39, 47, 843 P.2d 182 (1992). If the jury returns appropriate verdicts of guilty to multiplicitous charges, the trial court must accept only the verdict as to the greater charge under a doctrine of merger.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.09-B MULTIPLE ACTS

The State claims distinct multiple acts which each could separately constitute the crime of _____. In order for the defendant to be found guilty of _____, you must unanimously agree upon the same underlying act.

Notes on Use

For authority, see K.S.A. 22-3421. This instruction is for use when distinct incidents separated by time or space are alleged by the State in a single count of the charging document. In other words, under circumstances where the State could have proceeded under multiple counts but chose not to do so. This form of charge presents a problem because the defendant is entitled to a unanimous jury verdict as to which incident constituted the crime.

Comment

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. *State v. Timley*, 255 Kan. 286, Syl. ¶ 2, 875 P.2d 242 (1994). See also, *State v. Barber*, 26 Kan. App. 2d 330, 988 P.2d 250 (1999).

A multiple acts case is distinguishable from a multiple means case. Unanimity is not required as to the means by which a crime was committed so long as substantial evidence supports each alternative means. *State v. Timley*, 255 Kan. 286, Syl. ¶ 1.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.10 LESSER INCLUDED OFFENSES - VERDICT FORMS

We, the jury, find the defendant guilty of (principal offense charged).

Presiding Juror

We, the jury, find the defendant guilty of (lesser included offense).

Presiding Juror

We, the jury, find the defendant not guilty.

Presiding Juror

Notes on Use

A verdict form should be completed for each criminal offense charged. A verdict form should also include any lesser included offenses under the crime charged and a verdict of not guilty.

Comment

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

The trial court's use of only one all-inclusive verdict form with guilty or not guilty alternatives listed for the charged crime and each lesser included offense is criticized in *State v. Franklin*, 264 Kan. 496, 505, 958 P.2d 611 (1998). The Supreme Court stated that PIK 68.10 should be followed where lesser included offense instructions are present.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.11 VERDICT FORM - VALUE IN ISSUE

We, the jury, find the defendant guilty of _____ and find the (value of) (damage to) (amount of) the [(property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s])] [(which the defendant [obtained] [damaged] [impaired] [gave])] [(over which the defendant [obtained] [exerted] unauthorized control)] to be:

_____ dollars (\$ _____) or more
Less than _____ dollars (\$ _____)
(Place an X in the appropriate square.)

Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this form.

See Comment to and Notes on Use to PIK 3d 59.70, Value in Issue.

Comment

In *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814 (1987), the Court held that the trial court erred by allowing the jury to consider sales tax in its determination of the value of the merchandise stolen from a retail store.

The value to be used in determining whether theft is a felony or misdemeanor is the fair market value of the property taken. *State v. Robinson*, 4 Kan. App. 2d 428, 608 P.2d 1014 (1980).

68.12 DEADLOCKED JURY

This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

Also, there is no reason to believe that the case would ever be submitted to 12 people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

[These matters are mentioned now because some of them may not have been in your thoughts.]

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion [so that this case may be completed].

You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.

[The giving of this instruction at this time in no way means it is more important than any other instruction. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.]

[You may now retire and continue your deliberations in such manner as may be determined by your good judgment as reasonable people.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

This instruction is a modification of PIK Civil 2d 10.20 suggested for use in civil cases when there is apparent failure of a jury to reach a verdict. The instruction can be given in substance with the other instructions at the conclusion of the case. If it is used after the jury has commenced deliberations, it should be done so with caution. The Committee recommendation that PIK Civil 10.20 not be given in criminal cases in the 1968 Supplement is modified in conformity to these notes and comment.

If the instruction is given with the other instructions before jury deliberations begin, the material in brackets should be deleted.

Comment

It was held there was no error in giving PIK Civil 10.20 in *State v. Oswald*, 197 Kan. 251, 417 P.2d 261 (1966). "However," said the Court, "as a word of caution, this instruction quite properly could have been given at the time of the original charge." The practice of lecturing a jury in a criminal case after reported disagreement was not commended. Oral comments accompanying this instruction were held to be coercive and prejudicial error in *State v. Earsery*, 199 Kan. 208, 428 P.2d 794 (1967), but their effect, standing alone in that case, was not determined. A belated instruction was criticized, but, under attending circumstances indicating that the judge's remarks had no immediate coercive effect, the instruction was held not to be reversible error in *State v. Basker*, 198 Kan. 242, 424 P.2d 535 (1967).

In *Bush v. State*, 203 Kan. 494, 454 P.2d 429 (1969), PIK Civil 10.20 was submitted to the jury after it had deliberated for some time and failed to reach a verdict. The holding in *State v. Earsery*, supra, to the effect that PIK Civil 10.20 standing alone would not constitute prejudicial error is discussed.

In *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015 (1971), the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward."

In *State v. Roadenbaugh*, 234 Kan. 474, 483, 673 P.2d 1166 (1983), the Court held it is not error to give the Allen charge before the jury retires.

In *State v. Poole*, 252 Kan. 108, 843 P.2d 689 (1992), the Kansas Supreme Court emphasized the need to exercise caution in giving the Allen-type instruction. The Court stressed that ". . . timing can be very important in determining prejudicial error." It observed that the defendant had failed to furnish a record that affirmatively reflected prejudicial error as to when the deliberations began, when the Allen-type instruction was given, if the trial judge

PATTERN INSTRUCTIONS FOR KANSAS 3d

made additional remarks, and when the jury reached its verdict. In the absence of such record, the Court acknowledged that there is a presumption that the actions of the trial court were proper.

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law - Jury Instructions - The Allen Charge," 6 Washburn L.J. 517 (1967).

In *State v. Noriega*, 261 Kan. 440, 452-56, 932 P.2d 940 (1997), without objection of the defendant, a modified *Allen* instruction was given to the jury before retiring to deliberate. On appeal, the defendant complained that the instruction was coercive. The Supreme Court noted that although there was no compelling reason to have departed from PIK Crim. 68.12, the defendant failed to show his right to a fair trial or a unanimous verdict was prejudiced.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.13 POST-TRIAL COMMUNICATION WITH JURORS

You have now completed your duties as jurors in this case and are discharged with the thanks of the Court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance, the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Notes on Use

See Rules of Supreme Court Rule No. 169. Under this rule, the Court shall give the substance of the above instruction upon completion of the jury trial and before discharge of the jury.

Supreme Court Rule No. 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized, if possible.

Supreme Court Rule 226 MRPC 3.5 provides that "[a] lawyer shall not: communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case."

Comment

Jurors shall not be called for posttrial hearings without an order of the Court after motion. The burden is upon the party seeking the order to show the necessity for the order. *Cornejo v. Probst*, 6 Kan. App. 2d 529, 630 P.2d 1202

PATTERN INSTRUCTIONS FOR KANSAS 3d

(1981); *Walters v. Hitchcock*, 237 Kan. 31, 697 P.2d 847 (1985); *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985); *State v. Ruebke*, 240 Kan. 493, 731 P.2d 842 (1987).

Supreme Court Rule 169 was quoted in *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 815 P.2d 506 (1991).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.14 MURDER IN THE FIRST DEGREE - MANDATORY 40
YEAR SENTENCE - VERDICT FORM FOR LIFE
IMPRISONMENT WITH PAROLE ELIGIBILITY
AFTER 15 YEARS**

SENTENCING VERDICT

**We, the jury, impaneled and sworn, do upon our oath or
affirmation, unanimously determine that a sentence of
LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY
AFTER 15 YEARS be imposed by the Court.**

Presiding Juror

_____, _____

Notes on Use

For authority, see K.S.A. 21-4624(e) for premeditated murder occurring before July 1, 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.14-A MURDER IN THE FIRST DEGREE - MANDATORY
40 YEAR SENTENCE - VERDICT FORM FOR LIFE
IMPRISONMENT WITH PAROLE ELIGIBILITY
AFTER 40 YEARS**

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist: [The jury shall set forth here in legible print each such aggravating circumstance.]

and so, therefore, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS be imposed by the Court.

Presiding Juror

_____, _____

Notes on Use

For authority, see K.S.A. 21-4624(e) and 21-4628 for premeditated murder occurring before July 1, 1994.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.14-A-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist: [The jury shall set forth here in legible print each such aggravating circumstance.]

and so, therefore, unanimously sentence the defendant to death.

Presiding Juror

_____, _____

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended L. 1994, ch. 252, § 4.

**68.14-B MURDER IN THE FIRST DEGREE - MANDATORY
MINIMUM 40 YEAR SENTENCE - VERDICT FORM
FOR LIFE IMPRISONMENT WITH PAROLE
ELIGIBILITY AFTER 40 YEARS
(Alternative Sentencing Verdict)**

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and do outweigh mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]
- [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
- [That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
- [That the defendant authorized or employed another person to commit the crime.]
- [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

- [That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]
- [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]
- [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]

and so, therefore, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS be imposed by the Court.

Presiding Juror

_____, _____
Notes on Use

For authority, see K.S.A. 21-4624(e) and 21-4628 for premeditated murder occurring before July 1, 1994.

The applicable bracketed clauses should be included in the verdict form.

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.14-B-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH (Alternative Verdict)

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

- [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]
- [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
- [That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
- [That the defendant authorized or employed another person to commit the crime.]
- [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]
- [That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]

PATTERN INSTRUCTIONS FOR KANSAS 3d

- [That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]

 - [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]
- and so, therefore, unanimously sentence the defendant to death.

Presiding Juror

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended L. 1994, ch. 252, § 4.

The applicable bracketed clauses should be included in the verdict form.

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A-1 that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**68.17 CAPITAL MURDER - SENTENCE OF DEATH -
VERDICT FORM FOR SENTENCE AS PROVIDED BY
LAW**

SENTENCING VERDICT

**We, the jury, impaneled and sworn, do upon our oath
or affirmation, unanimously determined that a sentence
as provided by law be imposed by the Court.**

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended by L. 1994, ch. 252, § 4. If the jury does not reach a verdict of a recommendation of death upon conviction of capital murder, the court *may* sentence the defendant to the mandatory minimum 40-year term. L. 1994, ch. 252, § 10.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. |

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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:

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

_____, _____.

(PIK 3d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

We, the jury, find the defendant guilty of first degree murder.

Presiding Juror

We, the jury, find the defendant guilty of second degree murder.

Presiding Juror

We, the jury, find the defendant guilty of voluntary manslaughter.

Presiding Juror

We, the jury, find the defendant guilty of involuntary manslaughter.

Presiding Juror

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 3d 68.10)

69.02 THEFT WITH TWO PARTICIPANTS

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 5, 1993, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store, Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later, John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

**Instruction 1. PIK 3d 51.02, Consideration and
Binding Application of Instructions.**

PIK 3d 51.05, Rulings of the Court.

PATTERN INSTRUCTIONS FOR KANSAS 3d

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

Instruction 2. PIK 3d 59.01, Theft.

Instruction 3. PIK 3d 59.70, Value in Issue.

Instruction 4. PIK 3d 54.05, Responsibility for Crimes of Another.

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 68.11, Verdict of Guilty and Finding of Value of Property.

PIK 3d 68.03, Not Guilty Verdict.

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)**

At times during the trial, I have ruled upon the

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 theft of property of the value of at least \$500 but less than \$25,000. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That Acme Department Store was the owner of the property;
2. That the defendant exerted unauthorized control over the property;
3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;
4. That the value of the property was at least \$500 but less than \$25,000; and
5. That this act occurred on or about the 5th day of July, 1993, in Sedgwick County, Kansas.

(PIK 3d 59.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 3.

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in an amount of at least \$500 but less than \$25,000.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 3d 59.70)

Instruction No. 4.

A person who, either before or during its commission, intentionally aids 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.

(PIK 3d 54.05)

Instruction No. 5.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 6.

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(PIK 3d 54.01)

Instruction No. 7.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____
(PIK 3d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

Five hundred dollars (\$500) or more

Less than Five hundred dollars (\$500)

(Place an X in the appropriate square.)

Presiding Juror

(PIK 3d 68.11)

We, the jury find the defendant not guilty of

_____.

Presiding Juror

(PIK 3d 68.03)

PATTERN INSTRUCTIONS FOR KANSAS 3d

69.03 POSSESSION OF MARIJUANA WITH INTENT TO SELL - ENTRAPMENT AS AN AFFIRMATIVE DEFENSE

Summary of the Facts and Issues

On July 3, 1996, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted on October 4, 1996. A price was negotiated and a meeting was set up for October 5, 1996, to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1. PIK 3d 51.02, Consideration and Binding Application of Instructions.

PIK 3d 51.05, Rulings of the Court.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

**that the defendant is guilty. The State's burden of proof does not shift to the defendant.
(PIK 3d 52.08)**

Instruction 4.

Entrapment is a defense if the defendant is induced to commit a crime which the defendant had no previous disposition to commit. It is not a defense if the defendant originated the plan to commit the crime or when he had shown a predisposition for committing the crime or when he had shown predisposition for committing the crime and was merely afforded an opportunity to consummate the crime and was assisted by law enforcement officers.

The defendant cannot rely on the defense of entrapment if you find that in the course of defendant's usual activities the sale of marijuana was likely to occur and the law enforcement officer or his agent did not mislead the defendant into believing his conduct to be lawful.

**A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the marijuana by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the marijuana by defendant.
(PIK 3d 54.14)**

Instruction No. 5.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty until you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt

PATTERN INSTRUCTIONS FOR KANSAS 3d

as to the truth of any of the claims made by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 6

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 3d 54.01)

Instruction No. 7.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict must be unanimous.
(PIK 3d 68.01)

District Judge

_____ , _____

VERDICT FORMS

We, the jury, find the defendant guilty of possession of marijuana with intent to sell.

Presiding Juror

(PIK 3d 68.02)

We, the jury, find the defendant not guilty of possession of marijuana with intent to sell.

Presiding Juror

(PIK 3d 68.03)

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

- 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. PIK 3d 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.**

PATTERN INSTRUCTIONS FOR KANSAS 3d

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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

_____, _____

(PIK 3d 68.01-A)

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.

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.

Presiding Juror

_____, _____.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

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 .. | 70.01-A |
| B.A.T. .08 Or More Or DUI Charged In The Alternative .. | 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, Revoked, or While Habitual Violator | 70.10 |
| Felony Driving While Privileges Canceled, Suspended, Revoked, or While Habitual Violator | 70.11 |

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 201, 737 P.2d 880 (1987).

Under K.S.A. 8-1567(a)(1), "the fact of driving with an alcohol concentration of .10 or above is now a crime, even in a case . . . where the State cannot prove the driver was under the influence of alcohol to the extent he or she is incapable of driving safely." *State v. Larson*, 12 Kan. App. 2d 198, 200, 737 P.2d 880 (1987); *State v. Zito*, 11 Kan. App. 2d 432, 434, 724 P.2d 149 (1986).

In *City of Wichita v. Hull*, 11 Kan. App. 2d 441, 445, 724 P.2d 699 (1986), it was held that by omission of the element of intent in K.S.A. 8-1567, the Legislature intended driving while under the influence of alcohol or drugs to be an absolute liability *malum prohibitum* offense.

Driving while under the influence of alcohol is a lesser included offense of aggravated vehicular homicide. *State v. Woodman*, 12 Kan. App. 2d 110, 119, 735 P.2d 1102 (1987).

Driving while under the influence of alcohol under certain circumstances is a lesser included offense of involuntary manslaughter where: (1) Driving under the influence is alleged as the underlying misdemeanor in the information or complaint; and (2) all of the elements of driving under the influence are alleged in the information or complaint and are necessarily proved to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, Syl. ¶ 2, 744 P.2d 833 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**70.01-A TRAFFIC OFFENSE - ALCOHOL CONCENTRATION
.08 OR MORE**

The defendant is charged with the crime of (operating) (attempting to operate) a vehicle while the alcohol concentration in (his)(her) blood or breath is .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant (drove) (attempted to drive) a vehicle;
2. That the defendant, while (driving) (attempting to drive) had an alcohol concentration in (his)(her) blood or breath of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

The phrase "alcohol concentration" means the number of grams of alcohol per (100 milliliters of blood) (210 liters of breath).

Notes on Use

For authority, see K.S.A. 8-1567(a)(1) and (2), and K.S.A. 8-1005.

Comment

The Committee is of the opinion the alcohol concentration in the defendant's blood or breath must result from alcohol consumed before or while operating or attempting to operate a vehicle.

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. 838 (1987).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993).

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.01-B B.A.T. .08 OR MORE OR DUI CHARGED IN THE ALTERNATIVE

The defendant is charged in the alternative with (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more or (operating) (attempting to operate) a vehicle while under the influence of alcohol. You are instructed that the alternative charges constitute one crime.

You should consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more and sign the verdict upon which you agree.

You should further consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol and sign the verdict upon which you agree.

Notes on Use

The Committee believes that K.S.A. 8-1567 defines a single offense. The State may, however, charge the offense in the alternative. See PIK 3d 70.01, Traffic Offense - Driving Under the Influence of Alcohol or Drugs, and PIK 3d 70.01-A, Traffic Offense - Alcohol Concentration .08 or more.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978), and *State v. McCowan*, 226 Kan. 752, 764, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.02 DRIVING UNDER THE INFLUENCE - IF CHEMICAL TEST USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. [If a test shows there was .08 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that (he)(she) was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.] [If a test shows there was less than .08 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).]

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. This instruction is to be used in conjunction with PIK 3d 70.01 when chemical tests have been administered. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used. This instruction is not applicable to a charge or alternative charge of a per se violation of K.S.A. 8-1567(a)(1).

Comment

The constitutionality of a presumption is described in the Comment to PIK 3d 54.01 and 54.01-B.

The Committee believes that "prima facie" evidence as used in K.S.A. 8-1005 creates a presumption, and the suggested instruction is worded accordingly. *State v. Haremsza*, 213 Kan. 201, 515 P.2d 1217 (1973).

PATTERN INSTRUCTIONS FOR KANSAS 3d

The above instruction has been approved in dicta in *State v. Price*, 233 Kan. 706, 711, 664 P.2d 869 (1983).

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.03 TRANSPORTING AN ALCOHOLIC BEVERAGE IN AN OPENED CONTAINER

The defendant is charged with the crime of transporting an alcoholic beverage in an opened container. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant transported a container of alcoholic beverage in a vehicle upon a highway or street;**
- 2. That the container had been opened;**
- 3. That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;**
- 4. That the defendant knew or had reasonable cause to know (he)(she) was transporting an opened container of alcoholic beverage; and**
- 5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1599. The 1994 amendment broadened the application of the statute to cover any cereal malt beverage. A person convicted of this offense shall be punished by a fine of not more than \$200, or by imprisonment for not more than six months, or by both such fine and imprisonment. In addition to fine and/or imprisonment, the Court must suspend the defendant's driving privileges. K.S.A. 8-1599(g).

Alcoholic beverage is defined in K.S.A. 8-1599(a) to mean any alcoholic liquor, as defined by K.S.A. 41-102 or any cereal malt beverage, as defined in K.S.A. 41-2701.

Highway and street are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

Comment

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), held that a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Former K.S.A. 41-2719 (now 8-1599), which prohibits transportation of an open container of cereal malt beverage in a vehicle on the highway or street, applies to passengers as well as to the driver of the vehicle. *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982).

In *State v. Bishop*, 14 Kan. App. 2d 223, 227, 786 P.2d 1152 (1990), it was held that transporting open containers of alcoholic liquor in violation of K.S.A. 41-804 applies to passengers as well as drivers. It further held that to sustain a conviction of transporting an open container, the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported, and that the doctrine of constructive possession does not extend to unknowing passengers who are accused of transporting an open container.

K.S.A. 8-1599(h) provides it shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic liquor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.04 RECKLESS DRIVING

The defendant is charged with the crime of reckless driving. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

- 1. That the defendant was driving a vehicle;**
- 2. That the defendant was driving in a reckless manner; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Reckless means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger.

Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than 90 days, or by a fine of not less than \$25 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than 10 days nor more than six months, or by a fine of not less than \$50 nor more than \$500, or by both such fine and imprisonment.

Comment

Reckless is defined as an indifference to whether or not wrong is done. To be reckless, the conduct must show disregard of or indifference to the consequences under circumstances involving danger to life or safety of others, although no harm was intended. *Montgomery v. Barton*, 212 Kan. 368, 370, 510 P.2d 1187 (1973).

See also, *Hanson v. Swain*, 172 Kan. 105, 238 P.2d 517 (1951); *Bailey v. Resner*, 168 Kan. 439, 214 P.2d 323 (1950).

"The offense of reckless driving is not a lesser included offense of driving under the influence of alcohol or drugs." *State v. Mourning*, 233 Kan. 678, 682-683, 664 P.2d 857 (1983). See also, *State v. Brueninger*, 238 Kan. 429, 434-

PATTERN INSTRUCTIONS FOR KANSAS 3d

435, 710 P.2d 1325 (1985).

Conviction of a law enforcement officer for reckless driving while on duty affirmed. Conduct not privileged under K.S.A. 8-1506. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.05 VIOLATION OF CITY ORDINANCE

The ordinance of the City of _____, Kansas, makes it unlawful for any person to (state offense charged) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. (List the various elements of the offense.)
- 2.
- 3.
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

The elements of the applicable substantive crime should be set forth in the concluding portion of the instruction.

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.06 OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS

The defendant is charged with the crime of operating an aircraft while under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant was operating an aircraft;
2. (a) That the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug), and the control of (his)(her) mental or physical functions was thereby impaired to the extent that the defendant was incapable of safely operating an aircraft;
or
(b) That the defendant had .10 percent or more by weight of alcohol in (his)(her) blood as shown by chemical analysis of (his)(her) blood, breath or urine; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 3-1001 and K.S.A. 3-1002. A first conviction of this offense is punishable by imprisonment of not more than one year, or by a fine of not less than \$100 nor more than \$500, or by both such fine and imprisonment. Second and subsequent convictions shall be punishable by imprisonment for not less than 30 days nor more than one year, and, in the discretion of the Court, a fine of not more than \$500. K.S.A. 3-1003. In addition, pursuant to K.S.A. 3-1003(b), the Court may order the defendant not to operate an aircraft for any purpose.

If the blood alcohol level is .10 percent or more, the element of "under the influence of intoxicating liquor" is satisfied.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

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. 3-1003.

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.07 OPERATING AN AIRCRAFT WHILE UNDER THE INFLUENCE - IF CHEMICAL TEST IS USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) may be taken to determine the amount of alcohol in the defendant's blood at the time the alleged offense occurred. If the test shows there was less than .10 percent by weight of alcohol in the defendant's blood, it shall be presumed the defendant was not under the influence of intoxicating liquor.

You are further instructed that evidence derived from a (blood) (breath) (urine) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (intoxicating liquor) (any drug) (a combination of alcohol and any drug). The evidence established by the test is not conclusive, but it should be considered by you along with all the other evidence in this case.

Notes on Use

For authority, see K.S.A. 3-1004 and K.S.A. 3-1005.

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.08 IGNITION INTERLOCK DEVICE VIOLATION

The defendant is charged with the crime of an ignition interlock device violation. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. [That the defendant tampered with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative;]

or

[That the defendant requested or solicited _____ to blow into an ignition interlock device, or to start a motor vehicle equipped with such a device, for the purpose of providing an operable motor vehicle to _____, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device;]

or

[That the defendant blew into or started a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to _____, a person whose driving privileges had been restricted to driving a motor vehicle equipped with such a device;]

or

[That the defendant operated a motor vehicle not equipped with an ignition interlock device during a period in which (his)(her) driving privileges were restricted to driving a motor vehicle equipped with such a device;]

2. That the defendant did so intentionally;
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Ignition interlock device means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such a person has consumed an alcoholic beverage.

Notes on Use

For authority, see K.S.A. 8-1017. Violation of this section is a class A, nonperson misdemeanor.

Ignition interlock device is defined in K.S.A. 1994 Supp. 8-1013(d). See also, K.S.A. 1994 Supp. 8-1015 which sets forth the authorized restrictions of driving privileges and how they are imposed.

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 tire 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

70.10 MISDEMEANOR DRIVING WHILE LICENSE IS 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's driving privileges were (canceled) (suspended) (revoked) by the division of motor vehicles;]
- [2. That the defendant's driving privileges were revoked as an habitual violator by the division of motor vehicles which had determined the defendant to be an habitual violator and had revoked the defendant's driving privileges;]
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 by mail had passed; and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

You are further instructed that the law of Kansas does not require actual receipt of notice from the division of motor vehicles. 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).]

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority (driving while canceled, suspended or revoked), see K.S.A. 8-262 *et seq.* and *State v. Jones*, 231 Kan. 366, 644 P.2d 464 (1984). For authority (driving while habitual violator), see K.S.A. 8-285 *et seq.*

This instruction includes all the statutory elements for a conviction of driving while a license is canceled, suspended or revoked, including the requirement that the division of motor vehicles mailed a copy of the notice to the defendant at the last known address shown by the division's records. K.S.A. 8-255(d). However, when a defendant has actual knowledge that his or her license to drive has been suspended, the State is not required to present direct evidence that the DMV has complied with the statutory mailing requirement. See *State v. Campbell*, 24 Kan. App. 2d 553, Syl. ¶ 3, 948 P.2d 684 (1997). Thus, if supported by the evidence, the trial court can modify this instruction by inserting the following as a third claim required to be proved by the State:

"3. That the defendant had actual knowledge that (his) (her) driving privileges had been (canceled) (suspended) (revoked) by the division of motor vehicles;"

This would substitute for the language contained in claims 3 and 4 as well as the paragraph immediately following claim 5.

Effective July 1, 1999, driving while habitual violator is a class A nonperson misdemeanor. Also, effective July 1, 1999, a first conviction of driving while canceled, suspended or revoked is a class B nonperson misdemeanor. A second or subsequent conviction of driving while canceled, suspended or revoked is a class A nonperson misdemeanor. Therefore, this instruction can be used for all misdemeanor prosecutions under either K.S.A. 8-262 *et seq.* or K.S.A. 8-285 *et seq.* See PIK 3d 70.11 for felony prosecutions prior to July 1, 1999.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 _____, _____, 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority (driving while canceled, suspended or revoked), see K.S.A. 8-262 *et seq.* and *State v. Thomas*, 266 Kan. 265, 970 P.2d 986 (1998). 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).

Prior to July 1, 1999, driving while habitual violator was a severity level 9, nonperson felony. Also, a third or subsequent conviction of driving while canceled, suspended or revoked was a severity level 9, nonperson felony. Under *Lewis* and *Thomas*, the prosecution of a felony, as opposed to a misdemeanor, requires the state to prove that a defendant had knowledge that his or her driving privileges were suspended or revoked.

Effective July 1, 1999, the legislature designated driving while habitual violator as a class A nonperson misdemeanor. Also, effective July 1, 1999, driving on a canceled, suspended or revoked license was designated as a misdemeanor even on third or subsequent convictions. Therefore, for the prosecution of all misdemeanor violations after July 1, 1999, under either K.S.A. 8-262 *et seq.* or K.S.A. 8-285 *et seq.*, the "knowledge" element is no longer required and the instruction at PIK 3d 70.10 is appropriate.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

PIK CRIMINAL INDEX

- ABANDONMENT OF A CHILD,**
 - Aggravated, 58.05-A
 - Elements instruction, 58.05
- ABORTION,**
 - Criminal, 56.10
 - Justification, 56.11
- ABUSE OF A CHILD,**
 - Elements instruction, 58.11
- ACCESSORY, 54.05**
- ACCOMPLICE,**
 - Testimony, 52.18
 - Aiding and abetting, 54.05
- ACTS,**
 - Multiple, 68.09-B
- ADDING DOCKAGE OR FOREIGN MATERIAL TO GRAIN,**
 - Elements Instruction, 59.63-B
- ADJUSTING DEBTS, 66.02**
- ADMINISTRATION OF JUSTICE,**
 - Interference, 60.17
- ADMISSIONS,**
 - Guiding instruction, 52.05
- ADULTERATION OR CONTAMINATION OF FOOD OR DRINK,**
 - Criminal threat, 56.23-A
- ADULTERY,**
 - Elements instruction, 57.09
- AFFIRMATIVE DEFENSES,**
 - Bigamy, 58.01
 - Burden of proof, 52.08
 - Criminal discharge of a firearm, 64.02-B
 - Criminal use of weapons, 64.04
 - Endangering a child, 58.10
 - Indecent liberties with a child, 57.05-B
 - Mistreatment of dependant adult, 56.38
 - Promoting obscenity, 65.05
 - Promoting obscenity to a minor, 65.05-A
 - Transporting an Alcoholic Beverage in an Opened Container, 70.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

AGGRAVATED ABANDONMENT OF A CHILD,

Elements instruction, 58.05-A

AGGRAVATED ARSON,

Elements instruction, 59.22

AGGRAVATED ASSAULT,

Elements instruction, 56.14

AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER

Elements instruction, 56.15

AGGRAVATED BATTERY,

Elements instruction, 56.18

**AGGRAVATED BATTERY AGAINST LAW ENFORCEMENT
OFFICER,**

Elements instruction, 56.19

AGGRAVATED BURGLARY,

Elements instruction, 59.18

AGGRAVATED CRIMINAL SODOMY,

Causing child under 14 to engage, 57.08-A

Elements instruction, 57.08, 57.08-A, 57.08-B

No consent, 57.08-B

Nonmarital child under 16, 57.08

AGGRAVATED CRIMINAL THREAT,

Elements instruction, 56.23-B

AGGRAVATED ESCAPE FROM CUSTODY,

Elements instruction, 60.11

AGGRAVATED FAILURE TO APPEAR,

Elements instruction, 60.15

AGGRAVATED FALSE IMPERSONATION,

Elements instruction, 60.26

AGGRAVATED INCEST,

Elements instruction, 58.04

AGGRAVATED INDECENT LIBERTIES WITH A CHILD,

Elements instruction, 57.06

AGGRAVATED INDECENT SOLICITATION OF A CHILD,

Elements instruction, 57.13

**AGGRAVATED INTERFERENCE WITH PARENTAL
CUSTODY,**

By hiree, 56.26-B

By parents hiring another, 56.26-A

Other circumstances, 56.26-C

PATTERN INSTRUCTIONS FOR KANSAS 3d

- AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM,**
Elements instruction, 60.06-B
- AGGRAVATED JUVENILE DELINQUENCY,**
Elements instruction, 58.13
- AGGRAVATED KIDNAPPING,**
Elements instruction, 56.25
- AGGRAVATED ROBBERY,**
Elements instruction, 56.31
- AGGRAVATED SEXUAL BATTERY,**
Child under 16, 57.21
Dwelling, 57.22
Elements instruction, 57.20, 57.21, 57.22, 57.23, 57.24,
57.25
Force or Fear, 57.20
Mental deficiency of victim, 57.24
Victim unconscious or powerless, 57.23
- AGGRAVATED SODOMY,**
Elements instruction, 57.08
- AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL,**
Elements instruction, 59.31
- AGGRAVATED VEHICULAR HOMICIDE,**
Elements instruction, 56.07-A
- AGGRAVATED WEAPONS VIOLATION,**
Elements instruction, 64.03
- AIDING AND ABETTING, 54.05**
- AIDING A FELON OR PERSON CHARGED AS A FELON,**
Elements instruction, 60.13
- AIDING A PERSON CONVICTED OR CHARGED WITH A
MISDEMEANOR,**
Elements instruction, 60.14
- AIDING ESCAPE,**
Elements instruction, 60.12
- AIRCRAFT,**
Operating under influence, 70.06, 70.07
- AIRCRAFT IDENTIFICATION,**
Fraudulent Acts, 60.35
- AIRCRAFT PIRACY,**
Elements instruction, 56.25

PATTERN INSTRUCTIONS FOR KANSAS 3d

AIRCRAFT REGISTRATION,

- Failure to register, 60.32
- Fraudulent, 60.33

ALCOHOLIC BEVERAGES,

- Furnishing to a minor for illicit purposes, 58.12-B
- Transporting in an opened container, 70.03

ALCOHOLIC LIQUOR,

- Furnishing to a minor, 58.12
- Defense, 58.12-C

ALTERING A LEGISLATIVE DOCUMENT,

- Elements instruction, 59.15

ALIBI,

- Guiding instruction, 52.19

ALIEN, ILLEGAL,

- Knowingly employing, 66.09

ALTERNATIVE CHARGES,

- Guiding instruction, 68.09-A

ANABOLIC STEROIDS,

- Offer to sell with intent to sell, 67.14
- Possession, 67.16
- Possession with intent to sell, 67.14
- Selling, offering to sell, cultivating or dispensing, 67.15

ANIMALS,

- Cruelty, 65.15
- Defense, 65.16
- Unlawful disposition, 65.17

ANTICIPATORY CRIMES,

- Chapter containing, 55.00

APPEARANCE,

- Aggravated failure to appear, 60.15
- Failure to appear, 60.15

ARREST,

- Use of Force, 54.23, 54.24
- Resisting use of force, 54.25

ARSON,

- Aggravated, 59.22
- Defraud an insurer or lienholder, 59.21
- Elements instruction, 59.20

PATTERN INSTRUCTIONS FOR KANSAS 3d

ASSAULT,

Aggravated, 56.14

Aggravated on law enforcement officer, 56.15

Elements instruction, 56.12

ASSAULT ON LAW ENFORCEMENT OFFICER,

Aggravated, 56.15

Elements instruction, 56.13

ASSEMBLY,

Unlawful, 63.02

ASSISTING SUICIDE,

Elements instruction, 56.08

ATTEMPT,

Defense, 55.02

Elements instruction, 55.01

ATTEMPTED POISONING,

Elements instruction, 56.21

ATTEMPTING TO ELUDE POLICE OFFICER,

Elements instruction, 70.09

ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER,

Elements instruction, 60.16

ATTENDING AN UNLAWFUL DOG FIGHT,

Elements instruction, 65.19

AUTHORIZED INTERCEPTION OF A COMMUNICATION,

Unlawful disclosure, 60.06-C

AUTOMOBILE MASTER KEY VIOLATION,

Elements instruction, 59.48

BATTERY,

Aggravated, 56.18

Aggravated sexual, 57.20, 57.24, 57.25

Aggravated against law enforcement officer, 56.19

Domestic, 56.16-A

Elements instruction, 56.16

Law enforcement officer, 56.17

School employee, 56.16-B

Sexual, 57.19

Vehicular, 56.07-B

BEVERAGE CONTAINERS WITH DETACHABLE TABS,

Selling, 64.18

PATTERN INSTRUCTIONS FOR KANSAS 3d

BIGAMY,

Affirmative defense, 58.02

Defense, 58.02

Elements instruction, 58.01

BINGO,

Elements instruction, 56.32

BLACKMAIL,

Elements instruction, 56.32

BREACH OF PRIVACY - DIVULGING MESSAGE,

Elements instruction, 62.04

BREACH OF PRIVACY - INTERCEPTING MESSAGE,

Elements instruction, 62.03

BRIBERY,

Commercial, 66.05

Elements instruction, 61.01

Sports, 66.06

Receiving, 66.07

BURDEN OF PROOF,

Affirmative defenses, 52.08

Guiding instruction, 52.02

BURGLARY,

Aggravated, 59.18

Elements instruction, 59.17

Possession of tools, 59.19

BUSINESS,

Crimes against, Chapter 66.00

CABLE TELEVISION SERVICES THEFT,

Elements instruction, 59.57

CAMERAS IN THE COURTROOM,

Instruction, 51.11

CAPITAL MURDER, 56.00-A, et seq.

Concluding instruction, sentencing proceeding, 68.01-A

Illustrative Instruction, 69.04

Verdict Forms, 68.03, 68.14-A-1, 68.14-B-1, 68.17

CARRYING CONCEALED WEAPONS,

Elements instruction, 64.12

CASTING OBJECT ONTO STREET OR ROAD,

Elements instruction, 59.52, 59.55

PATTERN INSTRUCTIONS FOR KANSAS 3d

CAUSING AN UNLAWFUL PROSECUTION FOR A WORTHLESS CHECK,

Elements instruction, 59.10

CAUTIONARY INSTRUCTIONS,

Application, 51.02

Chapter containing, 51.00

Consideration of instructions, 51.02, 51.03

Court rulings, 51.05

Penalty, consideration by jury, 51.10

Prejudice, 51.07

Receipt by jury before close of case, 51.09

Rulings of court, 51.05

Statements of counsel, 51.06

Sympathy, 51.07

CEREAL MALT BEVERAGE,

Furnishing to a minor, 58.12-A

Defense, 58.12-D

CHECK, WORTHLESS,

See worthless check, this index.

CHILD,

Aggravated abandonment, 58.05-A

Aggravated indecent liberties, 57.06

Aggravated indecent solicitation of, 57.13

Abandonment, 58.05

Abuse, 58.11

Contributing to misconduct or deprivation, 58.14

Endangering, 58.10

Affirmative defense, 58.10

Enticement, 57.11

Hearsay evidence, 52.21

Indecent liberties, 57.05, 57.05-A

Affirmative defenses, 57.05-B

Indecent solicitation, 57.12

Nonsupport, 58.06

Promoting prostitution, under 16, 57.15-A

Sexual exploitation, 57.13-A

Sodomy, 57.05-A

Solicitation,

Aggravated indecent, 57.13

Indecent, 57.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHILDREN,

Crimes affecting, Chapter 58.00

CHILD'S HEARSAY EVIDENCE,

Instruction, 52.21

CIRCULATING FALSE RUMORS CONCERNING FINANCIAL STATUS,

Elements instruction, 62.08

CIRCUMSTANTIAL EVIDENCE,

Guiding instruction, 52.16

CITY ORDINANCE,

Violation, 70.05

CIVIL RIGHTS,

Denial, 62.05

CLAIM, FALSE,

Presenting, 61.05

Permitting, 61.06

COIN-OPERATED MACHINES,

Opening, damaging or removing, 59.50

Possession of tools, 59.51

COMMERCIAL BRIBERY,

Elements instruction, 59.10

COMMERCIAL GAMBLING,

Elements instruction, 65.08

COMMERCIAL PRACTICES,

Deceptive, 66.03

COMMITMENT,

Insanity, 54.10-A

COMMITTED PERSON, CUSTODY,

Interference, 56.27

COMMUNICABLE DISEASE,

Unlawfully exposing another, 56.40

COMMUNICATION,

Unlawful disclosure of authorized interception, 60.06-C

COMMUNICATION FACILITY,

Unlawful use to facilitate felony drug transaction, 67.22

COMMUNICATION WITH JURORS,

Post-trial, 68.13

COMPENSATION FOR PAST OFFICIAL ACTS,

Defense, 61.04

Elements instruction, 61.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

- COMPOUNDING A CRIME,**
 - Elements instruction, 60.07
- COMPULSION,**
 - Instruction of principle, 54.13
- COMPUTER CRIME,**
 - Defense, 59.64-A
 - Elements instruction, 59.64
 - Trespass, 59.64-B
- CONCEALED WEAPONS,**
 - Carrying, 64.12
- CONCLUDING INSTRUCTIONS AND VERDICT FORMS,**
 - Chapter containing, 68.00
- CONDONATION,**
 - Instruction on principle, 54.15
- CONDUCT,**
 - Disorderly, 63.01
- CONDUCT BY JUROR,**
 - Corrupt, 60.18
- CONFESSION,**
 - Guiding instruction, 52.17
- CONFINED PERSON,**
 - Mistreatment, 56.29
- CONFLICTS OF INTEREST,**
 - Lottery,
 - Commission member, 65.30
 - Contractor, 65.31
 - Employee, 65.30
 - Retailer, 65.31
- CONSPIRACY,**
 - Act in Furtherance, 55.06
 - Declarations of conspirator, 55.07
 - Defense, 55.04
 - Defined, 55.05
 - Elements instruction, 55.03
 - Subsequent entry, 55.08
- CONTRABAND,**
 - Traffic in correctional institution, 60.27
- CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION,**
 - Elements instruction, 58.14

PATTERN INSTRUCTIONS FOR KANSAS 3d

**CONTROLLED STIMULANTS, DEPRESSANTS,
HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS,**

- Cultivating, 67.15
- Manufacture or dispensation, 67.15
- Possession, 67.14, 67.16
- Selling or offering to sell, 67.15

CONTROLLED SUBSTANCES,

- Analog, 67.26
- Chapter relating to, 67.00
- Medicinals, 67.23
- Possession, 67.23
- Selling, offering to sell, possessing with intent to sell
or dispensing to person under 18 years of age, 67.23
- Sale defined, 67.13-A
- Sale, etc., 67.13-B
- Simulated, see simulated controlled substances, this index.
- Substances designated under K.S.A. 65-4113, 67.23
- Unlawfully manufacturing, 67.21
 - Before July 1, 1999, 67.21-A

**CONTROLLED SUBSTANCES ACT, 67.13, 67.13-A, 67.13-B,
67.14, 67.15, 67.16, 67.23, 67.26**

- Receiving or acquiring proceeds derived from
violation, 67.25

CORPORATIONS,

- Criminal responsibility for acts of agents, 54.08
- Responsibility for crime, 54.08, 54.09

CORRECTIONAL INSTITUTION,

- Traffic in contraband, 60.27

CORROBORATION,

- Rape case, 57.04

CORRUPT CONDUCT BY JUROR,

- Elements instruction, 60.18

CORRUPTLY INFLUENCING A WITNESS,

- Elements instruction, 60.06

COUNSEL,

- Arguments and statements, cautionary instruction, 51.06

COURT,

- Harassment by telefacsimile, 60.31
- Rulings, cautionary instruction, 51.05

PATTERN INSTRUCTIONS FOR KANSAS 3d

COURTROOM,

Cameras, 51.11

CREATING A HAZARD,

Elements instruction, 64.14

CREDIBILITY,

Of witness, 52.09

Rape case, prosecutrix's testimony, 57.03

CRIME,

Commission in Different Ways, 68.09-A

Compounding, 60.07

Falsely reporting, 60.19

CRIME, PROOF OF OTHER,

Evidence, admissibility, 52.06

CRIMES,

Anticipatory, Chapter 55.00

Corporations,

Responsibility, 54.08, 54.09

Defenses, see Defenses, this index.

Other, proof, 52.06

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN,

Chapter containing, 58.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS,

Chapter containing, 60.00

CRIMES AFFECTING PUBLIC TRUST,

Chapter containing, 61.00

CRIMES AFFECTING BUSINESS,

Chapter containing, 66.00

CRIMES AGAINST PERSONS,

Chapter containing, 56.00

CRIMES AGAINST PROPERTY,

Chapter containing, 59.00

CRIMES AGAINST THE PUBLIC MORALS,

Chapter containing, 65.00

CRIMES AGAINST THE PUBLIC PEACE,

Chapter containing, 63.00

CRIMES AGAINST THE PUBLIC SAFETY,

Chapter containing, 64.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS,

Chapter containing, 62.00

PATTERN INSTRUCTIONS FOR KANSAS 3d

CRIMES OF ANOTHER,

Responsibility, 54.05

Actor not prosecuted, 54.07

Crime not intended, 54.06

CRIMINAL ABORTION,

Elements instruction, 56.10

Justification, 56.11

**CRIMINAL DAMAGE TO PROPERTY - WITH INTENT TO
DEFRAUD AN INSURER OR LIENHOLDER,**

Elements instruction, 59.24

CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT,

Elements instruction, 59.23

CRIMINAL DEFAMATION,

Elements instruction, 62.06

Truth as defense, 62.07

CRIMINAL DEPRIVATION OF PROPERTY,

Elements instruction, 59.04

CRIMINAL DESECRATION,

Cemeteries, 63.12

Dead Bodies, 63.13

Flags, 63.11

Monuments, 63.12

Places of worship, 63.12

CRIMINAL DISCHARGE OF FIREARM,

Affirmative defense, 64.02-B

Felony, 64.02-A-1

Misdemeanor, 64.02-A

CRIMINAL DISCLOSURE OF A WARRANT,

Elements instruction, 60.28

CRIMINAL DISPOSAL OF EXPLOSIVES,

Elements instruction, 64.11

CRIMINAL DISPOSAL OF FIREARMS,

Elements instruction, 64.05

CRIMINAL HUNTING,

Defense, 59.33-B

Elements instruction, 59.33

Posted land, 59.33-A

CRIMINAL INJURY TO PERSON,

Elements instruction, 56.18-A

PATTERN INSTRUCTIONS FOR KANSAS 3d

CRIMINAL INTENT,

Presumption, 54.02

General, 54.01-A

CRIMINAL LIABILITY,

Defenses, see Defenses, this index.

Principles, Chapter 54.00

CRIMINAL POSSESSION OF EXPLOSIVE,

Defense, 64.11-B

Elements instruction, 64.11-A

CRIMINAL POSSESSION OF A FIREARM,

Felony, 64.06

Juvenile, 64.07-B

Affirmative Defenses, 64.07-C

Misdemeanor, 64.07

CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR,

Elements instruction, 64.07

CRIMINAL RESTRAINT,

Elements instruction, 56.28

CRIMINAL SODOMY,

Aggravated, 57.08, 57.08-A, 57.08-B

Elements instruction, 57.07

CRIMINAL SOLICITATION,

Defense, 55.10

Elements instruction, 55.09

CRIMINAL SYNDICALISM,

Permitting premises to be used for, 60.04

CRIMINAL TRESPASS,

Elements instruction, 59.25

Health care facility, 59.25-A

Railroad property, 59.25-B

CRIMINAL USE OF EXPLOSIVES,

Elements instruction, 59.38

CRIMINAL USE OF NOXIOUS MATTER,

Elements instruction, 59.40

CRIMINAL THREAT,

Adulteration or contamination of food or drink, 56.23-A

Aggravated, 56.23-B

Elements instruction, 56.23

PATTERN INSTRUCTIONS FOR KANSAS 3d

CRUELTY TO ANIMALS,

Defense, 65.16

Elements instruction, 65.15

CULTIVATING,

Controlled stimulants, depressants, hallucinogenic drugs or anabolic steroids, 67.15

CUSTODY,

Aggravated escape from, 60.11

Escape from, 60.10

CUSTODY, COMMITTED PERSON,

Interference, 56.27

CUSTODY, PARENTAL,

Aggravated interference, 56.26-A, 56.26-B, 56.26-C

Interference, 56.26

DAMAGE TO PROPERTY,

Criminal, without consent, 59.23

Intent to defraud insurer or lienholder, 59.24

DANGEROUS ANIMAL,

Permitting to be at large, 56.22

DEADLOCKED JURY,

Instruction, 68.12

DEALER,

Possession - no tax stamp, 67.24

DEALING IN FALSE IDENTIFICATION DOCUMENTS,

Elements instruction, 60.30

DEALING IN GAMBLING DEVICES,

Defense, 65.10-A

Elements instruction, 65.10

Presumption, 65.11

DEALING IN PIRATED RECORDINGS,

Elements instruction, 59.58-A

DEATH PENALTY,

See Capital Murder, this index.

DEATH SENTENCE,

See Capital Murder, this index.

Aggravating Circumstances, 56.00-C, 56.00-F

Burden of Proof, 56.00-E

Mitigating Circumstances, 56.00-D, 56.00-F

Theory of Comparing Aggravating and Mitigating, 56.00-F

Reasonable Doubt, 56.00-G

PATTERN INSTRUCTIONS FOR KANSAS 3d

Sentencing Proceeding, 56.00-B
Sentencing Recommendation, 56.00-H
Verdict Forms, 68.14-A-1, 68.14-B-1, 68.17

DEBT ADJUSTING,

Elements instruction, 66.02

DECEPTIVE COMMERCIAL PRACTICES,

Elements instruction, 66.03

DEFAMATION,

Criminal, 62.06

Defense, 62.07

DEFACING IDENTIFICATION MARKS OF A FIREARM,

Elements instruction, 64.08

DEFENDANTS,

Failure to testify, 52.13

Multiple, 52.07

Witness, 52.10

DEFENSE OF PERSON,

Use of force, 54.17

DEFENSES,

Abortion, 56.11

Age of minor, 54.02

Animals, cruelty, 65.15

Attempt, 55.02

Bigamy, 58.02

Compensation for past official acts, 61.04

Compulsion, 54.13

Computer crime, 59.64-A

Condonation, 54.15

Conspiracy, 55.04

Crime of another, 54.05, 54.06, 54.07

Crime of corporation, 54.08, 54.09

Criminal abortion, 62.06

Criminal hunting, 59.33-B

Cruelty to animals, 65.15

Dealing in gambling devices, 65.10-A

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Disclosing information obtained in preparing tax returns,
56.34

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Eavesdropping, 62.02
- Entrapment, 54.14
- General intent crime, voluntary intoxication, 54.12
- Ignorance of fact, 54.03
- Ignorance of law, 54.04
- Ignorance of statute, 54.02
- Impossibility of committing offense, attempt, 55.02
- Insanity, mental disease or defect, 54.10
- Intoxication,
 - Involuntary, 54.11
 - Voluntary,
 - General intent crime, 54.12
 - Particular state of mind, 54.12-A-1
 - Specific intent crime, 54.12-A
- Law, mistake or ignorance, 54.04
- Minor, age, 54.02
- Mistake of fact, 54.03
- Mistake of law, 54.04
- Obscenity, promoting, 65.05
- Possession of gambling device, 65.12-A
- Procuring agent, 54.14-A
- Promoting obscenity, 65.05
- Promoting obscenity to a minor, 65.05-A
- Restitution, 54.16
- Self-defense, 54.17, 54.17-A, 54.18, 54.19
- Specific intent crime, voluntary intoxication, 54.12-A
- Unlawful discharge of firearm, 64.02-B
- Unlawful use of weapons, 64.04
- Voluntary intoxication,
 - General intent crime, 54.12
 - Particular state of mind, 54.12-A-1
 - Specific intent crime, 54.12-A
- Withdrawal, conspiracy, 55.04
- Worthless check, 59.07

DEFINITIONS,

- Chapter containing, 53.00
- Conspiracy-Act in furtherance, 55.06
- Drug sale, 67.13-A
- Explosives, 64.10-A
- Gambling, 65.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Homicide definitions, 56.04
- Kansas Parimutuel Racing Act, 65.52
- Lottery, 65.25
- Obscenity, 65.03
 - Promoting, 65.03
- Sale, drugs, 67.13-A
- Sex offenses, 57.18
- Sexual intercourse, 57.02
- DEFRAUDING AN INNKEEPER,**
 - Elements instruction, 59.61
- DELINQUENCY, JUVENILE,**
 - Aggravated, 58.13
- DELIVERY OF STORED GOODS,**
 - Unauthorized, 59.47
- DENIAL OF CIVIL RIGHTS,**
 - Elements instruction, 62.05
- DEPENDANT ADULT,**
 - Mistreatment, 56.37
 - Affirmative Defense, 56.38
- DEPOSITION,**
 - Guiding instruction, 52.12
- DEPRESSANTS,**
 - Cultivating, 67.15
 - Manufacture or dispensation, 67.15
 - Offer to sell with intent to sell, 67.14
 - Possession, 67.16
 - Possession with intent to sell, 67.14
 - Selling or offering to sell, 67.15
- DEPRIVATION,**
 - Child's, contributing, 58.14
- DEPRIVATION OF PROPERTY,**
 - Criminal, 59.04
- DESECRATION,**
 - Unlawful, 63.11, 63.12, 63.13
- DESECRATION OF FLAGS,**
 - Elements instruction, 63.15
- DESTROYING A WRITTEN INSTRUMENT,**
 - Elements instruction, 59.14
- DIMINISHED MENTAL CAPACITY,**
 - Elements instruction, 54.12-B

PATTERN INSTRUCTIONS FOR KANSAS 3d

DISCLOSING INFORMATION OBTAINED IN PREPARING TAX RETURNS,

Defense, 56.34

Elements instruction, 56.33

DISCOUNTING A PUBLIC CLAIM,

Elements instruction, 61.07

DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS,

Unauthorized, 60.06-C

DISCLOSURE OF A WARRANT,

Unlawful, 60.28

DISEASE, COMMUNICABLE,

Unlawfully exposing another, 56.40

DISORDERLY CONDUCT,

Elements instruction, 63.01

DISPENSATION,

Controlled stimulants, depressants, hallucinogenic drugs or anabolic steroids, 67.15

DISPOSAL OF EXPLOSIVES,

Criminal, 64.11

DISPOSAL OF FIREARMS,

Criminal, 64.05

DOCKAGE,

Adding to grain, 59.63-B

DOCUMENT,

Fraudulently obtaining execution, 59.05

DOG,

Fight,

Attending unlawful, 65.19

Unlawful conduct, 65.18

Illegal ownership or keeping, 65.20

DOMESTIC ANIMAL,

Injury, 59.32

DOMESTIC BATTERY,

Elements instruction, 56.16-B

DRIVE-BY SHOOTING,

Elements instruction, 64.02-A-1

DRIVING,

License cancelled, suspended, revoked, or while habitual violator

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Misdemeanor, 70.10
- Privileges suspended, revoked or while habitual violator,
Felony, 70.11
- Under the influence of alcohol or drugs,
Alcohol concentration .08 or more, 70.01-A
B.A.T. .08 or more charged in alternative, 70.01-B
Chemical test used, 70.02
Elements instruction, 70.01
Involuntary manslaughter, 56.06-A
- DRUGS, NARCOTIC,**
See Controlled Substances, this index.
- DRUG PARAPHERNALIA,**
Manufacture, 67.18-A
Possession, 67.18-A
Use or Possession with intent to use, 67.17
- DRUG TRANSACTION, FELONY,**
Unlawful use of communications facility to facilitate, 67.22
- DUTY TO RETREAT,**
Use of Force, 54.17-A
- EAVESDROPPING,**
Defense of public utility employee, 62.02
Elements instruction, 62.01
- EMBEZZLEMENT,**
Grain, 59.62
- ENCOURAGING JUVENILE MISCONDUCT,**
Elements instruction, 58.09
- ENDANGERING A CHILD,**
Affirmative defense, 58.10
Elements instruction, 58.10
- ENTICEMENT OF A CHILD,**
Elements instruction, 57.11
- ENTRAPMENT,**
Instruction on principle, 54.14
- EPHEDRINE, PSUEDOPHEDRINE OR
PHENYLPROPANOLAMINE,**
Possession,
Elements instruction, 67.27
Marketing, sale, etc.,
Elements instruction, 67.28

PATTERN INSTRUCTIONS FOR KANSAS 3d

EQUITY SKIMMING,

Elements instruction, 66.10

ESCAPE,

Aiding, 60.12

ESCAPE FROM CUSTODY,

Aggravated, 60.11

Elements instruction, 60.10

EVIDENCE,

Admissibility,

 More than one defendant, 52.07

 Proof of other crime, 52.06

Admissions, 52.05

Affirmative defenses, 52.08

Alibi, 52.19

Burden of proof, 52.02, 52.08

Cautionary instructions, 51.01, 51.04

Child's hearsay, 52.21

Circumstantial, 52.16

Confession, 52.17

Consideration, 51.04

Credibility, 52.09

Defendant as witness, 52.10

Deposition testimony, 52.12

Guides for consideration, 52.00

Hearsay, child's, 52.21

Indictment, 52.01

Information, 52.01

Introduction, instructions before, 51.01

Multiple defendants, 52.07

Number of witnesses, 52.11

Presumption of innocence, 52.02, 52.03

Proof of other crime, 52.06

Reasonable doubt, 52.02, 52.04

Stipulations, 52.05

Testimony,

 Accomplice, 52.18

 Defendant's failure, 52.13

 Deposition, 52.12

 Expert witness, 52.14

 Impeachment, 52.15

Witnesses, number, 52.11

PATTERN INSTRUCTIONS FOR KANSAS 3d

EXECUTION OF DOCUMENTS,

Fraudulently obtaining, 59.05

EXHIBITION,

Hypnotic, 62.10

EXPERT WITNESSES,

Guiding instruction, 52.14

EXPLANATIONS OF TERMS,

Chapter containing, 53.00

EXPLOITATION OF A CHILD,

Sexual, 57.12-A

EXPLOSIVE DEVICES,

Possession, 59.39

Transportation, 59.39

EXPLOSIVES,

Criminal possession, 64.11-A

Defense, 64.11-B

Criminal use, 59.38

Definition, 64.10-A

Disposal, criminal, 64.11

Failure to register receipt, 64.10

Failure to register sale, 64.09

EXPOSING A PAROLED OR DISCHARGED PERSON,

Elements instruction, 62.09

EXPOSING ANOTHER TO A COMMUNICABLE DISEASE,

Unlawfully, 56.40

EYEWITNESS IDENTIFICATION,

Elements instruction, 52.20

FAILURE TO APPEAR,

Elements instruction, 60.15

FAILURE TO POST SMOKING PROHIBITED AND DESIGNATED SMOKING AREA SIGNS,

Elements instruction, 62.11-A

FAILURE TO REGISTER AN AIRCRAFT,

Elements instruction, 60.32

FAILURE TO REGISTER RECEIPT OF EXPLOSIVES,

Elements instruction, 64.10

FAILURE TO REGISTER SALE OF EXPLOSIVES,

Elements instruction, 64.09

FAILURE TO REPORT A WOUND,

Elements instruction, 64.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

- FALSE ALARM,**
 - Giving, 63.10
- FALSE CLAIM,**
 - Presenting, 61.05
- FALSE IDENTIFICATION DOCUMENTS,**
 - Elements instruction, 60.30
- FALSE IMPERSONATION,**
 - Aggravated, 60.26
 - Elements instruction, 60.25
- FALSE INFORMATION**
 - Making, 59.13
- FALSE MEMBERSHIP CLAIM,**
 - Elements instruction, 65.14
- FALSE RUMORS,**
 - Concerning financial status, 62.08
- FALSE SIGNING OF PETITION,**
 - Elements instruction, 60.24
- FALSE TOKENS,**
 - Disposal, 59.37
 - Manufacture, 59.37
- FALSE WRITING,**
 - Making, 59.13
- FALSELY REPORTING A CRIME,**
 - Elements instruction, 60.19
- FAMILY RELATIONSHIPS,**
 - Crimes affecting, Chapter 58.00
- FAX,**
 - Harassment of court by, 60.31
- FELON,**
 - Aiding, 60.13
 - Forcible, use of force, 54.20
 - Class A, punishment, 68.04
 - Class A, verdicts, 68.05
 - Possession of firearms, 64.06
 - Unlawful use of weapons, 64.01
- FELONY DRIVING WHILE PRIVILEGES SUSPENDED,
REVOKED, OR WHILE HABITUAL VIOLATOR,**
 - Elements instruction, 70.11
- FELONY DRUG TRANSACTION,**
 - Communication facility to facilitate, 67.22

PATTERN INSTRUCTIONS FOR KANSAS 3d

FELONY MURDER,

- Alternatives instruction, 56.02-A
- Instruction, 56.02
- Verdict forms, 68.15, 68.16

FINANCIAL CARD,

- Altered or nonexistent, 59.36
- Cancelled, use of, 59.35
- Use of another, 59.34

FINANCIAL STATUS,

- Circulating false rumors concerning, 62.08

FIREARMS,

- Criminal discharge,
 - Defense, 64.02-B
 - Felony, 64.02-A-1
 - Misdemeanor, 64.02-A
- Criminal disposal, 64.05
- Criminal possession,
 - Felony, 64.06
 - Juvenile, 64.07-B
 - Affirmative Defenses, 64.07-C
 - Misdemeanor, 64.07
 - Identification marks, defacing, 64.08
- Possession in state building or county courthouse, 64.07-A

FIREFIGHTER,

- Unlawful interference, 56.20

FIRST DEGREE MURDER,

- Felony murder alternatives, 56.02-A
- Felony murder instruction, 56.02
- Illustrative instructions, 69.01
- Mandatory minimum 40 year sentence,
 - Aggravating circumstances, 56.01-B
 - Burden of proof, 56.01-D
 - Mitigating circumstances, 56.01-C
 - Reasonable doubt, 56.01-F
 - Sentencing procedure, 56.01-A
 - Sentencing recommendation, 56.01-G
 - Theory of comparison, 56.01-E
- Verdict form, 68.14-A

FLAGS,

- Desecration, 63.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

FLEEING OR ATTEMPTING TO ELUDE POLICE OFFICER,

Elements instruction, 70.09

FOOD OR DRINK,

Adulteration or contamination - criminal threat, 56.23-A

FORCE, USE,

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Duty to retreat, 54.17-A

Felon, forcible, 54.20

Initial aggressor, 54.22

Law enforcement officer, 54.23

Private person,

Not summoned to assist, 54.24

Summoned to assist, 54.23

Resisting arrest, 54.25

FOREIGN MATERIAL,

Adding to grain, 59.36-B

FORGERY,

Lottery ticket, 65.32

Making or issuing a forged instrument, 59.11

Passing a forged instrument, 59.12

Possession of devices, 59.16

FORMS, VERDICT,

Multiple counts, 68.08

Value in Issue, 68.11

FRAUD, WAREHOUSE RECEIPT,

Duplicate or additional receipt, 59.46

Original receipt, 59.45

**FRAUDULENT ACTS RELATING TO AIRCRAFT
IDENTIFICATION NUMBERS,**

Elements instruction, 60.35

FRAUDULENT REGISTRATION OF AIRCRAFT,

Elements instruction, 60.33

Supplying false information, 60.34

FRAUDULENT RELEASE OF A SECURITY AGREEMENT,

Elements instruction, 59.44

**FRAUDULENTLY OBTAINING EXECUTION OF A
DOCUMENT,**

Elements instruction, 59.05

PATTERN INSTRUCTIONS FOR KANSAS 3d

**FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR
ILLICIT PURPOSES,**

Elements instruction, 58.12-B

FURNISHING ALCOHOLIC LIQUOR TO A MINOR,

Elements instruction, 58.12

Defense, 58.12-A

FURNISHING CEREAL MALT BEVERAGE TO A MINOR,

Elements instruction, 58.12-A

Defense, 58.12-D

GAMBLING,

Commercial, 65.08

Definition, 65.07

Elements instruction, 65.06

Permitting premises to be used for commercial, 65.09

GAMBLING, DEVICES,

Dealing in, 65.10

Defense, 65.10-A

Possession, 65.12

Defense, 65.12-A

Presumption, 65.11

GAMING LAW,

Violations of Tribal, 65.36

GENERAL CRIMINAL INTENT,

Instruction, 54.01-A

GENERAL INTENT CRIME,

Voluntary intoxication defense, 54.12

GIVING A FALSE ALARM,

Elements instruction, 63.10

GOVERNMENTAL FUNCTIONS,

Crimes affecting, Chapter 60.00

GRAIN EMBEZZLEMENT,

Elements instruction, 59.62

GUILTY VERDICT,

General form, 68.02

HABITUALLY GIVING A WORTHLESS CHECK,

Same day, 59.09

Within two years, 59.08

HABITUALLY PROMOTING PROSTITUTION,

Elements instruction, 57.16

PATTERN INSTRUCTIONS FOR KANSAS 3d

HALLUCINOGENIC DRUGS,

- Cultivating, 67.15
- Manufacture or dispensation, 67.15
- Offer to sell with intent to sell, 67.14
- Possession, 67.16
- Possession with intent to sell, 67.14
- Selling or offering to sell, 67.15

HARASSMENT BY TELEPHONE,

- Elements instruction, 63.14

HARASSMENT OF COURT BY TELEFACSIMILE,

- Elements instruction, 60.31

"HARD 40",

- See Murder, First Degree, Mandatory minimum 40 year sentence, this index

HAZARD,

- Creating, 64.14

HAZING,

- Elements instruction, 56.36

HEARSAY EVIDENCE,

- Child's, 52.21

HEALTH CARE FACILITY,

- Criminal trespass, 59.25-A

HIGHWAY SIGN OR MARKER,

- Landmark, tampering, 59.29

HOMICIDE,

- Aggravated vehicular, 56.07-A
- Definitions, 56.04
- Unintended victim, 56.09

HUNTING,

- Criminal, 59.33
 - Defense, 59.33-B
 - Posted land, 59.33-A

IDENTIFICATION DOCUMENTS,

- False, 60.30

IDENTIFICATION, EYEWITNESS,

- Elements instruction, 52.20

IDENTIFICATION MARKS ON FIREARMS,

- Defacing, 64.08

IDENTITY THEFT,

- Elements instruction, 62.13

PATTERN INSTRUCTIONS FOR KANSAS 3d

IGNITION INTERLOCK DEVICE VIOLATION,

Elements instruction, 70.08

IGNORANCE,

Of age of minor, 54.02

Of fact, 54.03

Of law, 54.04

Of statute, 54.02

ILLEGAL ALIEN,

Knowingly employing, 66.09-A

ILLEGAL BINGO OPERATION, 65.06-A

ILLUSTRATIVE SETS OF INSTRUCTIONS,

Chapter containing, 69.00

IMPAIRING A SECURITY INTEREST,

Concealment, 59.41

Destruction, 59.41

Exchange, 59.42

Failure to account, 59.43

Sale, 59.42

**IMPAIRING A SECURITY INTEREST - CONCEALMENT OR
DESTRUCTION,**

Elements instruction, 59.41

IMPERSONATION,

Aggravated false, 60.26

False, 60.25

INCENDIARY DEVICE,

Possession, 59.39

Transportation, 59.39

INCEST,

Aggravated, 58.04

Elements instruction, 58.03

INCITEMENT TO RIOT,

Elements instruction, 63.05

INCLUDED OFFENSES, LESSER, 68.09

INDECENT LIBERTIES WITH A CHILD,

Aggravated, 57.06

Elements instruction, 57.05, 57.05-A

INDECENT SOLICITATION OF A CHILD,

Affirmative defenses, 57.05-B

PATTERN INSTRUCTIONS FOR KANSAS 3d

Aggravated, 57.13
Elements instruction, 57.12

INDICTMENT,

Guiding instruction, 52.01

INFLUENCE, JUDICIAL OFFICER,

Attempting, 60.16

INFLUENCING A WITNESS,

Corruptly, 60.06

INFORMATION,

Guiding instruction, 52.01

INFORMANT,

Testimony - for benefits, 52.18-A

INITIAL AGGRESSOR'S USE OF FORCE,

Instruction, 54.22

INJURING PREGNANT WOMAN,

Elements instruction, 56.41

By Vehicle, 56.42

INJURY TO A DOMESTIC ANIMAL,

Elements instruction, 59.32

INMATES, ETC.,

Unlawful Sexual Relations, 57.26

INNKEEPER, DEFRAUDING,

Elements instruction, 56.18-A

INSANITY,

See Mental Disease or Defect, this index

**INSTALLING COMMUNICATION FACILITIES FOR
GAMBLERS,**

Elements instruction, 65.13

INSTRUCTIONS,

Application, 52.01, 51.03

Concluding,

Chapter containing, 68.00

Specific instruction, 68.01

Illustrative, Chapter 69.00

Multiple counts, 68.07

INSURANCE CONTRACT,

Unlawful interest, 61.08

Unlawful procurement, 61.09

INSURER,

Arson to defraud, 59.21

PATTERN INSTRUCTIONS FOR KANSAS 3d

Damage to property to defraud, 59.24

INTENT,

Criminal, 54.02

Instruction, 54.01-A

Presumption, 54.01

INTENT TO SELL,

Possession,

Controlled stimulants, depressants, hallucinogenic drugs or
anabolic steroids, 67.14

INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE,

Elements Instruction, 60.17

INTERFERENCE WITH A FIREFIGHTER,

Unlawful, 56.20

INTERFERENCE WITH PARENTAL CUSTODY,

Aggravated, 56.26-A, 56.26-B, 56.26-C

Elements instruction, 56.26

**INTERFERENCE WITH THE CONDUCT OF PUBLIC BUSINESS
IN A PUBLIC BUILDING,**

Elements instruction 60.29

**INTERFERENCE WITH THE CUSTODY OF A COMMITTED
PERSON,**

Elements instruction, 56.27

INTIMIDATION OF A WITNESS OR VICTIM,

Aggravated, 60.06-B

Elements instruction, 60.06-A

INTOXICATING LIQUOR OR DRUGS,

Operating aircraft, 70.06

If chemical test used, 70.07

INTOXICATION,

Involuntary, 54.11

Public, 63.09

Voluntary, 54.12, 54.12-A, 54.12-A-1

INTRODUCTORY INSTRUCTIONS,

Application, 51.02, 51.03

Arguments of counsel, 51.06

Binding application, 51.02

Chapter containing, 51.00

Close of case, jury receives before, 51.09

Consideration of evidence, 51.04

Consideration of instructions, 51.01, 51.02

PATTERN INSTRUCTIONS FOR KANSAS 3d

Counsel, statements and arguments, 51.06

Court, rulings, 51.05

Evidence, 51.01

Evidence, consideration, 51.04

Guiding application, 51.03

Jury, consideration of penalty, 51.10

Jury receives before close of case, 51.09

Nature of, 51.02, 51.03

Penalty, consideration by jury, 51.10

Prejudice, 51.07

Pronoun, form, 51.08

Statements of counsel, 51.06

Sympathy, 51.07

INVOLUNTARY INTOXICATION,

Defense, 54.11

INVOLUNTARY MANSLAUGHTER,

Driving under the influence, 56.06-A

Elements instruction, 56.06

ISSUING A FORGED INSTRUMENT,

Elements instruction, 59.11

JUDICIAL OFFICER,

Attempting to influence, 60.16

Unlawful collection, 61.10

JUROR,

Corrupt conduct, 60.18

Note taking, 51.01-A

JURY,

Consideration of penalty, cautionary instruction, 51.10

Deadlocked, 68.12

Penalty, consideration, cautionary instruction, 51.10

Post-trial communication, 68.13

Receipt of instructions before close of case, cautionary instruction, 51.09

JUSTICE, ADMINISTRATION OF,

Interference, 60.17

JUVENILE DELINQUENCY,

Aggravated, 58.13

JUVENILE MISCONDUCT,

Encouraging, 58.09

PATTERN INSTRUCTIONS FOR KANSAS 3d

KANSAS ODOMETER ACT,

Violations, 59.65-A to 59.65-F

KANSAS PARIMUTUEL RACING ACT,

Definitions, 65.52

Violation, 65.51

KIDNAPPING,

Aggravated, 56.25

Elements instruction, 56.24

KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY WITHIN THE UNITED STATES,

Elements instruction, 66.09

LANDMARK,

Highway sign or marker, 59.29

Tampering, 59.28

LAW ENFORCEMENT OFFICER,

Aggravated assault, 56.14

Aggravated battery, 56.19

Assault, 56.13

Battery, 56.17

LEGAL PROCESS,

Obstructing, 60.08

Simulating, 60.21

LEGISLATIVE DOCUMENT,

Altering, 59.15

LESSER INCLUDED OFFENSES,

Forms, 68.10

Instruction, 68.09

LEWD AND LASCIVIOUS BEHAVIOR,

Elements instruction, 57.10

LIABILITY,

Principles, Chapter 54.00

LIBERTIES WITH A CHILD,

Aggravated indecent, 57.06

Indecent, 57.05, 57.05-A

Affirmative defenses, 57.05-B

Sodomy, 57.05-A

LIENHOLDER,

Arson to defraud, 59.21

Damage to property to defraud, 59.24

PATTERN INSTRUCTIONS FOR KANSAS 3d

LITTERING,

Private property, 59.27

Public, 59.26

LOST OR MISLAID PROPERTY,

Theft, 59.02

LOTTERY,

Conflicts of interest,

Commission member, 65.30

Contractor, 65.31

Employee, 65.30

Retailer, 65.31

Definitions, 65.25

Forgery of ticket, 65.32

Ticket,

Forgery, 65.32

Unlawful purchase, 65.34

Unlawful sale, 65.33

Unlawful purchase of ticket, 65.34

Unlawful sale of ticket, 65.33

MACHINES, COIN-OPERATED,

Opening, damaging or removing, 59.50

Possession of tools for opening, damaging or removing, 59.51

MAGAZINE SALE,

Tie-in, 66.04

MAINTAINING A PUBLIC NUISANCE,

Elements instruction, 63.06

MAKING FALSE INFORMATION,

Elements instruction, 59.13

MAKING A FORGED INSTRUMENT,

Elements instruction, 59.11

MAKING FALSE PUBLIC WAREHOUSE REPORTS,

Elements instruction, 59.63-A

MAKING FALSE PUBLIC WAREHOUSE RECORDS AND STATEMENTS,

Elements instruction, 59.63

MANDATORY MINIMUM 40 YEAR SENTENCE,

Aggravated circumstances, 56.01

Burden of proof, 56.01-D

Mitigating circumstances, 56.01-C

Reasonable doubt, 56.01-F

PATTERN INSTRUCTIONS FOR KANSAS 3d

Sentencing procedure, 56.01-A
Sentencing recommendation, 56.01-G
Theory of comparison, 56.01-E
Verdict form, 68.14-A

MANSLAUGHTER,

Involuntary, 56.06
 Driving under the influence, 56.06-A
Voluntary, 56.05

MANUFACTURING,

Controlled stimulants, depressants, hallucinogenic drugs or
 anabolic steroids, 67.15
Controlled substance, 67.21
 Before July 1, 1999, 67.21-A

MANUFACTURING A CONTROLLED SUBSTANCE,

Elements instruction, 67.21

MARRIAGE,

Rape defense, 57.01-A

MASTER KEY,

Automobile, 59.48

MEMBERSHIP CLAIM,

False, 65.14

MENTAL DISEASE OR DEFECT,

Commitment, 54.10-A
Instruction on principle, 54.10

MENTAL CAPACITY,

Diminished, 54.12-B

MINOR,

Furnishing alcoholic liquor, 58.12
 Defenses, 58.12-C
 Furnishing cereal malt beverage, 58.12-D

MISCELLANEOUS CRIMES,

Chapter containing, 70.00

MISCONDUCT,

Contributing to a child's, 58.14
Official, 61.02

MISCONDUCT, JUVENILE,

Encouraging, 58.09

MISDEMEANOR DRIVING WHILE LICENSE IS CANCELED, SUSPENDED OR REVOKED,

Elements instruction, 70.10

PATTERN INSTRUCTIONS FOR KANSAS 3d

MISDEMEANORS,

- Driving under the influence of intoxicating liquor or drugs, 70.01
- Driving while intoxicated, chemical test used, 70.02
- Driving while license is canceled, suspended, revoked, or while habitual violator, 70.10
- Operating aircraft under influence, 70.06
- Reckless driving, 70.04
- Traffic offenses, 70.01
- Transporting liquor in opened container, 70.03
- Unlawful use of weapons, 64.02
- Violation of city ordinance, 70.05

MISTAKE OF LAW,

- Defense, 54.04

MISTREATMENT OF A CONFINED PERSON,

- Elements instruction, 56.29

MISTREATMENT OF DEPENDANT ADULT,

- Affirmative Defense, 56.38

MISUSE OF PUBLIC FUNDS,

- Elements instruction, 61.11

MULTIPLE ACTS, 68.09-B

MULTIPLE COUNTS,

- Forms, 68.08
- Instructions, 68.07

MULTIPLE DEFENDANT,

- Admissibility of evidence, 52.07

MURDER,

- Alternatives, 56.02-A
- Capital Murder, 56.00 *et seq.*
 - Illustrative Instructions, 69.04
- Felony murder, 56.02
- First degree, 56.03
- First degree, mandatory minimum 40 year sentence,
 - Aggravating circumstances, 56.01-B
 - Burden of proof, 56.01-D
 - Mitigating circumstances, 56.01-C
 - Reasonable doubt, 56.01-F
 - Sentencing procedure, 56.01-A
 - Sentencing recommendation, 56.01-G
 - Theory of comparison, 56.01-E

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Verdict form, 68.14-A
- Homicide definitions, 56.04
- Second degree, 56.03
- Unintentional, 56.03-A
- NARCOTICS,**
 - Drug sale defined, 67.13
 - Sale, 67.13, 67.13-B
- NARCOTIC DRUGS AND CERTAIN STIMULANTS,**
 - Offer to sell with intent to sell, 67.13-C
 - Possession, 67.13, 67.13-B, 67.13-C
 - Sale, 67.13, 67.13-B, 67.13-C
- NONCONTROLLED SUBSTANCE,**
 - Representation controlled, 67.20
- NONDISCLOSURE OF SOURCE OF RECORDINGS,**
 - Elements instruction, 59.60
- NONSUPPORT OF A CHILD,**
 - Elements instruction, 58.06
- NONSUPPORT OF A SPOUSE,**
 - Elements instruction, 58.07
- NOTETAKING BY JURORS, 51.01-A**
- NOT GUILTY VERDICT,**
 - Because of insanity, 68.06
 - General form, 68.03
- NOXIOUS MATTER,**
 - Criminal use, 59.40
- NUISANCE, PUBLIC,**
 - Maintaining, 63.06
 - Permitting, 63.07
- OBJECT ONTO STREET OR ROAD,**
 - Casting, 59.52, 59.53, 59.54, 59.55
- OBSCENITY,**
 - Promoting, 65.01
 - Affirmative defenses, 65.05
 - Definitions, 65.03
 - Minor, 65.02
 - Affirmative defenses, 65.05-A
 - Presumption, 65.04
- OBSTRUCTING LEGAL PROCESS,**
 - Elements instruction, 60.08

PATTERN INSTRUCTIONS FOR KANSAS 3d

OBSTRUCTING OFFICIAL DUTY,

Elements instruction, 60.09

ODOMETER, ACT,

Violations, 59.65-A to 59.65-F

OFFENSES, LESSER INCLUDED,

Forms, 68.10

Instruction, 68.09

OFFICIAL ACTS, PAST,

Compensation, 61.03

Defense, 61.04

OFFICIAL ACT, UNAUTHORIZED,

Performance, 60.20

OFFICIAL DUTY,

Obstructing, 60.09

OFFICIAL MISCONDUCT,

Elements instruction, 61.02

OPENING, DAMAGING, OR REMOVING COIN-OPERATED MACHINES,

Elements instruction, 59.50

Possession of tools, 59.51

OPERATING AIRCRAFT,

While under influence, 70.06

If chemical test used, 70.07

OTHER CRIMES,

Instruction, 52.06

PARAPHERNALIA,

See Drug Paraphernalia, this index.

PARENTAL CUSTODY,

Aggravated interference, 56.26-A, 56.26-B, 56.26-C

Interference, 56.26

PARIMUTUEL RACING ACT,

Definitions, 65.52

Violations, 65.51

PAROLED OR DISCHARGED PERSON,

Exposing, 62.09

PARTY LINE, TELEPHONE,

Refusal to yield, 64.13

PASSING A FORGED INSTRUMENT,

Elements instruction, 59.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

PAST OFFICIAL ACTS,

Compensation, 61.03

Defense, 61.04

PATRONIZING A PROSTITUTE,

Elements instruction, 57.17

PENALTY,

Consideration by jury, cautionary instruction, 51.10

PERFORMANCE OF AN UNAUTHORIZED OFFICIAL ACT,

Elements instruction, 60.20

PERJURY,

Elements instruction, 60.05

PERMITTING A FALSE CLAIM,

Elements instruction, 61.06

PERMITTING A PUBLIC NUISANCE,

Elements instruction, 63.07

PERMITTING DANGEROUS ANIMAL TO BE AT LARGE,

Elements instruction, 56.22

PERMITTING PREMISES TO BE USED FOR COMMERCIAL GAMBLING,

Elements instruction, 65.09

PERMITTING PREMISES TO BE USED FOR CRIMINAL SYNDICALISM,

Elements instruction, 60.04

PERSONAL RIGHTS,

Crimes involving, Chapter 62.00

PETITION SIGNING,

False, 60.24

PHENYLPROPANOLAMINE,

Marketing, sale, etc., 67.28

Possession, 67.27

PIRACY, AIRCRAFT,

Elements instruction, 56.35

PIRACY OF RECORDINGS,

Dealing in, 59.58-A

Defense, 59.59

Elements instruction, 59.58

Non-disclosure of source, 59.60

POISONING,

Attempted, 56.21

PATTERN INSTRUCTIONS FOR KANSAS 3d

POLICE OFFICER,

Fleeing or attempting to elude, 70.09

POLITICAL PICTURES OR ADVERTISEMENTS,

Posting, 56.21

POSSESSION,

Burglary tools, 59.19

Controlled stimulants, depressants, hallucinogenic
drugs or anabolic steroids, 67.16

With intent to sell, 67.14

Ephedrine, 67.27

Firearm,

Felony, 64.07

Juvenile, 64.07-B

Affirmative Defenses, 64.07-C

Misdemeanor, 59.12

Forged instrument, 59.12

Forgery devices, 59.16

Gambling device, 65.12

Incendiary or explosive device, 59.39

Phenylpropanolamine, 67.27

Pseudoephedrine, 67.27

Substances designated under K.S.A. 65-4113, 67.23

POSSESSION BY DEALER - NO TAX STAMP,

Elements instruction, 67.24

POSSESSION OF CONTROLLED STIMULANTS,

**DEPRESSANTS, HALLUCINOGENIC DRUGS OR
ANABOLIC STEROIDS,**

Elements instruction, 67.16

Intent to sell, 67.14

**POSSESSION OF FIREARM IN STATE BUILDING OR COUNTY
COURTHOUSE,**

Elements instruction, 64.07-A

POSSESSION OF A GAMBLING DEVICE,

Elements instruction, 65.12

POSSESSION OR MANUFACTURE OF DRUG

PARAPHERNALIA,

Elements instruction, 67.18-A

**POSSESSION OF SUBSTANCES UNDER K.S.A. 65-4113 WITH
INTENT TO SELL,**

Elements instruction, 67.23

PATTERN INSTRUCTIONS FOR KANSAS 3d

POSTED LAND,

Unlawful hunting, 59.33-A

POST-TRIAL COMMUNICATION WITH JURORS,

Instruction, 68.13

POSTING OF POLITICAL PICTURES OR ADVERTISEMENTS,

Elements instruction, 59.49

PRACTICING CRIMINAL SYNDICALISM,

Elements instruction, 60.03

PREGNANT WOMAN,

Injuring, 56.41

By Vehicle, 56.42

PREJUDICE,

Cautionary instruction, 51.07

PREMISES,

Gambling, permitting use, 65.09

PRESCRIPTION ONLY DRUG,

Unlawfully obtaining, 64.16

For sale, 64.17

PRESENTING A FALSE CLAIM,

Elements instruction, 61.05

PRESUMPTION OF INNOCENCE,

Guiding instruction, 52.02, 52.03

PRESUMPTION OF INTENT,

Instruction of principle, 54.01

To deprive, 54.01-B

PRESUMPTIONS,

Gambling devices, dealing, 65.11

Obscenity, 65.04

PRESUMPTIONS OF INTENT TO DEFRAUD,

Worthless check, 59.06-A

PRINCIPLES OF CRIMINAL LIABILITY,

Chapter containing, 54.00

PRIVACY, BREACH OF,

Divulging message, 62.04

Intercepting message, 62.03

PROCURING AGENT,

Instruction, 54.14-A

PROMOTING OBSCENITY,

Affirmative defenses, 65.05

Definitions, 65.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

Elements instruction, 65.01

Presumptions, 65.04

PROMOTING OBSCENITY TO A MINOR,

Affirmative defenses, 65.05-A

Elements instruction, 65.02

PROMOTING PROSTITUTION,

Child under 16, 57.15-A

Elements instruction, 57.15

Habitually, 57.16

PROMOTING PYRAMID PROMOTIONAL SCHEME,

Elements instruction, 59.66

PROMOTING SEXUAL PERFORMANCE BY A MINOR,

Elements instruction, 57.12-B

PRONOUN FORM,

Cautionary instruction, 51.08

PROOF OF OTHER CRIME,

Admissibility of evidence, 52.06

PROPERTY,

Criminal damage with intent to defraud insurer
or lienholder, 59.24

Criminal damage - without consent, 59.23

Criminal deprivation, 59.04

PROPERTY, CRIMES AGAINST,

Chapter containing, 59.00

PROSTITUTION,

Elements instruction, 57.14

Habitually promoting, 57.16

Patronizing, 57.17

Promotion, 57.15

PROVOCATION,

Retaliation, 54.21

PSUEDOPHEDRINE,

Marketing, sale, etc., 67.28

Possession, 67.27

PUBLIC BUILDING,

Interference with conduct of public business, 60.29

PUBLIC BUSINESS,

Interference with conduct of in public building, 60.29

PUBLIC CLAIM,

Discounting, 61.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

- PUBLIC FUNDS,**
 - Misuse, 61.11
- PUBLIC INTOXICATION,**
 - Elements instruction, 63.09
- PUBLIC MORALS,**
 - Crimes, Chapter 65.00
- PUBLIC NOTICE,**
 - Tampering, 60.23
- PUBLIC NUISANCE,**
 - Maintaining, 63.06
 - Permitting, 63.07
- PUBLIC PEACE,**
 - Crimes against, Chapter 63.00
- PUBLIC RECORD,**
 - Tampering, 60.22
- PUBLIC SAFETY,**
 - Crimes against, Chapter 64.00
- PUBLIC TRUSTS,**
 - Crimes affecting, Chapter 61.00
- PUBLIC WAREHOUSE,**
 - Making false,
 - Records, 59.63
 - Reports, 59.63-A
 - Statements, 59.63
- PUBLIC UTILITY EMPLOYEE,**
 - Eavesdropping, 62.02
- PUNISHMENT,**
 - Felony, Class A, 68.04
- PYRAMID PROMOTIONAL SCHEME,**
 - Promoting, 59.66
- RACING ACT,**
 - Parimutuel,
 - Definitions, 65.52
 - Violations, 65.51
- RACKETEERING,**
 - Elements instruction, 66.01
- RAILROAD PROPERTY,**
 - Criminal trespass, 59.25-B
- RAPE,**
 - Corroboration, necessity, 57.04

PATTERN INSTRUCTIONS FOR KANSAS 3d

Credibility of prosecutrix's testimony, 57.03

Defense of marriage, 57.01-A

Elements instruction, 57.01

REASONABLE DOUBT,

Guiding instruction, 52.02, 52.04

RECEIPT OF EXPLOSIVES,

Failure to register, 64.10

RECEIVING A SPORTS BRIBE,

Elements instruction, 66.07

RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM A VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT,

Elements instruction, 67.25

RECENTLY STOLEN PROPERTY,

Possession, 59.01

RECKLESS DRIVING,

Elements instruction, 70.04

RECORDINGS,

Piracy, 59.58

Dealing in, 59.58-A

Defense, 59.59

Non-disclosure of source, 59.60

RECUT TIRES,

Sale, 59.56

REFUSAL TO YIELD A TELEPHONE PARTY LINE,

Elements instruction, 64.13

REMAINING AT AN UNLAWFUL ASSEMBLY,

Elements instruction, 63.03

REPORTING A CRIME,

Falsely, 60.19

Resisting arrest, 54.25

RESPONSIBILITY FOR CRIMES OF ANOTHER,

Actor not prosecuted, 54.07

Crime not intended, 54.06

Instruction on principle, 54.05

RESTITUTION,

Instruction on principle, 54.16

RESTRAINT,

Criminal, 56.28

PATTERN INSTRUCTIONS FOR KANSAS 3d

RIOT,

- Elements instruction, 63.04
- Incitement, 63.05

ROBBERY,

- Aggravated, 56.31
- Elements instruction, 56.30

RULINGS OF COURT,

- Cautionary instructions, 51.05

RUMORS, FALSE,

- Concerning financial status, 62.08

SALE OF EXPLOSIVES,

- Failure to register, 64.09

SALE OF RECUT TIRES,

- Elements instruction, 59.56

SCHOOL EMPLOYEE,

- Battery against, 56.16-B

SECOND DEGREE MURDER, 56.03

- Elements instruction, 56.03
- Unintentional, 56.03-A

SECURITY AGREEMENT,

- Fraudulent release, 59.44
- Definition, Chapter 53.00

SECURITY INTEREST,

- Definition, Chapter 53.00
- Impairing,
 - Concealment, 59.41
 - Destruction, 59.41
 - Exchange, 59.42
 - Failure to account, 59.43
 - Sale, 59.42

SEDITION,

- Elements instruction, 60.02

SELF-DEFENSE,

- Defense of dwelling, 54.18
- Defense of person, 54.17, 54.17-A
- Defense of property other than dwelling, 54.19
- Felon, forcible, 54.20
- Force, use of, 54.17, 54.18, 54.19, 54.20

PATTERN INSTRUCTIONS FOR KANSAS 3d

**SELLING, OFFERING TO SELL, CULTIVATING OR
DISPENSING CONTROLLED STIMULANTS,
DEPRESSANTS, HALLUCINOGENIC DRUGS OR
ANABOLIC STEROIDS,**

Elements instruction, 67.15

**SELLING, OFFERING TO SELL, POSSESSING WITH INTENT
TO SELL OR DISPENSING SUBSTANCES DESIGNATED
UNDER K.S.A. 65-4113 TO A PERSON UNDER 18 YEARS
OF AGE,**

Elements instruction, 67.23

**SELLING BEVERAGE CONTAINER WITH DETACHABLE
TABS,**

Elements instruction, 64.18

SERVICES,

Theft, 59.03

SEX OFFENSES,

Chapter containing, 57.00

Definitions, 57.18

SEXUAL BATTERY,

Aggravated, 57.20, 57.24, 57.25

Elements instruction, 57.19

SEXUAL EXPLOITATION OF A CHILD,

Elements instruction, 57.12-A

SEXUAL INTERCOURSE,

Definition, 57.02

SEXUAL PERFORMANCE,

Promoting by a minor, 57.12-B

SEXUAL PREDATOR,

Civil commitment, 57.40

Burden of Proof, 57.42

Definitions, 57.41

SEXUAL RELATIONS,

Unlawful voluntary, 57.27

With Inmates, Etc., 57.26

SHOOTING,

Drive By, 64.02-A-1

SIGNING OF PETITION,

False, 60.24

SIMULATED CONTROLLED SUBSTANCES,

Manufacture, 67.18

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Possession, 67.18
- Possession with intent to use, 67.17
- Promotion, 67.19
- Use, 67.17
- SIMULATING LEGAL PROCESS,**
 - Elements instruction, 60.21
- SKIMMING,**
 - Elements instruction, 66.10
- SMOKING,**
 - Failure to post signs, 62.11-A
- SMOKING IN PUBLIC PLACE,**
 - Unlawful, 62.11
 - Defense, 62.12
- SODOMY,**
 - Aggravated, 57.08
 - Elements instruction, 57.07
- SOLICITATION, CRIMINAL,**
 - Defense, 55.10
 - Elements instruction, 55.09
- SOLICITATION OF A CHILD,**
 - Aggravated indecent, 57.13
 - Indecent, 57.12
- SPECIFIC INTENT CRIME,**
 - Voluntary intoxication defense, 54.12-A
- SPORTS BRIBERY,**
 - Elements instruction, 66.06
- SPORTS CONTEST,**
 - Tampering, 66.08
- SPOUSE,**
 - Nonsupport, 58.07
- STALKING,** 56.39
- STATE POSTAGE,**
 - Unlawful use, 61.12
- STATUTORY PRESUMPTION OF INTENT TO DEPRIVE,**
 - Instruction, 54.01-B
- STEROIDS,**
 - Possession, 67.16
 - Possession with intent to sell, 67.14
 - Selling, offering to sell, cultivating or dispensing, 67.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

STIMULANTS,

- Cultivating, 67.15
- Dispensation, 67.15
- Offer to sell with intent to sell, 67.14
- Possession, 67.13, 67.16
- Possession with intent to sell, 67.14
- Selling or offering to sell, 67.13-B

STIPULATIONS,

- Guiding instruction, 52.05

STORED GOODS,

- Unauthorized delivery, 59.47

STREET OR ROAD,

- Casting object onto, 59.52-59.55

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,**

- Elements instruction, 67.23

SUICIDE,

- Assisting, 56.08

SYMPATHY,

- Cautionary instruction, 51.07

SYNDICALISM,

- Permitting premises to be used for criminal, 60.04
- Practicing criminal, 60.03

TAMPERING WITH A LANDMARK,

- Elements instruction, 59.28

**TAMPERING WITH A LANDMARK - HIGHWAY SIGN OR
MARKER,**

- Elements instruction, 59.29

TAMPERING WITH PUBLIC NOTICE,

- Elements instruction, 60.23

TAMPERING WITH A PUBLIC RECORD,

- Elements instruction, 60.22

TAMPERING WITH A SPORTS CONTEST,

- Elements instruction, 66.08

TAMPERING WITH A TRAFFIC SIGNAL,

- Aggravated, 59.31
- Elements instruction, 59.30

PATTERN INSTRUCTIONS FOR KANSAS 3d

TAX RETURNS,

Defense, 56.34

Disclosing information obtained in preparing, 56.33

TAX STAMP,

Possession by dealer without, 67.24

TELEFACSIMILE,

Harassment of court, 60.31

TELEPHONE,

Harassment, 63.14

Refusal to yield party line, 64.13

TERMS, EXPLANATIONS,

Chapter containing, 53.00

TESTIMONY,

Informant-for benefits, 52.18-A

TESTIMONY OF INFORMANT FOR BENEFITS,

Instruction, 51.18-A

THEFT,

Elements instruction, 59.01

Identity, 62.13

Illustrative instructions, 69.02

Knowledge of property stolen, 59.01-A

Lost or mislaid property, 59.02

Recently stolen property, 59.01; Notes on Use
Services, 59.03

Welfare fraud, 59.01-B

THEFT OF CABLE TELEVISION SERVICES,

Elements instruction, 59.57

THEFT OF LOST OR MISLAID PROPERTY,

Elements instruction, 59.02

THEFT OF SERVICES,

Elements instruction, 59.03

THREAT,

Adulteration or contamination of food or drink, 56.23-A

Aggravated, 56.23-B

Criminal, 56.23

TIE-IN MAGAZINE SALE,

Elements instruction, 66.04

TIRES,

Sale of recut, 59.56

PATTERN INSTRUCTIONS FOR KANSAS 3d

TOKENS, FALSE,

Disposal, 59.37

Manufacture, 59.37

TRAFFIC AND MISCELLANEOUS CRIMES,

Chapter containing, 70.00

TRAFFIC OFFENSE,

Alcohol concentration of .08 or more, 70.01-A

B.A.T. .08 or more, 70.02-B

D.U.I., 70.01

**TRAFFIC IN CONTRABAND IN A CORRECTIONAL
INSTITUTION,**

Elements instruction, 60.27

TRAFFIC SIGNAL,

Aggravated tampering, 59.31

Tampering, 59.30

TRANSPORTATION,

Explosive device, 59.39

Incendiary device, 59.39

**TRANSPORTING ALCOHOLIC BEVERAGE IN OPENED
CONTAINER,**

Elements instruction, 70.03

TREASON,

Elements instruction, 60.01

TRESPASS,

Computer, 59.64-B

Criminal, 59.25-A

Health care facility, 59.25-A

TRIBAL GAMING LAW,

Violations, 65.36

UNAUTHORIZED DELIVERY OF STORED GOODS,

Elements instruction, 59.47

UNAUTHORIZED OFFICIAL ACT,

Performance, 60.20

UNIFORM CONTROLLED SUBSTANCES ACT,

67.13, 67.13-A, 67.13-B, 67.14, 67.15, 67.16

Receiving or acquiring proceeds derived from a violation,
67.25

UNLAWFUL ASSEMBLY,

Elements instruction, 63.02

Remaining, 63.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

- UNLAWFUL COLLECTION BY A JUDICIAL OFFICER,**
Elements instruction, 61.10
- UNLAWFUL CONDUCT OF DOG FIGHTING,**
Attending, 65.19
Elements instruction, 65.18
- UNLAWFUL DEPRIVATION OF PROPERTY,**
Elements instruction, 59.04
- UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION
OF COMMUNICATIONS,**
Elements instruction, 60.06-C
- UNLAWFUL DISCLOSURE OF A WARRANT,**
Elements instruction, 60.28
- UNLAWFUL DISPOSITION OF ANIMALS,**
Elements instruction, 65.17
- UNLAWFUL FAILURE TO REPORT A WOUND,**
Elements instruction, 64.15
- UNLAWFUL HUNTING,**
Posted land, 59.33-A
- UNLAWFUL INTEREST IN AN INSURANCE CONTRACT,**
Elements instruction, 61.08
- UNLAWFUL INTERFERENCE WITH A FIREFIGHTER,**
Elements instruction, 56.20
- UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE
TOKENS,**
Elements instruction, 59.37
- UNLAWFUL PROCUREMENT OF INSURANCE CONTRACT,**
Elements instruction, 61.09
- UNLAWFUL PURCHASE OF LOTTERY TICKET,**
Instruction, 65.34
- UNLAWFUL SALE OF LOTTERY TICKET,**
Instruction, 65.33
- UNLAWFUL SEXUAL RELATIONS WITH INMATES, ETC.,**
Elements instruction, 57.26
- UNLAWFUL SMOKING IN PUBLIC PLACE,**
Defense, 62.12
Elements instruction, 62.11
- UNLAWFUL USE OF A COMMUNICATION FACILITY TO
FACILITATE FELONY DRUG TRANSACTION,**
Elements instruction, 67.22

PATTERN INSTRUCTIONS FOR KANSAS 3d

**UNLAWFUL USE OF FINANCIAL CARD - ALTERED OR
NONEXISTENT,**

Elements instruction, 59.39

UNLAWFUL USE OF FINANCIAL CARD - CANCELLED,
Elements instruction, 59.35

UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER,
Elements instruction, 59.34

UNLAWFUL USE OF STATE POSTAGE,
Elements instruction, 61.12

UNLAWFUL USE OF WEAPONS - FELONY,
Affirmative defense, 64.04
Elements instruction, 64.01

UNLAWFUL USE OF WEAPONS - MISDEMEANOR,
Affirmative defense, 64.04
Elements instruction, 64.02

UNLAWFUL VOLUNTARY SEXUAL RELATIONS,
Elements instruction, 57.27

**UNLAWFULLY EXPOSING ANOTHER TO A
COMMUNICABLE DISEASE,**
Elements instruction, 56.40

**UNLAWFULLY MANUFACTURING A CONTROLLED
SUBSTANCE,**

Before July 1, 1999,

Elements Instruction, 67.21-A

Elements instruction, 67.21

UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG,
Elements instruction, 64.16

For resale, 64.17

USE OF FORCE,

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Duty to retreat, 54.17-A

Felon, forcible, 54.20

Initial aggressor, 54.22

Law enforcement officer, 54.23

Private person,

Not summoned to assist, 54.24

Summoned to assist, 54.23

Resisting arrest, 54.25

PATTERN INSTRUCTIONS FOR KANSAS 3d

VAGRANCY,

Elements instruction, 63.08

VALUE IN ISSUE,

Instruction, 59.70

Verdict form, 68.11

VEHICULAR BATTERY,

Elements instruction, 56.07-B

VEHICULAR HOMICIDE,

Aggravated, 56.07-A

Elements instruction, 56.07

VERDICT FORMS,

Capital murder, 68.14-A-1, 68.14-B-1, 68.17

Chapter containing, 68.00

Guilty, form, 68.02

Mental disease or defect, not guilty, 68.06

Not guilty, form, 68.03

Value in issue, 68.11

VICTIM OR WITNESS,

Aggravated intimidation, 60.06-B

Intimidation, 60.06-A

VIOLATION OF CITY ORDINANCE,

Elements instruction, 70.05

VIOLATION OF KANSAS ODOMETER ACT,

Conspiring, 59.65-B

Operating a vehicle, 59.65-C

Tampering, 59.65-A

Unlawful device, 59.65-D

Unlawful sale, 59.65-E

Unlawful service, 50.65-F

VIOLATION OF PERSONAL RIGHTS,

Chapter containing, 62.00

VIOLATION OF TRIBAL GAMING LAW,

Elements Instruction, 65.36

VOLUNTARY INTOXICATION,

Defense, 54.12, 54.12-A-1

General intent crime, Defense, 54.12

Particular state of mind, Defense, 54.12-A-1

VOLUNTARY MANSLAUGHTER,

Elements instruction, 56.05

PATTERN INSTRUCTIONS FOR KANSAS 3d

VOLUNTARY SEXUAL RELATIONS,

Unlawful, 57.27

**WAREHOUSE RECEIPT FRAUD - DUPLICATE OR
ADDITIONAL RECEIPT,**

Elements instruction, 59.46

WAREHOUSE RECEIPT FRAUD - ORIGINAL RECEIPT,

Elements instruction, 59.45

WARRANT, DISCLOSURE,

Unlawful, 60.28

WEAPONS,

Affirmative defense, 64.04

Aggravated violation, 64.03

Carrying concealed, 64.12

Unlawful use,

Felony, 64.01

Misdemeanor, 64.02

WELFARE FRAUD,

Theft, 59.01-B

WITNESS,

Corruptly influencing, 60.06

WITNESSES,

Credibility, 52.09

Defendant, 52.10

Expert, 52.14

Number, 52.11

WITNESS OR VICTIM,

Aggravated intimidation, 60.06-B

Intimidation, 60.06-A

WORTHLESS CHECK,

Causing unlawful prosecution, 59.10

Defense, 59.07

Elements instruction, 59.06

Habitually giving on same day, 59.09

Habitually giving within two years, 59.08

Presumption of intent to defraud, 59.06-A

WOUND,

Failure to report, 64.15

WRITTEN INSTRUMENT,

Destroying, 59.14

