Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

[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.]

It is your duty to presume that the defendant is not guilty of the crime(s) charged. The law requires the State to prove the defendant guilty beyond a reasonable doubt. The burden is always on the State. The defendant is not required to prove innocence or to produce any evidence.

During the course of this trial, 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

If a judge wishes to give some instructions before the introduction of evidence, it is authorized by K.S.A. 22-3414(3).

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. This instruction informs the jury about the elements

of the crime, the burden of proof (PIK 3d 52.02), consideration of the evidence (PIK 3d 51.04), and weighing the credibility of witnesses (PIK 3d 52.09).

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. If the defendant is charged with more than one crime, then the judge should list the elements of each offense.

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.

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 may wish to 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.

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.

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).

51.07 SYMPATHY OR PREJUDICE FOR OR AGAINST A PARTY

The instruction which originally appeared at PIK 51.07 is deleted because it was disapproved for general use. *State v. Harmon*, 254 Kan. 87, 865 P.2d 1011 (1993); *State v. Reser*, 244 Kan. 306, 767 P.2d 1277 (1989); *State v. Sully*, 219 Kan. 222, 547 P.2d 344 (1976); and *State v. Maggard*, 26 Kan. App. 2d 888, 995 P.2d 916 (2000). Under very unusual factual circumstances, where the trial judge believes that the jury may be influenced by sympathy or prejudice, the court may instruct, "You must consider this case without favoritism or sympathy for or against either party. Neither sympathy nor prejudice should influence you." See *e.g., State v. Rhone*, 219 Kan. 542, 548 P.2d 752 (1976), which approved of this instruction where the State's key witness was so ill and feeble that the parties and the jury were taken to the witness' residence to hear her testimony.

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.

In *State v. Deavers*, 252 Kan. 149, 164, 843 P.2d 695 (1992), the Court addressed whether this instruction should be given in "Hard 40" cases where the jury determined the penalty. Due to statutory modification, the jury no longer determines the penalty in "Hard 40" or "Hard 50" cases.

However, in death penalty cases under K.S.A. 21-4622 *et seq.*, in instructing the jury during the "guilt/innocence" phase of the trial, 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."

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.

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

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

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

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

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

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

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

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

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

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

(5) *Other Crime as Element of Crime Charged.* Evidence of a prior conviction is admissible independent of K.S.A. 60-455 if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972). Where evidence of a prior conviction is admitted for this purpose, the trial court should give a limiting instruction on its use by the jury. *Cf., State v. Gander*, 220 Kan. 88, 90-91, 551 P.2d 797 (1976); *State v. Martin*, 208 Kan. 950, 951-953, 495 P.2d 89 (1972).

In *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), the Kansas Supreme Court held that in a prosecution for criminal possession of a firearm, when requested by a defendant, the trial court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration, a prior convicted felon. The procedure for adopting the stipulation is set forth in the opinion. In *State v. Gill*, 268 Kan. 247, 997 P.2d 710 (2000), the Court confirmed that this procedure is only necessary when requested by a defendant.

(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

52.13 DEFENDANT'S FAILURE TO TESTIFY

A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference of guilt from the fact that the defendant did not testify, and you must not consider this fact 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

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).

This instruction was modified to comply with *City of Colby v. Cranston*, 27 Kan. App. 2d 530, 7 P.3d 300 (2000). In that case, following *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), the Court of Appeals held that once a criminal defendant requests a prophylactic instruction regarding his or her silence, the full and free exercise of the constitutionally guaranteed privilege against self-incrimination requires an instruction with two components: (1) a statement that the defendant cannot be compelled to testify, and (2) a statement that no adverse inference can be drawn from the defendant's silence.

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.

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

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

52.18-A TESTIMONY OF AN INFORMANT - FOR BENEFITS

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

Notes on Use

It is error to refuse to give this instruction when requested. *State v. Fuller*, 15 Kan. App. 2d 34, 41, 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).

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. Kliewer*, 210 Kan. 820, 504 P.2d 580; *State v. McMullen*, 20 Kan. App. 2d 985, 894 P.2d 251 (1995); and *State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999). 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.

Aiding and Abetting: See Accessory above.

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

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

Believes: See Reasonable Belief.

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

Breach of Peace: A disturbance which alarms, angers or disturbs the peace and quiet of others. See *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983); and *State v. Cleveland*, 205 Kan. 426, 469 P.2d 251 (1970) for discussion of this concept. See PIK 3d 63.01, Disorderly Conduct.

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

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

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

Compulsion: K.S.A. 21-3209; PIK 3d 54.13, Compulsion; *State v.Dunn*, 243 Kan. 414, 421, 758 P.2d 718 (1988); *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. App. 2d 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; See generally *State v. Crockett*, 26 Kan. App. 2d 202, 987 P.2d 1101 (1999); 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).

Drug Paraphernalia: See PIK 3d 67.18-B.

Dwelling: K.S.A. 21-3110 (7). See also Residence below.

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

Entrapment: K.S.A. 21-3210; PIK Crim 3d 54.14.

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

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

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

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

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).

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).

Residence: K.S.A. 77-201 and *Herrick v. State*, 25 Kan. App. 2d 472, 965 P.2d 844 (1998) for distinction between residence and dwelling.

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).

Simulated Controlled Substance: See PIK 3d 67.18-B.

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; and *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998) (utterance must be more than mere political statement or idle talk; proper test to determine whether a statement is a threat is objective, not subjective, i.e., that of a reasonable person).

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

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

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

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

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

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

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.

Instruction 54.01 is consistent with the principles of felony murder. *State v. Yardley*, 267 Kan. 37, 978 P.2d 886 (1999).

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

54.01-A GENERAL CRIMINAL INTENT

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

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

Notes on Use

For authority, see K.S.A. 21-3201(a) and (b). This instruction is not recommended for general use. The PIK instruction defining the crime should cover either specific or general criminal intent as an element of the crime. This instruction should be used only where the crime requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973); *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997); *State v. Isley*, 262 Kan. 281, 293, 936 P.2d 275 (1997); *State v. Yardley*, 267 Kan. 37, 978 P.2d 886 (1999).

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).

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

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

PIK 54.05 was specifically approved in *State v. Minor*, 229 Kan. 86, 89, 622 P.2d 998 (1981), and *State v. Manard*, 267 Kan. 20, 978 P.2d 253 (1999).

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

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.

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

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

54.12-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

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

Where the defendant is charged with murder in the first degree, or murder in the second degree committed intentionally, voluntary intoxication may be a defense where such intoxication impaired the defendant's mental faculties to the extent that he was incapable of premeditation or forming the necessary intent to kill. In such a case there must be proof that the defendant was intoxicated to such an extent that he was not conscious of what he was doing or that he was not aware of what he was doing. *State v. Cravatt*, 267 Kan. 314, 979 P.2d 679 (1999).

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.

The instruction should not ordinarily be used where the defendant is not the occupant of the dwelling in question. *State v. Alexander*, 268 Kan. 610, 1 P.3d 875 (2000).

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.

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.

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).

K.S.A. 21-3402 was amended in 1993 to include two alternative definitions of second-degree murder. Under subsection (a) it is defined as the intentional killing of a human being. Under subsection (b) it is defined as a killing committed "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 1999 Supp. 21-3402. The Supreme Court has held that attempted second-degree murder charged under subsection (b) cannot be recognized as a crime in Kansas, as it would required proof of an intent to commit an unintentional act, a logical impossibility. *State v. Shannon*, 258 Kan. at 429. In *State v. Clark*, 261 Kan. 460, 466-67, 931 P.2d 664 (1997), the Court acknowledged the propriety of an instruction on attempted second-degree murder charged under subsection (a) of K.S.A. 21-3402, though the Court held that the evidence in that particular case did not warrant the instruction.

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.

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. 888 (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).

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).

55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

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

Comment

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

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

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* 519 U.S. 1090, 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. 1111 (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).

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).

Conversations among co-conspirators, planning the time, location and manner of committing the crime, do not constitute overt acts. *State v. Crockett*, 26 Kan. App. 2d 202, 204, 987 P.2d 1101 (1999).

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. 888 (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).

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. Daughtery*, 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).

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).

Conversations among co-conspirators, planning the time, location and manner of committing the crime, do not constitute overt acts. *State v. Crockett*, 26 Kan. App. 2d 202, 204, 987 P.2d 1101 (1999).

The overt act for the crime of conspiracy to commit murder may be the commission of the murder itself. *State v. Wilkins*, 267 Kan. 355, 365, 985 P.2d 690 (1999).

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.

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).

PIK 55.09 was approved as a correct statement of the offense of criminal solicitation in *State v. Westfahl*, supra.

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).

An alternative request, i.e., that a friend either raise the money to post the defendant's bond or murder the complaining witness, constituted sufficient evidence to support a conviction of criminal solicitation. *State v. Mason*, 268 Kan. 37, 40, 986 P.2d 387 (1999).

"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. 887 (June 9, 1998).

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.

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 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).

This instruction was cited with approval in *State v. Lamae*, 268 Kan. 544, 998 P.2d 106 (2000).

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.]

56.18-A CRIMINAL INJURY TO PERSON

Comment

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

56.19 AGGRAVATED BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

1. (a) That the defendant intentionally caused (great bodily harm to) (disfigurement of) _____;
   or
   (b) That the defendant intentionally caused bodily harm to _____ (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 _____ 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 intentionally caused bodily harm to _____ with a motor vehicle;
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.

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) or 1(d) is a severity level 3, person felony; and as described in 1(b) or (c), a severity level 6, person felony.

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

Comment

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

56.20 UNLAWFUL INTERFERENCE WITH A FIREFIGHTER

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

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

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

Notes on Use

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

56.26 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

The 1986 Legislature amended K.S.A. 21-3422, adding subsection (b) which states, "It is not a defense to a prosecution under this section that the defendant 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." Prior to this amendment, *State v. Al-Turck*, 220 Kan. 557, 552 P.2d 1375 (1976), had held that in the absence of a court order, both parents have an equal right to custody of their minor children.

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.

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) (visitation rights) or (custody rights) (parenting time), refused to return the child at the expiration of (these rights) (that time);

   or

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

   or

   That the defendant detained or concealed the child

in a place unknown to _____, either inside or outside this state; 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. The choice of the terms "visitation" or "visitation rights" and "custody rights" or "parenting time" should be made based upon the language used in the controlling court order. L. 2000, ch. 171, § 4.

Comment

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

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).

In *State v. Montgomery*, 26 Kan. App. 2d 346, 988 P.2d 258 (1999), the Court of Appeals held that, limited to the facts of the case, the taking of the victim's glasses was incidental to the crime of attempted rape and had no significance independent of that crime; therefore, the taking of the glasses was insufficient to support defendant's conviction of aggravated robbery.

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).

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).

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).

In *State v. Montgomery*, 26 Kan. App. 2d 346, 988 P.2d 258 (1999), the Court of Appeals held that, limited to the facts of the case, the taking of the victim's glasses was incidental to the crime of attempted rape and had no significance independent of that crime; therefore, the taking of the glasses was insufficient to support defendant's conviction of aggravated robbery.

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.

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.**

As used in this instruction:

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

[(Physical injury means any touching of _____ against [his][her] will, with physical force, in an intentional, hostile and aggravated manner or the projecting of such force against [him][her]. Physical harm requires a finding of substantial physical pain or an impairment of physical condition.)

(Cruel punishment means such punishment as would amount to torture or barbarity, and any cruel and degrading punishment.

Cruel means disposed to inflict pain or suffering which causes or is conducive to injury, grief or pain.

Punishment means severe, rough or disastrous treatment.

Consideration must be given to the age and physical and mental condition of _____.)]

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."

Authority for the definitions is found in *State v. Bennett*, 26 Kan. App. 2d 157, 980 P.2d 597 (1999).

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56.38 AFFIRMATIVE DEFENSE TO MISTREATMENT OF A DEPENDENT ADULT

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

Notes on Use

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

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

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

56.39 STALKING

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

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

1. That the defendant 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, including that which is communicated via electronic means, 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.]

[Electronic means includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, pagers and computer networks.]

Notes on Use

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

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

This statute was amended by the Legislature in 1994 and 1995. Please consult the 1993 Stalking instruction 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."

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. Schriner*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

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

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

The crime of indecent liberties with a child is a lesser included offense of rape where the evidence establishes that the defendant forcibly raped a female under 16 years of age. *State v. Lilley*, 231 Kan. 694, 696, 647 P.2d 1323 (1982); and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983).

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.

The court should refrain from including all possible alternative means of rape [2(a), (b) and (c)] absent substantial evidence to support each alternative means. *State v. Ice*, 27 Kan. App. 2d 1, 997 P.2d 737 (2000).

57.28 - 57.39 RESERVED FOR FUTURE USE.

57.40 SEXUAL PREDATOR/CIVIL COMMITMENT

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

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

1. **That the respondent has been (convicted of) (charged with) _____, a sexually violent offense;**
2. **That the respondent suffers from a (mental abnormality) (personality disorder) which makes the respondent likely to engage in repeat acts of sexual violence; and**
3. **That the respondent cannot control (his) (her) dangerous behavior because of (his) (her) (mental abnormality) (personality disorder).**

OR

1. **That the respondent has been convicted of _____;**
2. **That the crime was sexually motivated;**
3. **That the respondent suffers from a (mental abnormality) (personality disorder) which makes the respondent likely to engage in repeat acts of sexual violence; and**
4. **That the respondent cannot control (his) (her) dangerous behavior because of (his) (her) (mental abnormality) (personality disorder).**

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 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. 346, 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.

In applying the United States Supreme Court's ruling in *Hendricks* to the Kansas Sexually Violent Predator Act, our Kansas Supreme Court in *In re Care and Treatment of Crane*, 269 Kan. 578, 7 P.3d 285 (2000), held that "commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior."

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.

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

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. For a thorough analysis of the legislative history behind the 1993 changes to K.S.A. 21-3603 and 21-3606, see *State v. Ippert*, 268 Kan. 254, 995 P.2d 858 (2000).

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

58.05 ABANDONMENT OF A CHILD

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

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

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

Comment

The 2000 legislature amended K.S.A. 21-3604 to exempt from prosecution a parent who surrenders physical custody of an infant 45 days old or younger to any employee on duty at a fire station, city or county health department or medical care facility if such infant has not suffered bodily harm. L. 2000, ch. 174, § 11-12.

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.

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.

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 there was a reasonable probability that _____'s life, body or health would 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.

In *State v. Sharp*, 28 Kan. App. 2d 128, 13 P.3d 29 (2000), the Court of Appeals held that giving the prior version of this instruction was reversible error. The prior version of the instruction did not include the language requiring that the jury find there was a "reasonable probability" of injury to the child.

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).

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).

In *State v. Sampsel*, 268 Kan. 264, 997 P.2d 664 (2000), it was held that a minor who furnishes alcoholic beverages to another minor may be prosecuted under K.S.A. 21-3610. The court further held that the minor defendant was not entitled to an instruction on possession of alcoholic liquor as a lesser included offense.

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

CHAPTER 59.00

CRIMES AGAINST PROPERTY

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

59.20 ARSON (BEFORE JULY 1, 2000)

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

This instruction should be used only for crimes committed before July 1, 2000.

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. 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."

59.20-A ARSON (AFTER JULY 1, 2000)

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 _____;**

[3. That the property was a dwelling;] 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. 2000 Supp. 21-3718. This instruction should be used only for crimes committed on or after July 1, 2000. The crime is a severity level 6 person felony if the property is a dwelling and a severity level 7 nonperson felony if it is not.

Comment

The above amendment removes the value of the property as an element of the crime of arson.

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59.21 ARSON - DEFRAUD AN INSURER OR LIENHOLDER (BEFORE JULY 1, 2000)

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

This instruction should only be used for crimes committed before July 1, 2000.

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."

59.21-A ARSON - DEFRAUD AN INSURER OR LIENHOLDER (AFTER JULY 1, 2000)

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) _____;**

[4. That the property was a dwelling;] 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. 2000 Supp. 21-3718. This instruction should be used only for crimes committed on or after July 1, 2000. The crime is a severity level 6 person felony if the property is a dwelling and a severity level 7 nonperson felony if it is not.

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59.22 AGGRAVATED ARSON

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

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

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

   or

   That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (explosion);
2. **That the defendant did so without the consent of _____;**

OR

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

   or

   That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. **That the defendant did so with the intent to (injure) (defraud) _____;**

(3.) or (4.) That at the time there was a human being in the (building) (property); and

(4.) or (5.) That the [(fire) (explosion)] [(resulted) (did not result)] in a substantial risk of bodily harm; and

(5.) or (6.) That this act occurred on or about the _____ day of _____, _____, 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

59.67 MANUFACTURE, SALE OR DISTRIBUTION OF A THEFT DETECTION SHIELDING DEVICE

The defendant is charged with the (manufacture) (sale) (distribution) of a theft detection shielding device. The defendant pleads not guilty.

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

1. **That the defendant (made) (sold) (distributed) a theft detection shielding device; and**
2. **That this act occurred on or about the ___ day of _____, _____ in _____ County, Kansas.**

Theft detection shield device means a laminated bag or device particular to and intentionally marketed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

Note on Use

For authority, see K.S.A. 2000 Supp. 21-3764. Violation of this provision is a severity level 9 nonperson felony.

59.67-A POSSESSION OF A THEFT DETECTION SHIELDING DEVICE

The defendant is charged with possession of a theft detection shielding device. The defendant pleads not guilty.

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

1. **That the defendant intentionally possessed a theft detection shielding device; and**
2. **That the defendant intended to commit a theft; and**
3. **That this act occurred on or about the ____ day of _____, ____ in _____ County, Kansas.**

Theft detection shielding device means a laminated bag or device particular to and intentionally marketed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

Note on Use

For authority, see K.S.A. 2000 Supp. 21-3764. Violation of this provision is a severity level 9 nonperson felony.

59.67-B REMOVAL OF A THEFT DETECTION DEVICE

The defendant is charged with removal of a theft detection device. To establish this charge each of the following claims must be proved:

1. **That (name of owner) owned merchandise equipped with a theft detection device;**
2. **That defendant, without the permission of (name of owner) removed the theft detection device prior to purchase; and**
3. **That this act occurred on or about the ____ day of _____, _____ in _____ County, Kansas.**

Note on Use

For authority, see K.S.A. 2000 Supp. 21-3764. Violation of this provision is a severity level 9 nonperson felony.

59.68 COUNTERFEITING MERCHANDISE OR SERVICES

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

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

1. **That the defendant (made) (displayed) (advertised) (distributed) (offered for sale) (sold) (possessed with the intent to sell or distribute) certain (describe item or service);**
2. **That such (describe item or service) was identified by a (trademark) (trade name) owned by _____;**
3. **That _____ did not authorize the defendant to use the (trademark) (trade name);**
4. **That the retail value of the (describe item or service) (made) (displayed) (advertised) (distributed) (offered for sale) (sold) (possessed with the intent to sell or distribute) was (less than $500) (at least $500 but less than $25,000) ($25,000 or more);**

   or

   That the number of (describe item or service) (made) (displayed) (advertised) (distributed) (offered for sale) (sold) (possessed with the intent to sell or distribute) was (more than 100 but less than 1,000) (1,000 or more);

   and

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

In determining the quantity and retail value of the (describe item or service), you should include the aggregate number and value of all (items) (services) identified by the (trademark) (trade name) that the defendant (made) (displayed) (advertised) (distributed) (offered for sale) (sold) (possessed with the intent to sell or distribute).

Notes on Use

For authority see K.S.A. 2000 Supp. 21-3763. Counterfeiting of items or services with a retail value of less than $500 is a class A nonperson misdemeanor. Counterfeiting of items or services with a retail value of at least $500 but less than $25,000, or which involves more than 100 but less than 1,000 items bearing a counterfeit mark, or on a second violation is a severity level 9 nonperson felony. Counterfeiting of items or services with a retail value of $25,000 or more, or which involves 1,000 or more items bearing a counterfeit mark, or on a third or subsequent violation is a severity level 7 nonperson felony.

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59.69 RESERVED FOR FUTURE USE.

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).

59.70-A COUNTERFEITING MERCHANDISE OR SERVICES - VALUE OR UNITS IN ISSUE

The State has the burden of proof as to the (retail value of the goods or services) (number of items) allegedly counterfeited by the defendant.

The State claims that the (retail value) (number of items) involved herein is _____.

It is for you to determine the (retail value) (number of items) and enter it on the verdict form furnished.

Notes on Use

It is necessary to use this instruction with PIK 3d 68.11-A, Verdict Form - Counterfeiting Merchandise or Services - Value or Units in Issue, when an issue exists. The appropriate alternative should be used and the retail value or number of units involved inserted in the blank.

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CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

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 and not a question of fact for the jury to decide. "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

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

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

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

60.11 AGGRAVATED ESCAPE FROM CUSTODY

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

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

A. 1. That the defendant was being held in custody

[(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]

[(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.

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 and not a question of fact for the jury to decide. 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

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

The Kansas Court of Appeals approved PIK 3d 60.11 as a correct statement of the law in *State v. Mixon*, supra.

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

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.

60.36 VIOLATION OF A PROTECTIVE ORDER

The defendant is charged with the crime of violation of a protective order. The defendant pleads not guilty.

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

1. **That the defendant knowingly or intentionally violated**

   [(a) a protection from abuse order issued pursuant to Kansas law]

   [(b) a protective order issued by a court of any state or Indian tribe]

   [(c) a restraining order issued pursuant to Kansas law]

   [(d) an order issued as a condition of pretrial release, diversion, probation, suspended sentence or postrelease supervision that orders the defendant to refrain from having direct or indirect contact with another person] or

   [(e) an order issued as a condition of release after conviction or as a condition of an appeal bond that orders the defendant to refrain from having direct or indirect contact with 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. 21-3843. Violation of a protective order is a class A misdemeanor.

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

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 or persons therein; and

or

(b) installed or used, outside a private place, any device for hearing, recording, amplifying or broadcasting sounds originating in such place which sounds 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) (other wire) communication without the consent of the person in possession or control of the facilities for such communication; or

(d) installed or used a (concealed camcorder) (motion picture camera) (photographic camera of any type)

(1) to secretly (videotape) (film) (photograph) (record by electronic means) under or through the clothing being worn by _____;

or

(2) to secretly (videotape) (film) (photograph) (record by electronic means) _____, who is nude or in a state

of undress;

for the purpose of viewing (the body of) (the undergarment worn by) _____, without the consent or knowledge of _____, with the intent to invade the privacy of _____ under circumstances in which _____ has a reasonable expectation of privacy; 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. Subsection (d) was added as a result of L. 2000, ch. 181, § 7.

Comment

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

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

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

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

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

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

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62.02 EAVESDROPPING - DEFENSE OF PUBLIC UTILITY EMPLOYEE

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

Notes on Use

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

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.

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 severity level 7 person felony. Intent to defraud is defined in K.S.A. 21-3110(9).

62.14 UNLAWFULLY PROVIDING INFORMATION ON AN INDIVIDUAL CONSUMER

The defendant is charged with the crime of unlawfully providing information on an individual consumer. The defendant pleads not guilty.

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

1. **That the defendant is an officer or employee of a consumer reporting agency;**
2. **That the defendant knowingly and willfully provided information concerning _____ from the agency files to _____, a person not authorized to receive that information; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction:

The term "consumer reporting agency" means any person which, for monetary fees, dues or on a corporate nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer" means an individual.

Notes on Use

For authority, see K.S.A. 2000 Supp. 50-719. Unlawfully providing consumer information is a severity level 7 person felony. Definitions can be found in K.S.A. 50-702.

62.15 OBTAINING CONSUMER INFORMATION

The defendant is charged with the crime of obtaining information on a consumer under false pretenses. The defendant pleads not guilty.

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

1. **That the defendant knowingly and willfully obtained information on a consumer from a consumer reporting agency;**
2. **That the defendant did so under false pretenses; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a corporate nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer" means an individual.

The term "false pretenses" means that the defendant obtained information by means of an intentionally false statement or misrepresentation; that the false statement or misrepresentation deceived the consumer reporting agency; and that the consumer reporting agency relied, in whole or in part, upon the false statement or misrepresentation in relinquishing control of the information to the defendant.

Notes on Use

For authority, see K.S.A. 2000 Supp. 50-718. Obtaining information on a consumer under false pretenses is a severity level 7 person felony. Definitions can be found in K.S.A. 50-702.

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.

The crimes of criminal discharge of a weapon and aggravated assault are not multiplicitous. The apprehension of victims is not a necessary element of criminal discharge as it is in the crime of aggravated assault. *State v. Taylor*, 25 Kan. App. 2d 407, 965 P.2d 834 (1998).

The crime of criminal discharge of a weapon does not merge with homicide. *State v. Sims*, 265 Kan. 166, 960 P.2d 1271 (1998).

64.02-B CRIMINAL DISCHARGE OF A FIREARM - AFFIRMATIVE DEFENSE

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

Notes on Use

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

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

64.03 AGGRAVATED WEAPONS VIOLATION

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

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

1. **That the defendant (** allege any of the violations listed in PIK 3d 64.01 and 64.02 **);**
2. **That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) within five years prior to the commission of such act; and**

   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

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).

Although speaking to a conviction under K.S.A. 21-4204, criminal possession of a firearm, PIK 3d 64.07, the Kansas Supreme Court stated that when a defendant stipulated to a prior crime necessary for conviction under that statute that the court should mention to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

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. 888 (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.

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

Comment

K.S.A. 21-4204 makes "possession" of a firearm by a convicted felon an offense. The word "knowingly" is not used in the statute. The Committee in preparing this instruction has added the requirement that the possession of the firearm be "knowingly." This construction of the word "possession" is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself or herself. For example, see *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). In reaching this conclusion the Committee considered K.S.A. 21-3201 which provides that a criminal intent is an essential element of every crime defined by the code. Willful conduct is conduct that is purposeful and intentional and not accidental. An exception is made in K.S.A. 21-3204 which provides for an absolute criminal liability without criminal intent if the crime is a misdemeanor and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. In view of the case law set forth above

and the statutes just cited, it seems clear that in order to establish the offense of criminal possession of a firearm, it must be proved that the possession was knowing and intentional.

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).

If a defendant stipulates to a prior crime necessary for conviction under K.S.A. 21-4204, the court should reveal to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

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. 888 (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.

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).

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).

Although speaking to a conviction under K.S.A. 21-4204, criminal possession of a firearm, PIK 3d 64.07, the Kansas Supreme Court stated that when a defendant stipulated to a prior crime necessary for conviction under that statute that the court should mention to the jury neither the number nor nature of the prior convictions. The court should only instruct the jury that it may consider the convicted felony status element of the crime as proven by agreement of the parties in the form of a stipulation. *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999).

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 *DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 953 P.2d 231 (1998), at page 718, *State v. Hughes* is discussed in some detail in determining that a municipal ordinance regulating nudity in a drinking establishment was not unconstitutionally vague.

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

65.02 PROMOTING OBSCENITY TO A MINOR

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

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

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

CHAPTER 67.00

CONTROLLED SUBSTANCES

67.01 - 67.12

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

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS - POSSESSION

The defendant is charged with the crime of 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. The previous statute, K.S.A. 65-4127a(a), was repealed in 1994. 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 include 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. See PIK 3d 67.13-B for the instruction on sale of narcotic drugs.

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

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

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

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

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

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

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

The so-called innocent possession defense is not recognized in Kansas. To prove possession, the State must establish that a defendant intentionally appropriated the drug to himself or herself. The legal necessity of intentional appropriation adequately protects the innocent defendant from a claim of knowing possession of contraband. *State v. Calvert*, 27 Kan. App. 2d 390, 5 P.3d 537 (2000).

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). In *State v. Evans*, 219 Kan. 515, 548 P.2d 772 (1976), the court disapproved of the use of the definition of "sale" normally given it in the context of commercial law.

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. The previous statute, K.S.A. 65-4127a(b), was repealed in 1994. 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 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).

To sustain a conviction for the crime of sale of cocaine within 1,000 feet of a school, there must be evidence that the structure referred to as a school is one as defined in K.S.A. 1999 Supp. 65-4161(d). Such evidence is necessary to prove a necessary element of the offense. *State v. Star*, 27 Kan. App. 2d 930, 10 P.3d 37 (2000).

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. The previous statute, K.S.A. 65-4127a(b), was repealed in 1994. 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 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. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), the Court held that possession of cocaine is a lesser included offense of possession with intent to sell cocaine.

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).

To sustain a conviction for the crime of sale of cocaine within 1,000 feet of a school, there must be evidence that the structure referred to as a school is one as defined in K.S.A. 1999 Supp. 65-4161(d). Such evidence is necessary to prove a necessary element of the offense. *State v. Star*, 27 Kan. App. 2d 930, 10 P.3d 37 (2000).

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. The previous statute, K.S.A. 65-4127b(b), was repealed in 1994. 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.

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).

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).

To sustain a conviction for the crime of sale of cocaine within 1,000 feet of a school, there must be evidence that the structure referred to as a school is one as defined in K.S.A. 1999 Supp. 65-4161(d). Such evidence is necessary to prove a necessary element of the offense. *State v. Star*, 27 Kan. App. 2d 930, 10 P.3d 37 (2000).

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. The previous statute, K.S.A. 65-4127b(b), was repealed in 1994. 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), 65-4107(g) and 65-4109(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 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).

To sustain a conviction for the crime of sale of cocaine within 1,000 feet of a school, there must be evidence that the structure referred to as a school is one as defined in K.S.A. 1999 Supp. 65-4161(d). Such evidence is necessary to prove a necessary element of the offense. *State v. Star*, 27 Kan. App. 2d 930, 10 P.3d 37 (2000).

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. The previous statute, K.S.A. 65-4127b(a), was repealed in 1994. 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), 65-4107(g) and 65-4109(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 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. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), the Court held that possession of cocaine is a lesser included offense of possession with intent to sell cocaine.

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

drug severity level 4 felony, except that a violation which involves the possession of drug paraphernalia for the "planting, propagation, growing or harvesting of less than five marijuana plants" is a class A nonperson misdemeanor. K.S.A. 65-4152(d).

PIK 3d 67.18-B defining "drug paraphernalia" 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 the instruction.

PIK 3d 67.18-C setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

PIK 3d 67.18-B defining "simulated controlled substance" should be given.

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. See also *State v. Dunn*, 233 Kan. 411, 662 P.2d 1286 (1983).

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).

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.**

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.

PIK 3d 67.18-B defining "simulated controlled substance" should be given.

67.18-A DELIVERY 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

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.

Instructions defining "drug paraphernalia," PIK 3d 67.18-B, and setting forth factors to be considered in determining whether an object is drug paraphernalia, PIK 3d 67.18-C, 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.

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).

67.18-B SIMULATED CONTROLLED SUBSTANCE AND DRUG PARAPHERNALIA DEFINED

A. Simulated Controlled Substance

"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.

B. Drug Paraphernalia

"Drug paraphernalia" means all equipment, products and materials of any kind which are used or intended for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (injecting) (ingesting) (inhaling) (or otherwise introducing into the human body) a controlled substance in violation of the uniform controlled substances act. "Drug paraphernalia" shall include, but is not limited to:

(1) [insert specific item of paraphernalia],

(2) [insert specific item of paraphernalia], or

(3) [insert specific item of paraphernalia].

Notes on Use

For authority, see K.S.A. 65-4150(c) and (e). The specific items of paraphernalia listed in the statute and that are applicable to the case should be inserted into the instruction. This instruction should include only those items supported by the evidence. Inapplicable words should be stricken.

67.18-C DRUG PARAPHERNALIA – FACTORS TO BE CONSIDERED

In determining whether an object is drug paraphernalia, you shall consider, in addition to all other logically relevant factors, the following:

[Statements by (an owner) (a person in control) of the object concerning its use.]

[Prior convictions, if any, of (an owner) (a person in control) of the object, under any (state) (federal) law relating to any controlled substance.]

[The proximity of the object, in time and space, to a direct violation of the uniform controlled substances act.]

[The proximity of the object to controlled substances.]

[The existence of any residue of controlled substances on the object.]

[(Direct) (circumstantial) evidence of the intent of (an owner) (a person in control) of the object, to deliver it to a person (the owner) (the person in control) of the object knows, or should reasonably know, intends to use the object to facilitate a violation of the uniform controlled substances act. The innocence of (an owner) (a person in control) of the object as to a direct violation of the uniform controlled substances act shall not prevent a finding that the object is intended for use as drug paraphernalia.]

[(Oral) (written) instructions provided with the object concerning its use.]

[Descriptive materials accompanying the object which explain or depict its use.]

[National and local advertising concerning the object's use.]

[The manner in which the object is displayed for sale.]

[Whether (the owner) (the person in control) of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products.]

[(Direct) (circumstantial) evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.]

[The existence and scope of legitimate uses for the object in the community.]

[Expert testimony concerning the object's use.]

Notes on Use

For authority, see K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 which are supported by evidence.

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Notes on Use

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

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

(1) the substance was packaged in a manner normally used for the illegal delivery of controlled substances.

(2) the delivery of the substance included an exchange of or demand for money or other consideration for delivery of the substance, and the amount of the consideration was substantially in excess of the reasonable value of the substance.

(3) the physical appearance of the capsule or other material containing the substance was substantially identical to a specific controlled substance.

Comment

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

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

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.

Comment

The use of the term "manufacture" in K.S.A. 1998 Supp. 65-4101(n) is distinguished from the use of same term in K.S.A. 1998 Supp. 65-4159 in *State v. Bowen*, 27 Kan. App. 2d 122, 999 P.2d 286 (2000).

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

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.

Comment

The use of the term "manufacture" in K.S.A. 1998 Supp. 65-4101(n) is distinguished from the use of same term in K.S.A. 1998 Supp. 65-4159 in *State v. Bowen*, 27 Kan. App. 2d 122, 999 P.2d 286 (2000).

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.)

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).

In a prosecution under K.S.A. 1999 Supp. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 1999 Supp. 65-4163, the State is required to prove the underlying felony offense. Convictions of both K.S.A. 1999 Supp. 65-4141 and the underlying felony offense do not violate the Double Jeopardy Clause. *State v. Kee*, 27 Kan. App. 2d 677, 6 P.3d 938 (2000).

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.

Notes on Use

For authority, see K.S.A. 65-4164. The previous statute, K.S.A. 65-4127b(c) was repealed in 1994. 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 nonoperson 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).

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.

The trial court should be aware that in *State v. Edwards*, 27 Kan. App. 2d 754, 9 P.3d 568 (2000), a panel of the Court of Appeals held that in addition to the above statutory elements the trial court must also instruct that the evidence must show that the defendant was in possession of the controlled substance a sufficient time to have affixed the tax stamps. No petition for review was filed by the State. The type of possession required in order to be guilty of a violation of the drug tax stamp statute is different from the type of possession required to be guilty of the crime of possession of a controlled substance. Where the defense is raised as to whether the defendant had sufficient possession of the controlled substance and opportunity to affix the stamps, *Edwards* holds that it may be reversible error not to instruct on the issue. If the defense is raised, the trial court should consider adding an additional claim: "That the defendant was in possession of the (name of controlled substance) a sufficient time to have affixed tax stamps." The court should also consider including a definition of possession, possibly: "'Possession' as used in this instruction means actual possession, and not constructive possession."

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).

"[W]here the defendant is charged with possession of marijuana or a controlled substance, the jury must be instructed that the evidence must show the defendant was in possession of the substance in question a sufficient time to have affixed the stamps. A failure to give this instruction may be reversible error." *State v. Edwards*, 27 Kan. App. 2d 754, 9 P.3d 568 (2000).

In *State v. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), a defendant found to be in possession of nine rocks of crack cocaine was not considered a dealer, the court holding that evidence showed crack cocaine is sold by dosage although powder cocaine may be sold by weight. However, a defendant in possession of three rocks of crack cocaine was found to be a dealer where one rock weighed more than seven grams and the charge referred to weight rather than dosage. *State v. Edwards*, supra.

Where defendant had possession of two packages, neither of which was weighed separately but when weighed together weighed 1.4 grams, and neither package was tested separately but were mixed together before testing, the defendant's conviction for no tax stamp was reversed. *State v. Beal*, 26 Kan. App. 2d 837, 994 P.2d 669 (2000).

The Kansas drug tax does not impose a criminal penalty for double jeopardy purposes. *State v. Jensen*, 259 Kan. 781, 915 P.2d 109 (1996); *State v. Yeoman*, 24 Kan. App. 2d 639, 951 P.2d 964 (1997).

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

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

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

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

or

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

or

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

or

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

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. The crime is a drug severity level 4 felony if the value of the proceeds is less than $5,000, a drug severity level 3 felony if the value of the proceeds is at least $5,000 but less than $100,000, a drug severity level 2 felony if the value of the proceeds is at least $100,000 but less than $500,000, and a drug severity level 1 felony if the value of the proceeds is $500,000 or more.

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**

_____, _____, 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.

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 K.S.A. 1999 Supp. 65-7006. A violation of this section is a drug severity level 1 felony.

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 K.S.A. 1999 Supp. 65-7006. A violation of this section is a drug severity level 1 felony.

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CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS

68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, _____

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).

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.

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* 519 U.S. 1090, 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

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). Aggravated assault is not a lesser included crime of attempted murder. *State v. Saiz*, 269 Kan. 657, Syl. 3, 7 P.3d 1214 (2000).

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 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).

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. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).

9. **Aggravated Robbery** - Robbery is a lesser included offense only where there is in issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required. 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. Hollaway*, 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).
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. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974). Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987). In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), aggravated sexual battery was held not to be a lesser included offense of aggravated kidnapping, attempted aggravated sodomy or attempted aggravated rape because of the additional elements of a nonspousal

relationship and intent to arouse or satisfy sexual desires. The dissent argued the rationale that single act of force cannot provide the basis for multiple convictions, which was the basis of the findings that aggravated battery and aggravated robbery were multiplicitous in *State v. Warren*, 252 Kan. 169, 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.

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.

When the factual circumstances of a crime involve a "short, continuous, single incident" comprised of several acts individually sufficient for conviction, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act. *State v. Staggs*, 27 Kan. App. 2d 865, Syl. 2, 9 P.3d 601 (2000).

68.11-A VERDICT FORM - COUNTERFEITING MERCHANDISE OR SERVICES - VALUE OR UNITS IN ISSUE

We, the jury, find the defendant guilty of counterfeiting and find the (number of items) (retail value) of the (property) (services) counterfeited to be:

$25,000 or more ☐
At least $500 but less than $25,000 ☐
Less than $500 ☐
(Place an X in the appropriate square)

or

1,000 items or more ☐
More than 100 items but less than 1,000 items ☐
(Place an X in the appropriate square)

_____
Presiding Juror

Notes on Use

For use under K.S.A. 2000 Supp. 21-3763. Complete the form by selecting the applicable parenthetical expressions and the dollar amounts or items in issue. PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this form. See also PIK 3d 59.70-A, Counterfeiting Merchandise or Services - Value or Units in Issue.

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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.

In *State v. Whitaker*, 255 Kan. 118, 128, 872 P.2d 278 (1994), the defendant challenged a modified *Allen* instruction. The Supreme Court approved the use of PIK instructions but found that a non-PIK instruction given was not clearly erroneous because it did not require the jurors to change their votes or compromise individual judgments for the sake of reaching an agreement or judicial expediency.

The Supreme Court's reasoning for continued disapproval of a deadlock instruction given after the jury has begun deliberations is that such an instruction could be coercive or exert undue pressure on the jury to reach a verdict. One of the primary concerns with an *Allen*-type instruction has always been its timing. When the instruction is given before jury deliberations, some of the questions as to its coercive effect are removed. *State v. Struzik*, 269 Kan. 95, 5 P.3d 502 (2000).

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

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.

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) 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) 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).]

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.

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) 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.

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