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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52.05 STIPULATIONS AND ADMISSIONS

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

(1) _____.

(2) _____.

(3) _____.

Comment

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

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

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

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

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

52.06 PROOF OF OTHER CRIME - LIMITED ADMISSIBILITY OF EVIDENCE

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

Notes on Use

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

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

Comment

For recent cases approving admission of evidence of earlier wrongful acts, see: *State v. Higgenbotham*, 271 Kan. __, 23 P.3d 874 (2001) (to show identity, plan and intent); *State v. Simkins*, 269 Kan. 84, 3 P.3d 1274 (2000) (to show motive or intent); *State v. Carr*, 265 Kan. 608, 963 P.2d 421 (1998) (to establish relationship of parties or continuing course of conduct); *State v. Lane*, 262 Kan. 373, 940 P.2d 422 (1997) (to show intent, identity or knowledge). Admissibility tests are examined in *State v. Jordan*, 250 Kan. 180, 825 P.2d 157 (1992).

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

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. Bly*, 215 Kan. 168, 173, 523 P.2d 397 (1974). The same evidentiary question exists in civil actions. Since the principal focus of most civil actions is not the plaintiff's or defendant's commission of, or propensity to commit, criminal acts, the inherently prejudicial impact of the admission of the party's criminal acts is arguably lessened. For that

reason, the primary focus of this examination will be directed toward the admission of evidence in a criminal action.

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

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

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

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

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

> "Subject to K.S.A. 60-447, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, such evidence is admissible when relevant

to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

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

A. *Separate Hearing Required.* Admissibility of evidence of other crimes under K.S.A. 60-455 should be determined in advance of trial or, if during trial, in the absence of the jury. See *State v. Damewood*, 245 Kan. 676, 681, 783 P.2d 1249 (1989). The issue might well be determined at a pretrial hearing or an informal conference. As noted by a distinguished commentator, the task of determining admissibility can best be performed in an organized and unhurried atmosphere in which the parties can fully explore the evidentiary pattern. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 166 (1978). The hearing should be held prior to trial to avoid delaying the progression of the trial. The purpose of the hearing is to apply the three-part test set forth below.

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

(1) *Relevancy.* Initially, the trial court must determine whether the prior conviction is relevant to prove one of the eight factors specified in K.S.A. 60-455. The determination of relevancy must be based upon some knowledge of the facts, circumstances or nature of the prior offense. *State v. Cross*, 216 Kan. 511, 520, 532 P.2d 1357 (1975). Relevancy is more a matter of logic and experience than of law. Evidence is relevant if it has any tendency to prove or disprove a material fact, or if it renders the desired inference more probable than it would be without the evidence. *State v. Carr*, 265 Kan. at 624. If a particular factor, enumerated in the statute, is not an issue in the case, evidence of other crimes to prove that particular factor is irrelevant. *State v. Marquez*, 222 Kan. 441, 445, 565 P.2d 245 (1977).

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

(a) *Materiality.* Materiality requires that the fact to be proved is significant under the substantive law of the case and properly at issue. *State v. Faulkner*, 220 Kan. 153, 156, 551 P.2d 1247 (1976). To be material for purposes of K.S.A. 60-455, the fact must have a legitimate and effective bearing on the decision of the case and be in dispute. *State v. Faulkner*, 220 Kan. at 156.

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

For example, where criminal intent is obviously proved by the mere doing of an act, the introduction of other-crimes evidence has no probative value to prove intent (i.e., where an armed robber extracts money from a store owner at gunpoint, his or her intent is not genuinely in dispute). Likewise, where a defendant admits committing the act and the defendant's presence at the scene of the crime is not disputed, a trial court should not admit other-crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176. See also *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

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

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

(1) *Motive.* Motive may be defined as the cause or reason which induces action. While evidence of other crimes or civil wrongs may occasionally prove to be relevant to the issue of motive (*State v. Craig*, 215 Kan. 381, 382-383, 524 P.2d 679 [1974]), it is more often the case that the prior crime has no relevance to the issue. See *State v. Carty*, 231 Kan. 282, 288, 644 P.2d 407 (1982); *State v. McCorgary*, 224 Kan. 677, 684-685, 585 P.2d 1024 (1978). A prior crime would be relevant to the issue of motive where the defendant committed a subsequent crime to conceal a prior crime or to conceal or destroy evidence of a prior crime. It is not proper to introduce evidence of other crimes on the issue of motive merely to show similar yet unconnected crimes.

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

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

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

(3) *Intent.* For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). However, the crucial distinction in admitting other crimes evidence on the issue of intent is not whether the crime is a specific or general intent crime, but whether the defendant has claimed his acts were innocent. *State v. Graham*, 244 Kan. 194, 198, 768 P.2d 259 (1989). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal. In that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

Where criminal intent is obviously proved by the mere commission of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it was error to admit. *State v. Nunn*, 244 Kan. at 212.

Examples: Where a stabbing was susceptible of two interpretations, that defendant acted in self-defense or with the intent to kill, evidence of a prior conviction for aggravated battery was properly admitted to prove intent. *State v. Synoracki*, 253 Kan. 59, 74, 853 P.2d 24 (1993). Where the defendant had broken a jewelry store window, had taken the items on display, and had fled, it was clear that the crime was intentional and evidence of a prior crime should not have been admitted. *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1977). Intent is not at issue where there is clear evidence of malice and willfulness. *State v. Hensen*,

221 Kan. 635, 645, 562 P.2d 51 (1977). Intent was properly in issue where the charge of attempted burglary was supported by circumstantial evidence and the defense alleged that the defendant was on his way to see his girlfriend. *State v. Wasinger*, 220 Kan. at 602-603.

(4) *Preparation.* Preparation for an offense consists of devising or arranging means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts may have strong probative value in showing preparation if such acts convince a reasonable person that the actor intended that prior activities culminate in the commission of the crime at issue. *State v. Grissom*, 251 Kan. 851, 925, 840 P.2d 1142 (1992); Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

(5) *Plan.* Plan refers to the antecedent mental condition that points to the commission of the offense or offenses planned. The purpose in showing a common scheme or plan is to establish, circumstantially, the commission of the act charged and the intent with which it was committed. Admission of evidence under K.S.A. 60-455 to show plan has been upheld under at least two theories. "In one the evidence, though unrelated to the crime charged, is admitted to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes. . . . The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts. In such cases the evidence is admissible to show the plan or method of operation and the conduct utilized by the defendant to accomplish the crimes or acts. (citations omitted). . . . Another line of cases has held evidence of prior crimes or acts is admissible to show plan where there is some direct or causal connection between the prior conduct and the crimes charged (citations omitted)." *State v. Damewood*, 245 Kan. 676, 681-83, 783 P.2d 1249 (1989). See also *State v. Tiffany*, 267 Kan. 495, 500-02, 986 P.2d 1064 (1999); *State v. Grissom*, 251 Kan. at 922-25.

(6) *Knowledge.* Knowledge signifies an awareness of wrongdoing. Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 419; *State v. Faulkner*, 220 Kan. at 156. Knowledge is important as an element in crimes that require specific intent, such as receiving stolen property, committing forgery (*State v. Wright*, 194 Kan. 271, 275-276, 398 P.2d 339 [1965]), uttering forged instruments, making fraudulent entries, and possessing illegal drugs (*State v. Graham*, 244 Kan. at 196-98; *State v. Faulkner*, 220 Kan. at 156.) See Slough, 20 Kan. L. Rev. at 419.

(7) *Identity.* Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson*, 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness *is* important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing

Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also, *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

For examples, see *State v. Higgenbotham*, 271 Kan. __, 23 P.3d 874 (2001) (where prior murder was committed in similar manner); *State v. Lane*, 262 Kan. 373, 940 P.2d 422 (1997) (murders of abducted children held sufficiently similar); *State v. Richmond*, 258 Kan. 449, 904 P.2d 974 (where prior rape and robbery were committed in similar manner).

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

D. *Limiting Jury Instruction Required.* In *every* case where evidence of other crimes is admitted solely under the authority of K.S.A. 60-455, the trial court must give an instruction (PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence) limiting the purpose for which evidence of similar offenses is to be considered by the jury. *State v. Bly*, 215 Kan. at 176. The instruction need not be given contemporaneously with the evidence; timing of the instruction is left to the court's discretion. *State v. Hall*, 246 Kan. 728, 740-41, 793 P.2d 737 (1990). The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. An instruction concerning the purpose of evidence of other offenses should include only those factors of K.S.A. 60-455 that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. at 176.

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

The giving of a "shotgun" instruction has been frequently criticized and has been held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. When evidence is admitted solely under the authority of K.S.A. 60-455, the failure to give a limiting instruction, regardless of request, is of such a prejudicial nature as to require the granting of a new trial. *State v. Whitehead*, 226 Kan. 719, 722, 602 P.2d 1263 (1979). When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984).

If evidence of another crime is admissible, independent of K.S.A. 60-455, a limiting instruction is not required but may nevertheless be given. See Section III, Admission Independent of K.S.A. 60-455.

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

* *Conviction Not Required.* To be admissible under K.S.A. 60-455, it is not necessary for the State to show that the defendant was actually convicted of the other offense. *State v. Henson*, 221 Kan. at 644; *State v. Powell*, 220 Kan. 168, 172, 551 P.2d 902 (1976). The statute specifically includes other crimes or *civil wrongs*. An acquittal of the defendant of a prior offense does not bar evidence thereof where otherwise admissible; the acquittal bears only upon the weight to be given to such evidence. *State v. Searles*, 246 Kan. 567, 579, 793 P.2d 724 (1990).

* *Acquittal as a Collateral Estoppel.* When an application is made to admit evidence of a prior offense of which the defendant has been acquitted, an additional consideration may present itself -- the possibility of collateral estoppel. When an issue of ultimate fact has once been determined by a valid and final verdict or judgment, that issue cannot again be litigated between the same parties in any future lawsuit under the rule of collateral estoppel. See *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970). Thus, when a prior similar offense is offered as evidence on a particular issue of material fact and the defendant was previously tried and acquitted of the offense based on a determination of that issue, collateral estoppel nullifies the probative value of the evidence of the former offense. Then such evidence should not be admitted. *State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981). See also *State v. Searles*, 246 Kan. at 579-582.

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

* *Remoteness in Time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. *State v. Breazeale*, 238 Kan. 714, 723, 714 P.2d 1356 (1986). The probative value of a prior conviction progressively diminishes as the time interval between the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also, *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction).

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

the trial court should instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted.

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

* *Sex Offenses.* The Court has apparently taken a more liberal view regarding admission of evidence in prosecutions for sex crimes. See *State v.* Rucker, 267 Kan. 816, 987 P.2d 1080 (1999); *State v. Damewood*, 245 Kan. 676, 783 P.2d 1249 (1989); State *v. Fisher*, 222 Kan. 76, 563 P.2d 1012 (1977). For commentary, see Purinton, *Call it a "Plan" and a Defendant's Prior (Similar) Sexual Misconduct Is In: The Disappearance of K.S.A. 60-455*, JKBA Vol. 70, No. 8, Sept. 2001, and Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. at 175-76.

* *Presentation of Other Crimes in Case-in-Chief.* Evidence of other crimes admitted pursuant to K.S.A. 60-455 should be introduced in the State's case-in-chief rather than by way of cross-examination of the defendant. *State v. Quick*, 229 Kan. 117, 120-22, 621 P.2d 997 (1981); *State v. Harris*, 215 Kan. 961, 509 P.2d 101 (1974).

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

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

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

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

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

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

or skill used by that person on a specified occasion.

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

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

(3) *Res Gestae.* Acts done or declarations made before, during, or after the happening of the principal fact may be admissible as part of the *res gestae* where the acts are so closely connected with it as to form in reality a part of the occurrence. *State v. Davis*, 256 Kan. 1, 21, 883 P.2d 735 (1994).

Res gestae evidence is evidence which, though not constituting a part of the crimes charged, has a natural, necessary, or logical connection to the crime. *State v. Sanders*, 258 Kan. 409, 423, 904 P.2d 951 (1995).

Res gestae includes circumstances or acts which are automatic and undesigned incidents of the particular litigated act and which may be separated from the particular act by lapse of time, but are illustrative of that act. *Res gestae* is the whole of the transaction under investigation or being litigated. Acts or declarations within the whole of that transaction may be admissible as part of the *res gestae* to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *State v. Edwards*, 264 Kan. 177, Syl. ¶ 15, 955 P.2d 1276 (1998).

Acts done or declarations made as part of the *res gestae* are not admitted into evidence without limitation but are governed by the procedural rules and rules of evidence set out by Chapter 60, Article 4, of the Kansas Statutes Annotated. Wide latitude is given to the district court in determining whether evidence constitutes part of the *res gestae*. *State v. Edwards*, 264 Kan. at Syl. ¶ 16.

The admission of *res gestae* evidence does not require a limiting instruction. *State v. Spresser*, 257 Kan. 664, 667, 896 P.2d 1005 (1995).

The admission of other misconduct evidence as part of the *res gestae* has been criticized by Justice Six in his concurring opinion in *State v. Edwards*, 264 Kan. at 203. For further discussion, see Joseph, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455*, 49 Kan. L. Rev. 145, 172-183 (2000).

(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. Lumley*, 266 Kan. 939, 954, 976 P.2d 486 (1999); *State v. Carr*, 265 Kan. 608, 624, 963 P.2d 421 (1998); *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

Kansas courts have consistently admitted evidence of marital discord independently of K.S.A. 60-455 and despite any hearsay objection. *State v. Drach*, 268 Kan. 636, 649-651, 1 P.3d 864 (2000); *State v. Hedger*, 248 Kan. 815, 820, 811 P.2d 1170 (1991); *State v. Taylor*, 234 Kan. 401, 407-08, 673 P.2d 1140 (1983). This rule was extended to include persons living together in *State v. Young*, 253 Kan. 28, 852 P.2d 510 (1993). See also Arguello, *The Marital Discord Exemption to Hearsay: Fact or Judicially Legislated Fiction*, 46 Kan. L. Rev. 63 (1997).

(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, although the failure to do so is not reversible error in the absence of a request for such an instruction. *State v. Humphrey*, 258 Kan. 372, 367, 905 P.2d 664 (1995).

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. *Tucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime"

includes both felonies and misdemeanors. *Tucker 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); *State v. Johnson*, 21 Kan. App. 2d 576, 907 P.2d 144 (1995).

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

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

(10) *Rebuttal of Specific Statement.* The State may introduce evidence of other crimes to specifically rebut the incorrect testimony of a witness tending to establish a defense. *State v. Thompkins*, 263 Kan. 602, 621-25, 952 P.2d 1332 (1998); *State v. Burnett*, 221 Kan. 40, 42-43, 558 P.2d 1087 (1976); *State v. Faulkner,* 220 Kan. at 158-159. The use and extent of rebuttal evidence rests in the sound discretion of the trial court. *State v. Thompkins*, 263 Kan. at 623.

IV. CONCLUSIONS AND RECOMMENDATIONS

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

52.07 MORE THAN ONE DEFENDANT - LIMITED ADMISSIBILITY OF EVIDENCE

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

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

Notes on Use

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

Comment

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

52.17 CONFESSION

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

Comment

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

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

52.18 TESTIMONY OF AN ACCOMPLICE

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

Notes on Use

This instruction was approved in *State v. Schlicher*, 230 Kan. 482, 494, 639 P.2d 467 (1982). Whether or not an accomplice's testimony is corroborated, the better practice is for the trial court to give a cautionary instruction. This instruction should not be given when the accomplice is also a co-defendant.

Comment

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

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

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

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

If the accomplice testimony is partially corroborated, and there is a request for a cautionary instruction, failure to give such an instruction is error, but may or may not be reversible error depending upon what other cautionary instructions were given. *State*

v. Moody, 223 Kan. 699, 576 P.2d 637 (1978). See also, *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Ferguson*, 228 Kan. 522, 618 P.2d 1186 (1980).

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

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

This instruction must be given if requested when an informant's testimony is substantially uncorroborated. *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).

In *State v. Barksdale*, 266 Kan. 498, 514, 973 P.2d 165 (1999), the court expanded the definition of informant to include a disclosed person. Whether disclosed or undisclosed, in order to qualify as an informant, the person must act as an agent for the State in procuring information.

In *State v. Conley*, 270 Kan. 18, 24-25, 11 P.3d 1147 (2000), the court emphasized that an instruction on the testimony of an informant is unnecessary unless the person actually receives a benefit from the State in exchange for information. In this case, a prison inmate contacted the prosecutor's office and offered information about the defendant in the hope of receiving a reduction in his prison time. Although the inmate testified, he did not receive a sentence reduction or any other benefit from the State in exchange for the testimony. The court ruled that, under these facts, the witness was not acting as an informant for the State.

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CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

The definitions and explanations in this chapter are in alphabetical order. A cross reference is provided to statutes and some instructions.

There are many terms which are defined and explained in the Kansas statutes. These statutory definitions have not been repeated here but ready reference is made to the particular statute where a definition or explanation of the term may be found.

In presenting them to the jury, it is suggested that the following prefatory language be used:

"As used in these instructions, the term _____ (means) (includes) _____."

Accessory: The term "accessory" is not used in the Kansas Criminal Code. It is, however, used in K.S.A. 8-2101, Uniform Act Regulating Traffic, Parties to a crime established by uniform act; K.S.A. 48-3003, Code of Military Justice, Accessory after the fact; and K.S.A. 50-125, Restraint of trade, Acts deemed unlawful. In case law the term is used interchangeably with the concept of "aiding and abetting." See generally *State v, Kliewer*, 210 Kan. 820, 504 P.2d 580; *State v. McMullen*, 20 Kan. App. 2d 985, 894 P.2d 251 (1995); *State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999); and *State v. Davis*, 268 Kan. 661, 998 P.2d 1127 (2000). 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). See *State v. Coyote*, 268 Kan. 726, 1 P.3d 836 (2000).

Conduct, Reckless: K.S.A. 21-3201 (c). *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999).

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); *State v. Smith*, 268 Kan. 222, 993 P.2d 1213 (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; *State v. Filor*, 28 Kan. App. 2d 208, 13 P.3d 926 (2000).

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. See also PIK 3d 67.13-D, Possession of a Controlled Substance Defined.

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). See also *State v. Moore*, 269 Kan. 27, 4 P.3d 1141 (2000), for the proposition and discussion that in a robbery case actual fear generally need not be strictly proven, but that the law will presume fear if there are adequate indications of the victim's state of mind.

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-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. Mitchell*, 262 Kan. 434, 442-44, 939 P.2d 879 (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); *State v. Jackson*, 270 Kan. 755, 19 P.3d 121 (2001); *State v. Pink*, 270 Kan. 728, 20 P.3d 31 (2001).

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." In *State v. Wakefield*, 267 Kan. 116, 121, 977 P.2d 941 (1999), the court states that the trier of facts may consider the failure of a person to oppose the commission of a crime in connection with other circumstances as evidence of aiding

and abetting. As with the language from *Green*, the Committee believes that this language from *Wakefield* may properly be refused as an additional instruction by the trial judge because PIK3d 54.05 is adequate.

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).

54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER - CRIME NOT INTENDED

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

Notes on Use

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

Comment

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

In *State v. Pink*, 270 Kan. 728, 20 P.3d 31 (2001), the court approved this instruction in the prosecution of a defendant for felony murder where the State's evidence established that the defendant and another went to a residence with the intent to rob the occupants and some of the occupants were killed in the robbery.

54.07 RESPONSIBILITY FOR CRIME OF ANOTHER - ACTOR NOT PROSECUTED

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

Notes On Use

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

Comment

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

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

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

Notes on Use

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

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

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

Comment

In *State v. Hedges*, 269 Kan. 895, 901, 8 P.3d 1259 (2000), and *State v. Jorrick*, 269 Kan. 72, 83, 4 P.3d 610 (2000), the court makes it clear that after January 1, 1996, both the traditional "insanity" defense and the "diminished mental capacity" defense have been replaced by the "mental disease or defect" defense codified at K.S.A. 22-3220.

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

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

Notes on Use

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

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

Comment

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

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

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

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).

In *State v. Kleypas*, Slip opinion at 70-76, (Docket no. 80,920, filed Dec. 28, 2001), the Supreme Court considered and rejected the defendant's contentions that the trial court's voluntary intoxication instruction based upon PIK 54.12-A changed voluntary intoxication into an affirmative defense and prohibited the jury from aggregating intoxication with other evidence of mental disorder which also affected the defendant's capacity to form the necessary intent.

In *State v. Hedges*, 269 Kan. 895, 901, 8 P.3d 1259 (2000), and *State v. Jorrick*, 269 Kan. 72, 83, 4 P.3d 610 (2000), the court makes it clear that after January 1, 1996, both the traditional "insanity" defense and the "diminished mental capacity" defense have been replaced by the "mental disease or defect" defense codified at K.S.A. 22-3220.

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

54.17-A NO DUTY TO RETREAT

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

Notes on Use

The "no duty to retreat" instruction is required only in infrequent factual situations, such as that found in *State v. Scobee*, 242 Kan. 421, 748 P.2d 862 (1988), with such elements as a nonaggressor defendant being followed to and menaced on home ground. *State v. Ricks*, 257 Kan. 435, 894 P.2d 191 (1995); *State v. Saleem*, 267 Kan. 100, 977 P.2d 921 (1999).

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

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

Notes on Use

For authority, see K.S.A. 21-3214(1). Insert in the blank space the particular forcible felony applicable to the particular case. For a definition of forcible felony, see K.S.A. 21-3110(8).

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

Comment

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

54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

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

Comment

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

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

CHAPTER 55.00

ANTICIPATORY CRIMES

	PIK Number
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Criminal Solicitation	55.09
Criminal Solicitation - Defense	55.10

55.01 ATTEMPT

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

OR

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

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

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

An overt act necessarily must extend beyond mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

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

_____

_____).

Notes on Use

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

at two crime severity levels below the severity level for the completed crime. The lowest level for an attempt to commit a nondrug felony offense is severity level 10.

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

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.

K.S.A. 21-3301(b) provides that legal or factual impossibility is not a defense to a charge of attempt. See also PIK 3d 55.02.

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.

In *State v. Kleypas*, Slip opinion at 67 (Docket no. 80,920, filed Dec. 28, 2001), the Supreme Court recommended that PIK 55.01 be amended to include the term "overt act" rather than "act" and to include language indicating that mere preparation is insufficient to constitute an overt act. The Committee's definitional paragraph also includes language from *State v. Gobin*, 216 Kan. at Syl. 3.

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.

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).

In *State v. Jones*, 271 Kan. 201, 21 P.3d 569 (2001), the defendant solicited a partner for a sexual fetish via e-mail, and carried on e-mail correspondence with a person he thought to be a 13-year-old girl. The person with whom he was corresponding was actually an adult male police officer, and an adult female police officer met him at a mall, posing as the teenager. The Supreme Court upheld the defendant's conviction of attempted indecent liberties with a child, relying on K.S.A. 21-3301(b), which establishes that neither factual nor legal impossibility is a defense to a charge of attempt.

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

CHAPTER 56.00
CRIMES AGAINST PERSONS

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56.00-A CAPITAL MURDER

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

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

1. **That the defendant intentionally killed _____.**
2. **That such killing was done with premeditation.**
3. **(a) That such killing was done in the commission of a (kidnapping) (aggravated kidnapping) when the (kidnapping) (aggravated kidnapping) was committed with the intent to hold _____ for ransom;**

OR

(b) That such killing was done pursuant to a contract or agreement to kill _____;

OR

(c) That the defendant was an inmate or prisoner (confined in a state correctional institution) (confined in a community correctional institution) (confined in a jail) (in the custody of an officer or employee of a [state correctional institution] [community correctional institution] [jail]);

OR

(d) That _____ was a victim of (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy), and such killing was done in the commission of or subsequent to such (rape) (criminal sodomy) (aggravated criminal sodomy) (attempted rape) (attempted criminal sodomy) (attempted aggravated criminal sodomy);

OR

(e) That _____ was a law enforcement officer; [Law enforcement officer means any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes, or any officer of the Kansas Department of Corrections.]

OR

(f) That the premeditated and intentional killing of _____ and (_other victim[s]_) was (a part of the same act or transaction) (in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct);

OR

(g) That _____ was a child under the age of 14 years and such killing was done in the commission of (kidnapping) (aggravated kidnapping) when such (kidnapping) (aggravated kidnapping) was done with intent to commit a sex offense upon or with _____ or with intent that _____ commit or submit to a sex offense;

[Sex offense means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution, or sexual exploitation of a child.]

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

Notes on Use

For authority, see K.S.A. 21-3439, effective July 1, 1994. Capital murder is an off-grid person felony subject to a possible sentence of death. For first degree murder, see PIK 3d 56.01, Murder in the First Degree. For felony murder, see PIK 3d 56.02, Murder in the First Degree - Felony Murder.

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

When defendant is charged with a capital murder done in the commission of or subsequent to another offense, the elements of the other offense should be set out in a separate instruction.

In the case of murder for hire, any party to the contract or agreement is guilty of capital murder. Modifications to this instruction will be necessary in those cases where the defendant was not the person who performed the killing.

Comment

Kansas' first death penalty case under K.S.A. 21-3439 is *State v. Kleypas*, (Docket no. 80,920, filed Dec. 28, 2001).

56.00-B CAPITAL MURDER - DEATH SENTENCE - SENTENCING PROCEEDING

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

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

Notes on Use

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

Not later than five days after the time of arraignment, the county or district attorney shall file written notice of an intention to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. If the written notice is not filed, the sentencing proceeding is not permitted and the defendant shall be sentenced as otherwise provided by law.

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

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

Comment

Kansas' first death penalty case under K.S.A. 21-3439 is *State v. Kleypas*, (Docket no. 80,920, filed Dec. 28, 2001).

56.00-C CAPITAL MURDER - DEATH SENTENCE - AGGRAVATING CIRCUMSTANCES

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

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

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

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

and/or

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

and/or

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

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

Notes on Use

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

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

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

Comment

"In order to find that a murder was committed in an especially heinous, atrocious, or cruel manner so as to satisfy the aggravating circumstance contained in K.S.A. 21-4625(6), the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death. The Kansas definition of 'heinous, atrocious or cruel' narrows the class of death eligible defendants consistent with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution." *State v. Kleypas*, Slip opinion at Syl. 54-55 (Docket no. 80,920, filed Dec. 28, 2001).

Also contained in *Kleypas*, Slip opinion at 172-181, is an analysis regarding the defendant's constitutional and evidentiary challenge to the "avoid arrest" aggravating circumstance relied upon by the State. In a later section of the opinion, the Court also distinguishes the aggravating circumstance of "heinous, atrocious or

cruel manner" from the aggravating circumstance of "avoiding arrest." Slip opinion at 258-260.

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

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

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

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

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

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

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

56.00-D CAPITAL MURDER - DEATH SENTENCE - MITIGATING CIRCUMSTANCES

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

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

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

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

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

5. [The defendant acted under extreme distress or under the substantial domination of another person.]
and/or
6. [The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]
and/or
7. [The age of the defendant at the time of the crime.]
and/or
8. [At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]
and/or
9. [A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.] and/or
10. Other_____.]

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.

Notes on Use

For authority, see K.S.A. 21-4624(c) and 21-4626 and *State v. Kleypas*, Slip opinion at 254 (Docket no. 80,920, filed Dec. 28, 2001). The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the death sentence proceeding

Comment

In *State v. Kleypas*, Slip opinion at 193-96 (Docket no. 80,920, filed Dec. 28, 2001), the Supreme Court approved the trial court's instruction to the jury on the exercise of mercy as a mitigating circumstance. The Court also approved an instruction using language similar to that found in the first paragraph and first sentence of the third paragraph of PIK 56.00-D. Slip opinion at 248-250. The Court also recommended that language similar to the last two sentences of the third

paragraph of 56.00-D be adopted. Slip opinion at 254. The Court held that the jury need not find mitigating factors in writing. Slip opinion at 220.

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

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

56.00-D-1 CAPITAL MURDER - DUTY TO INFORM JURY OF ALTERNATIVE SENTENCE ABSENT DEATH SENTENCE

The Committee wishes to alert trial judges that, if requested, they must instruct the jury regarding the number of years in prison which a defendant will serve if not sentenced to death. The Committee has not attempted to draft such a pattern instruction, as each case will vary on its facts. However, trial judges will need to fashion such an instruction themselves if requested.

Notes on Use

"Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court." *State v. Kleypas*, Slip opinion at 258 (Docket no. 80,920, filed Dec. 28, 2001).

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

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist.

Notes on Use

For authority, see K.S.A. 21-4625 and *State v. Kleypas*, Slip opinion at 172 (Docket no. 80,920, filed Dec. 28, 2001).

Comment

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

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

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

Notes on Use

For authority see *State v. Kleypas*, Slip opinion at 172, 243 (Docket no. 80,920, filed Dec. 28, 2001). This instruction should be given in all death sentence proceedings to provide guidance to the jury that their decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

Comment

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

56.00-G CAPITAL MURDER - DEATH SENTENCE - REASONABLE DOUBT

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.

However, if one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court as otherwise provided by law.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, Slip opinion at 172, 234-35, 254 (Docket no. 80,920, filed Dec. 28, 2001).

Comment

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

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

56.00-H CAPITAL MURDER - DEATH SENTENCE - SENTENCING RECOMMENDATION

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

You have been provided two verdict forms which provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, and sentencing the defendant to death;

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, Slip opinion at 172, 234-35 (Docket no. 80,920, filed Dec. 28, 2001).

56.01 MURDER IN THE FIRST DEGREE

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

Notes on Use

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

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

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

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

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

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4625.

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

Comment

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

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, Slip opinion at 159 (Docket no. 80,920, filed Dec. 28, 2001).

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

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

Notes on Use

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

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

Comment

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

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

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, Slip opinion at 159 (Docket no. 80,920, filed Dec. 28, 2001).

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

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

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

Notes on Use

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

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

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

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

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

In *State v. Kleypas*, Slip opinion at 64 (Docket no. 80,920, filed Dec. 28, 2001), the Supreme Court held "in the commission of," "attempt to commit," and "flight from," as used in K.S.A. 21-3401, are temporal requirements delineating when a killing may occur and still be part of the underlying felony.

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

A felon may not be convicted of felony murder for the killing of his co-felon, caused not by his acts or actions but by the lawful acts of a law enforcement officer acting in self-defense in the course and scope of his duties in apprehending the co-felon, who was fleeing from an aggravated burglary in which both felons had participated. *State v. Sophophone*, 270 Kan. 703, 19 P.3d 70 (2001).

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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.]

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

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

56.04 HOMICIDE DEFINITIONS

(a) **Maliciously.**

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

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

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

(b) **Premeditation.**

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

For authority, see *State v. Holmes*, (Docket no. 84,360, filed Nov. 9, 2001); *State v. Jamison*, 269 Kan. 564, 573, 7 P.3d 1204 (2000); and *State v. Moncla*, 262 Kan. 58, 70-73, 936 P.2d 727 (1997).

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

(c) **Willfully.**

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

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

57.14 PROSTITUTION

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

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

1. **That the defendant (performed for hire) (offered or agreed to perform for hire where there is an exchange of value) the act of (sexual intercourse) (sodomy) (manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or to gratify the sexual desires of the defendant or another person); and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3512. Prostitution is a class B, nonperson misdemeanor. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

In *City of Junction City v. White*, 2 Kan. App. 2d 403, 580 P.2d 891 (1978), the Court of Appeals held that it was within the police power of the State to prohibit prostitution and that the right of privacy does not protect solicitation of customers by a prostitute.

In *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984), the Kansas Supreme Court held that K.S.A. 21-3512, which prohibits prostitution, is not unconstitutionally vague or overbroad. The language gives a definite warning as to the conduct proscribed when measured by common understanding and practice.

57.15 PROMOTING PROSTITUTION

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

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

1. **That the defendant:**
   - (a) **(established) (owned) (maintained) (managed) a house of prostitution; and**

     OR
   - (b) **participated in the (establishment) (ownership) (maintenance) (management) of a house of prostitution; and**

     OR
   - (c) **permitted any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; and**

     OR
   - (d) **procured a prostitute for a house of prostitution; and**

     OR
   - (e) **induced another to become a prostitute; and**

     OR
   - (f) **solicited a patron for a prostitute or for a house of prostitution; and**

     OR
   - (g) **procured a prostitute for a patron; and**

     OR
   - (h) **(procured transportation for) (paid for the transportation of) (transported) a person with the intention of assisting or promoting that person's engaging in prostitution; and**

     OR
   - (i) **was employed to perform any act of [set out applicable section of (a) through (h)]; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

1. **That the defendant intentionally touched the person of _____;**
2. **That the touching was done with the intent to arouse or satisfy the sexual desires of the defendant or another;**
3. **That _____ was then 16 or more years of age;**
4. **That the touching was done without the consent of _____ under circumstances when _____ was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (_other substance_), which condition was known by the defendant or was reasonably apparent to the defendant; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3518(a)(3). Aggravated sexual battery is a severity level 5, person felony.

Comment

See Comment to PIK 3d 57.20. Aggravated Sexual Battery - Force or Fear.

57.26 UNLAWFUL SEXUAL RELATIONS WITH INMATES, ETC.

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

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

1. **The defendant engaged in consensual (sexual intercourse) (lewd fondling or touching) (sodomy) with _____;**
2. **That the defendant and _____ were not married;**

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

4. **That _____ was a person 16 years of age or older who was an inmate;] and**

OR

[3. That the defendant was a parole officer;

4. **That _____ was a person 16 years of age or older who had been released on (parole) (conditional release) (post-release supervision) and was under the direct supervision and control of the defendant;] and**

OR

[3. That the defendant was (a law enforcement officer) (an employee of a jail) (an employee of a contractor who was under contract to provide services in a jail);

4. **That _____ was a person 16 years of age or older who was confined by lawful custody to a jail;] and**

OR

[3. That the defendant was (a law enforcement officer) (an employee of a juvenile detention facility or sanctions house) (an employee of a contractor who was under contract to provide services in a juvenile detention facility or sanctions house);

4. That _____ was a person 16 years of age or older who was confined by lawful custody to a juvenile detention facility or sanctions house;] and

OR

[3. That the defendant was an employee of (the Juvenile Justice Authority) (a contractor who was under contract to provide services in a juvenile correctional facility);

4. That _____ was a person 16 years of age or older who was confined by lawful custody to a juvenile correctional facility;] and

OR

[3. That the defendant was an employee of (the Juvenile Justice Authority) (a contractor who was under contract to provide direct supervision and offender control services to the Juvenile Justice Authority);

4. That _____ was a person 16 years of age or older (released on conditional release from a juvenile correctional facility under the direct supervision and control of the defendant) (placed in the custody of the Juvenile Justice Authority under the direct supervision and control of the defendant);] and

OR

[3. That the defendant was (an employee of the department of social and rehabilitation services) (an employee of a contractor who was under contract to provide services in a social and rehabilitation services institution);

4. That _____ was a person 16 years of age or older who was a patient in such institution;] and

OR

[3. That the defendant was a (teacher) (person in a position of authority);

4. That _____ was a person 16 or 17 years of age who was a student enrolled at the school where the defendant was employed;] and

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

Notes on Use

For authority, See K.S.A. 21-3520. Unlawful sexual relations with inmates, etc. is a severity level 10, person felony. For the definitions of "correctional institution," "inmate," and "parole officer," see K.S.A. 75-5202. For the definition of "postrelease supervision," see K.S.A. 21-4703. For the definitions of "juvenile detention facility," "juvenile correctional facility," and "sanctions house," see K.S.A. 38-1602. For the definition of "institution," see K.S.A. 76-12a01. The definition of "teacher" means and includes "teachers, supervisors, principals, superintendents, and any other professional employee in any public or private school."

Comment

K.S.A. 21-3520(a)(7) does not apply to a patient in an institution who is incapable of giving consent pursuant to K.S.A. 21-3502(a)(1)(C) or K.S.A. 21-3506(a)(3)(C).

K.S.A. 21-3520(a)(8) does not apply if the offender is the parent of the student. In the case of a parent offender, K.S.A. 21-3603 applies.

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57.27 UNLAWFUL VOLUNTARY SEXUAL RELATIONS

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

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

1. **That the defendant engaged in (sexual intercourse) (sodomy) (lewd fondling or touching) with (_____);**
2. **That (_____) was a child who was 14 years of age but less than 16 years of age at the time of the act;**
3. **That the defendant was less than 19 years of age and less than 4 years of age older than (_____);**
4. **That (_____) and the defendant were the only parties involved in the act;**
5. **That the defendant and (_____) were members of the opposite sex; and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3522. Under this statute, sexual intercourse is a severity level 8, person felony; sodomy is a severity level 9 person felony; and lewd fondling or touching is a severity level 10, person felony.

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

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58.01 BIGAMY

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

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

1. **That the defendant entered into a marriage in the State of Kansas while married to another; and**

   OR

   That the defendant entered into a marriage in the State of Kansas with a person the defendant knew was the spouse of another; and

   OR

   That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse while married to another at the time of the cohabitation; and

   OR

   That the defendant, after entering into a marriage in another state or country, cohabited within the State of Kansas with a spouse whom the defendant knew was a spouse of another at the time of the cohabitation; and

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

Notes on Use

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

Comment

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

58.06 NONSUPPORT OF A CHILD

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

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

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

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

Notes on Use

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

Comment

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

One who is outside the state may be chargeable with nonsupport of a child within this state even though he or she did not know the child was within the state. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918); *In re Fowles*, 89 Kan. 430, 131 Pac. 598 (1913).

It is no defense that the necessities of a child are provided by others. In a factual situation of the latter type, it would appear proper to instruct that "the children should be deemed to be in destitute or necessitous circumstances, if they would have been in such condition had they not been provided for by someone else." *State v. Wellman*, supra; *State v. Knetzer*, 3 Kan. App. 2d 673, 600 P.2d 160 (1979).

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

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

Necessitous circumstances was defined in *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913), and was cited with approval in *State v. Knetzer*, supra. Compare with *State v. Selberg*, 21 Kan. App. 2d 610, 904 P.2d 1014 (1995).

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

Prosecution under K.S.A. 21-3605(a)(1) may be based upon failure to meet a common law duty to support one's children and does not necessarily rest upon a failure to meet child support obligations issued by a divorce court. *State v. Filor*, 28 Kan. App. 2d 208, 13 P.3d 926 (2000).

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 OR CEREAL MALT BEVERAGE TO A MINOR

The defendant is charged with the crime of furnishing (alcoholic liquor) (cereal malt beverage) to a minor. The defendant pleads not guilty.

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

1. **That the defendant directly or indirectly (sold alcoholic liquor to) (bought alcoholic liquor for) (gave alcoholic liquor to) (furnished alcoholic liquor to) _____;**

   OR

   That the defendant directly or indirectly (sold cereal malt beverage to) (bought cereal malt beverage for) (gave cereal malt beverage to) (furnished cereal malt beverage to) _____;
2. **That _____ was a person under the age of 21 years; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3610. Furnishing alcoholic liquor or cereal malt beverage to a minor is a class B, person misdemeanor for which the minimum fine is $200.

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

See K.S.A. 41-2701 for definition of cereal malt beverage.

Comment

K.S.A. 21-3610 exempts from prosecution under this statute the parents or legal guardians of a minor or ward who furnish cereal malt beverage to that minor or ward.

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 Liquor or Cereal Malt Beverage to a Minor - Defense, for defense available to licensed retailer, club, drinking establishment or caterer.

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58.12-A FURNISHING CEREAL MALT BEVERAGE TO MINOR

In 2001, the legislature repealed the statute on which this instruction was based, K.S.A. 21-3610a, and incorporated its provisions into K.S.A. 21-3610. See PIK 3d 58.12 for an instruction on furnishing alcoholic liquor or cereal malt beverage to a minor.

58.12-B FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR ILLICIT PURPOSES

The defendant is charged with the crime of furnishing alcoholic beverages to a minor for illicit purposes. The defendant pleads not guilty.

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

1. **That the defendant directly or indirectly ([sold] [bought] [gave] [furnished]) ([a cereal malt beverage] [an intoxicating liquor]) ([for] [to]) _____;**
2. **That _____ was a child under 18 years of age;**
3. **That the defendant did so with the intent (to commit against _____) (to [encourage] [induce] _____ to [commit] [participate in]) the crime of (set out the crime as defined in Article 35 of Chapter 21 of Kansas Statutes Annotated or in K.S.A. 21-3602 or 21-3603 and amendments thereto); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3610b. Furnishing alcoholic beverages to a minor for illicit purposes is a severity level 9, person felony.

For a definition of "cereal malt beverage," see K.S.A. 41-2701 and amendments thereto.

58.12-C FURNISHING ALCOHOLIC LIQUOR OR CEREAL MALT BEVERAGE TO A MINOR - DEFENSE

It is a defense to the charge of furnishing (alcoholic liquor) (cereal malt beverage) to a minor that the defendant was a licensed retailer, club, drinking establishment or caterer, or holds a temporary permit, or an employee thereof; that the defendant sold the (alcoholic liquor) (cereal malt beverage) to the person with reasonable cause to believe that the person was 21 or more years of age; and that to purchase the (alcoholic liquor) (cereal malt beverage), the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document containing a photograph of the minor and purporting to establish that such minor was 21 or more years of age.

Notes on Use

For authority, see K.S.A. 21-3610(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

58.12-D FURNISHING CEREAL MALT BEVERAGE TO A MINOR - DEFENSE

In 2001, the legislature repealed the statute on which this instruction was based, K.S.A. 21-3610a, and incorporated its provisions into K.S.A. 21-3610. See PIK 3d 58.12-C for an instruction on defenses to the charge of furnishing alcoholic liquor or cereal malt beverage to a minor.

or

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

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

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

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

Notes on Use

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

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

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

Comment

In *State v. VanHecke and Gault*, 28 Kan. App. 2d 778, 20 P.3d 1277 (2001), the Court of Appeals reversed the district court's dismissal of charges against two high school teachers who had become involved in consensual sexual relationships with their 17-year-old students. The court found that K.S.A. 21-3612 encompassed intentionally causing a child under the age of 18 to become a child in need of care, as defined by the CINC statutes. The court further found that the CINC code defines a "child in need of care" to include a person less than 18 years of age who has been sexually abused. The CINC code refers back to K.S.A. Chapter 21, Article 35, and 21-3602 (incest) and 21-3603 (aggravated incest) for a definition of sexual abuse.

It should be noted that under *VanHecke*, sexual acts by any person with a 16- or 17-year-old may subject that person to criminal prosecution under K.S.A. 21-3612(a)(1).

CHAPTER 59.00

CRIMES AGAINST PROPERTY

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59.01 THEFT

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

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

1. **That _____ was the owner of the property;**
2. **That the defendant (obtained) (exerted) unauthorized control over the property;**

   OR

   That the defendant obtained control over the property by means of a false statement or representation which deceived _____ who had relied in whole or in part upon the false representation or statement of the defendant;

   OR

   That the defendant obtained by threat control over property;

   OR

   That the defendant obtained control over property knowing the property to have been stolen by another;
3. **That the defendant intended to deprive _____ permanently of the use or benefit of the property;**
4. **That the value of the property was ($25,000 or more) (at least $500 but less than $25,000) (less than $500); and**
5. **That this act occurred on or about the _____ day of _____, _____, 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

59.01-C THEFT-MULTIPLE-VALUE NOT IN ISSUE

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

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

1. **That [list all victims] were the owners 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 [list all victims] 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 [list all victims] permanently of the use or benefit of the property;**
4. **That [list all victims] were operating mercantile establishments;**
5. **That all of the above acts occurred within a 72-hour period and were each part of a common scheme or course of conduct; and**
6. **That these acts occurred on or between the _____ days of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority see K.S.A. 2001 Supp. 21-3701 which provides that theft from three separate merchants within a 72-hour period is a level 9 nonperson felony if the thefts were part of a common scheme or course of conduct.

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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 _____;**
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."

This instruction was approved in *State v. Rodriguez*, 269 Kan. 633, 637, 8 P.3d 712 (2000).

Comment

In *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977), it is held that a defendant who runs from a federal officer assisting state law enforcement officials in an arrest for state theft charges has obstructed official duty of a law enforcement official. To sustain a conviction under K.S.A. 21-3808, it is necessary that the State prove the defendant had reasonable knowledge that the person he or she opposed was a law enforcement official.

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

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

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

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

It was held in *State v. Timley*, 25 Kan. App. 2d at 786, that a felony arrest without a warrant is not legal process as defined in K.S.A. 21-3808.

In *State v. Seabury*, 267 Kan. 431, 985 P.2d 1162 (1999), the court held that obstructing the execution of a search warrant is a misdemeanor.

An instruction on the elements of an underlying felony is unwarranted when all the instructions coupled with the evidence at trial clearly specify the crime charged. Use of PIK 3d 60.09 is favored when the State charges obstruction of an officer in the discharge of his or her duties. *State v. Scott*, 28 Kan. App. 2d 418, 17 P.3d 966 (2001).

60.10 ESCAPE FROM CUSTODY

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

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

1. **That the defendant was being held in custody (on a written charge of a misdemeanor) (following defendant's conviction of a misdemeanor) (on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a misdemeanor) (upon commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a misdemeanor offense);**
2. **That the defendant intentionally departed from custody without lawful authority from _____; and**

   OR

   That the defendant intentionally failed to return to custody (following temporary leave lawfully granted) (following a court order authorizing temporary leave); and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

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

notwithstanding expungement, is forever disqualified from holding public office or employment. For sports bribery, see PIK 3d 66.06, Sports Bribery. Where the breach of official duty has already occurred, see PIK 3d 61.03, Compensation for Past Official Acts.

Comment

The bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's authority to make a binding decision. *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978). The bribery statutes were held not to be unconstitutionally vague and indefinite in *State v. Campbell*, 217 Kan. 756, 780, 539 P.2d 329 (1975).

61.02 OFFICIAL MISCONDUCT

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

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

1. That the defendant was a public (officer)(employee);
2. That the defendant knowingly and willfully used or authorized the use of ([an aircraft] [a vehicle] [a vessel]) ([under the defendant's control or direction] [in the defendant's custody]) exclusively for the private benefit or gain of (the defendant) (another); and

OR

That the defendant knowingly and willfully failed to serve civil process when required by law; and

OR

That the defendant knowingly and willfully used information confidential by law acquired in the course of and related to the defendant's office or employment (for the private benefit or gain of [the defendant][another])(to cause harm maliciously to another); and

OR

That the defendant knowingly and willfully and with the intent to reduce or eliminate competition among bidders or prospective bidders on any contract or proposed contract (disclosed confidential information regarding proposals or communications from bidders or prospective bidders on any contract or proposed contract) (accepted any bid or proposal on a contract or proposed contract after the deadline for acceptance of such bid or proposal) (altered any bid or proposal submitted by a bidder on a contract or proposed contract); and

OR

That the defendant knowingly and willfully

(destroyed) (tampered with) (concealed) evidence of a crime; and

OR

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

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

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

Notes on Use

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

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

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

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

Official misconduct committed by the acts defined in the first four alternatives of Element No. 2 of the instruction is a class A, nonperson misdemeanor. If the crime is committed by destroying, tampering with or concealing evidence of a crime, it is a severity level 8, nonperson felony if the evidence is of a felony, and a class B misdemeanor if the evidence is of a misdemeanor. If the crime is

committed by submitting a false or duplicate claim, it is a severity level 7, nonperson felony if the claim is for $25,000 or more; a level 9, nonperson felony if the claim is for at least $500 but less than $25,000; and a class A, nonperson misdemeanor if the claim is for less than $25,000.

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

Comment

State v. Adams, 254 Kan. 436, 866 P.2d 1017 (1994), held K.S.A. 21-3902 unconstitutional as vague and a violation of due process. The statute was amended in 1995 to state the specific acts forbidden.

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61.03 COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

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

1. **That _____ was a public (officer) (employee);**
2. **That _____ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;**

   OR

   That _____ performed an act of official misconduct, as follows: _____ _____;
3. **That the defendant (gave) (offered to give) to _____ any benefit, reward or consideration intending it to be compensation for the act; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 3d 61.04, Compensation for Past Official Acts - Defense.

In Element No. 2, designate the act alleged to constitute "official misconduct."

Comment

In *State v. Wilson*, 11 Kan. App. 2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

In *State v. Fritz*, 261 Kan. 294, 302, 933 P.2d 126 (1997), the court held that the test to determine whether the charges in a complaint or information are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges are not multiplicitous.

61.06 PERMITTING A FALSE CLAIM

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

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

1. **That the defendant was a public (officer) (employee);**
2. **That the defendant (approved by audit) (allowed or paid) a claim made upon _____;**
3. **That the defendant knew such claim was false or fraudulent in whole or in part;**
4. **That the amount of the false claim presented was (less than $500) (more than $500 but less than $25,000) ($25,000 or more); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3905. Permitting a false claim for $25,000 or more is a severity level 7, nonperson felony. Permitting a false claim for at least $500 but less than $25,000 is a severity level 9, nonperson felony. Permitting a false claim for less than $500 is a class A, nonperson misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his or her public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim, and PIK 3d 59.70, Value in Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value in Issue.

In Element No. 2, designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

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

63.01 DISORDERLY CONDUCT

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

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

1. That the defendant:

(a) engaged in brawling or fighting;

OR

(b) disturbed an assembly, meeting, procession, not unlawful in its character;

OR

(c) engaged in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others;

OR

(d) used offensive, obscene or abusive language that would tend to reasonably arouse alarm, anger or resentment in others.

2. That the defendant acted with knowledge or reasonable cause to believe that (his) (her) (conduct) (language) would alarm, anger, or disturb others or provoke an assault or other breach of the peace; and

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

(The language used by the defendant must be "fighting words" directed to a specific person or group. "Fighting words" means words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace.)

Notes on Use

For authority, see K.S.A. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The last

paragraph, a definitional paragraph for "fighting words," should be used when the defendant's speech is alleged to be the disorderly conduct.

Comment

In *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980), the Court found the statute as applied to conduct involving only speech was facially overbroad. It upheld the statute by construing it to prohibit only speech amounting to "fighting words." In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942), the Court upheld a state statute which, as construed by the state court, prohibited only words "plainly likely to cause a breach of the peace by the addressee." See also, *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983), disapproving former PIK 2d 63.01 as applied to speech; and *City of Wichita v. Edwards*, 23 Kan. App. 2d 962, 939 P.2d 942 (1997). In *State v. Phelps*, 28 Kan. App. 2d 690, 20 P.3d 731 (2001), the Court stated that a necessary element of "fighting words" is that the words be directed to a specific person or group.

In *State v. Beck*, 9 Kan. App. 2d 459, 461, 682 P.2d 137 (1984), the court stated that "there is no requirement in the statute that the general public be disturbed or that there be a danger of public disturbance." The court stated that "disorderly conduct is an offense which may be committed either in a public or private place." The court went on to state, "Unless it can be said that defendant's words were not fighting words as a matter of law, . . . the ultimate determination [is] a question of fact for the finder of fact." 9 Kan. App. 2d at 463.

State v. Beck, supra, also discussed the issue of just how thick skinned police officers have to be when confronted with disorderly conduct. The *Beck* court quoted with approval the Minnesota Supreme Court in *City of St. Paul v. Morris*, 258 Minn. 467, 468-69, 104 N.W.2d 902 (1960), stating that:

> "While it is obvious that not every abusive epithet directed toward police officers would be sufficiently disturbing or provocative to justify arrest for disorderly conduct, there is no sound reason why officers must be subjected to indignities such as present here, indignities that go far beyond what any other citizen might reasonably be expected to endure." 9 Kan. App. 2d at 462.

The *Beck* court further went on to say that the fact that the addressee is a police officer is only one factor to be considered when determining if fighting words were present. There is no *per se* rule for police officers.

Disorderly conduct will not usually be a lesser included offense of criminal threat or battery. *State v. Butler*, 25 Kan. App. 2d 35, 956 P.2d 733 (1998).

63.02 UNLAWFUL ASSEMBLY

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

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

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

   OR

   That the defendant in a lawfully assembled group of not less than five persons agreed to engage in (disorderly conduct) (a riot); and

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

Notes on Use

For authority, see K.S.A. 21-4102. Unlawful assembly is a class B, nonperson misdemeanor. A definition of disorderly conduct or riot must be given with this instruction. See PIK 3d 63.01, Disorderly Conduct or PIK 3d 63.04, Riot. For instruction involving conspiracy, see PIK 3d 55.03, Conspiracy.

63.09 PUBLIC INTOXICATION

The statute upon which this instruction was based (K.S.A. 21-4109) was repealed in 1977. See, however, K.S.A. 8-1543, pedestrian under the influence of alcohol or drugs, misdemeanor.

63.10 GIVING A FALSE ALARM

The defendant is charged with the crime of giving a false alarm. The defendant pleads not guilty.

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

1. **That the defendant transmitted in any manner to the fire department of any (city) (township) (other municipality) an alarm of fire;**

   OR

   That the defendant made a call in any manner for (police) (fire) (medical) (_specify other emergency service from K.S.A. 12-5301 *et seq.*_) emergency service assistance;
2. **That the defendant did so knowing that there was no reasonable ground to believe (a fire existed) (emergency service assistance was needed); and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4110. Giving a false alarm is a class A, nonperson misdemeanor. See PIK 3d 56.23, Criminal Threat, and 56.23-B, Aggravated Criminal Threat, which concern threats of violence communicated with the intent to terrorize or to cause evacuation of buildings or transportation facilities.

Comment

State v. Long, 234 Kan. 580, 675 P.2d 832 (1984) distinguishes a lesser included offense from a lesser degree of the same crime. The Committee does not believe that giving a false alarm is either a lesser included offense or a lesser degree of the crime of criminal threat.

65.15 CRUELTY TO ANIMALS

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

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

1. **That the defendant:**
   (a) **intentionally (killed) (injured) (maimed) (tortured) (mutilated) (_the animal_); and**

   OR

   (b) **(abandoned) (left) _____ without making provisions for its proper care; and**

   OR

   (c) **had physical custody of _____ and failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) (_other care_) as needed for the health or well-being of that kind of animal; and**
2. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4310. Cruelty to animals is a class A, nonperson misdemeanor. The act or acts of cruelty specified in (1)(a), (b) or (c) appropriate to the case, should be used in the instruction.

Comment

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

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

65.16 CRUELTY TO ANIMALS - DEFENSE

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

Notes on Use

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

CHAPTER 67.00

CONTROLLED SUBSTANCES

	PIK Number
REPEALED	67.01 - 67.12
Narcotic Drugs And Certain Stimulants - Possession	67.13
Controlled Substances - Sale Defined	67.13-A
Narcotic Drugs And Certain Stimulants - Sale, Etc.	67.13-B
Narcotic Drugs And Certain Stimulants - Possession Or Offer To Sell With Intent To Sell	67.13-C
Possession Of A Controlled Substance Defined	67.13-D
Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Possession Or Offer To Sell With Intent To Sell	67.14
Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Sale, Etc.	67.15
Stimulants, Depressants, Hallucinogenic Drugs Or Anabolic Steroids - Possession	67.16
Simulated Controlled Substances, Drug Paraphernalia, And Anhydrous Ammonia - Use Or Possession With Intent To Use	67.17
Possession Or Manufacture Of Simulated Controlled Substance	67.18
Delivery Of Drug Paraphernalia	67.18-A
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Possession By Dealer - No Tax Stamp Affixed 67.24
Receiving Or Acquiring Proceeds Derived From A Violation Of The Uniform Controlled Substances Act ... 67.25
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Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Possession 67.27
Ephedrine, Psuedoephedrine Or Phenylpropanolamine - Marketing, Sale, Etc. 67.28

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 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, conviction for a second offense is a drug severity level 2 felony, and conviction for a third or subsequent offense is 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.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

Comment

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).

In *State v. Daniels*, 28 Kan. App. 2d 364, 17 P.3d 373 (2000), the court held that Daniels' prior conviction for possession with intent to sell cocaine could not be used to enhance his sentence for possession of cocaine.

Where defendant was charged with and convicted of possession of amphetamines with intent to sell and the evidence at trial established that the controlled substance was methamphetamine, the court in *State v. McMannis*, 12 Kan. App. 2d 464, 747 P.2d 1343 (1987), reversed the conviction. The court held that "under the express terms of the statute under which defendant was convicted, amphetamine and methamphetamine are considered two different substances."

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. Maxwell*, 10 Kan. App. 2d 62, 691 P.2d 1316 (1984); *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 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, conviction for a second offense is a drug severity level 2 felony, and conviction for a third or subsequent offense is 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. See PIK 3d 67.13-A.

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).

That portion of K.S.A. 65-4161 prohibiting sale of drugs within 1,000 feet of a school prohibits sales within 1,000 feet of a school "as the crow flies, not by pedestrian routes." *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (1996).

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 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, conviction for a second offense is a drug severity level 2 felony, and conviction for a third or subsequent offense is 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. See PIK 3d 67.13-A.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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).

Where defendant was charged with and convicted of possession of amphetamines with intent to sell and the evidence at trial established that the controlled substance was methamphetamine, the court in *State v. McMannis*, 12 Kan. App. 2d 464, 747 P.2d 1343 (1987), reversed the conviction. The court held that "under the express terms of the statute under which defendant was convicted, amphetamine and methamphetamine are considered two different substances."

That portion of K.S.A. 65-4161 prohibiting sale of drugs within 1,000 feet of a school prohibits sales within 1,000 feet of a school "as the crow flies, not by pedestrian routes." *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (1996).

67.13-D POSSESSION OF A CONTROLLED SUBSTANCE DEFINED

Possession of a controlled substance requires that the defendant have control over the substance with knowledge of and the intent to have such control. To possess a controlled substance, the defendant must have knowledge of the presence of the controlled substance with the intent to exercise control over it. Control means to exercise a restraining or directing influence over the controlled substance.

(Possession may be immediate and exclusive, jointly held with another, or constructive.) (Joint possession occurs when two or more persons, who have the power or control and intent to manage property, exercise the same jointly.) (Constructive possession is knowingly keeping a controlled substance in a place to which the defendant has some measure of access and right of control.)

[When a defendant is in nonexclusive possession of (the premises upon) (an automobile in) which a controlled substance is found, it cannot be inferred that the defendant knowingly possessed the controlled substance unless there are other circumstances linking the defendant to the controlled substance. Factors you may consider in determining whether the defendant knowingly possessed the controlled substance include:

1. defendant's previous participation in the sale of a controlled substance;

2. defendant's use of controlled substances;

3. defendant's proximity to the area where the controlled substance was found;

4. the fact that the controlled substance was found in plain view;

5. incriminating statements of the defendant;

6. suspicious behavior of the defendant; and

7. proximity of defendant's possession(s) to the controlled substance.]

Notes on Use

For authority, see *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991); *State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976); and *State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208 (1983).

The first paragraph of this instruction should be given in every case where possession of a controlled substance is charged. The optional second paragraph should be given when joint or constructive possession is an issue. The optional third paragraph should be given when defendant does not have exclusive possession of the premises or automobile where a controlled substance is found. The court should instruct the jury regarding only those factors in optional paragraph three which are supported by evidence.

Comment

Possession of a controlled substance is having control over the controlled substance with knowledge of, and intent to have, such control. Possession and intent, like any element of a crime, may be proved by circumstantial evidence. Possession may be immediate and exclusive, jointly held with another, or constructive as where the drug is kept by the accused in a place to which he has some measure of access and right of control. *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991); *State v. Rose*, 8 Kan. App. 2d 659, 664, 665 P.2d 1111, rev. denied 234 Kan. 1077 (1983); *State v. Bullocks*, 2 Kan. App. 2d 48, 49-50, 574 P.2d 243 (1978).

"'When a defendant is in nonexclusive possession of premises on which drugs are found, the better view is that it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. [Citation omitted.] Such parallels the rule in Kansas as to a defendant charged with possession of drugs in an automobile of which he was not the sole occupant. [*State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976).] Incriminating factors noted in *Faulkner* are a defendant's previous participation in the sale of drugs, his use of narcotics, his proximity to the area where the drugs are found, and the fact that the drugs are found in plain view. Other factors noted in cases involving nonexclusive possession include incriminating statements of the defendant, suspicious behavior, and proximity of defendant's possessions to the drugs.' *Bullocks*, 2 Kan. App. 2d at 50, 574 P.2d 243." *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233 (1991). See also *State v. Marion*, 29 Kan. App. 2d ____, 27 P.3d 924 (2001); *State v. Alvarez*, 29 Kan. App. 2d ____, 28 P.3d 404 (2001); *State v. Fortune*, 28 Kan. App. 2d 559, 20 P.3d 74 (2001); and *State v. Fulton*, 28 Kan. App. 2d 815, 23 P.3d 167 (2001).

In a constructive possession case, where the State argued that defendant was guilty simply because she lived in the place where drugs and paraphernalia were found, court erred in not giving possession instruction and instruction on nonexclusive possession. *State v. Hazley*, 28 Kan. App. 2d 664, 19 P.3d 800 (2001).

Where the only controlled substance found is residue on paraphernalia, defendant's convictions of possession of cocaine and possession of drug paraphernalia were not multiplicitous. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991). The court held that "[p]roof of the possession of any amount of a controlled substance is sufficient to sustain a conviction even though such amount may not be measurable or useable."

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

The defendant is charged with the crime of 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. 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).

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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).

That portion of K.S.A. 65-4161 prohibiting sale of drugs within 1,000 feet of a school prohibits sales within 1,000 feet of a school "as the crow flies, not by pedestrian routes." *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (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).

That portion of K.S.A. 65-4161 prohibiting sale of drugs within 1,000 feet of a school prohibits sales within 1,000 feet of a school "as the crow flies, not by pedestrian routes." *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (1996).

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. 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).

That portion of K.S.A. 65-4161 prohibiting sale of drugs within 1,000 feet of a school prohibits sales within 1,000 feet of a school "as the crow flies, not by pedestrian routes." *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (1996).

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. 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).

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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).

If the charge involves the use or possession of drug paraphernalia, 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.

If the charge involves a simulated controlled substance, 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.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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 para nalia was delivered]) (caused drug paraphernal 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.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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).

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). See PIK 3d 67.20-A.

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.

67.20-A REPRESENTATION THAT NONCONTROLLED SUBSTANCE IS CONTROLLED SUBSTANCE - PRESUMPTION

If you find that any of the following factors is established by the evidence, then you may presume that delivery of the substance was under circumstances which would give a reasonable person reason to believe that the 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.

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 that the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was a controlled substance. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 65-4155(b).

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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). However, in *State v. Gunn*, 29 Kan. App. 2d __, 26 P.3d 710 (2001), the Court addressed the issue of

manufacturing for "own use" as a possible exception under K.S.A. 65-4101(n), rather than distinguishing it as the *Bowen* court did, and held that the defendant failed to present sufficient evidence to bring her within the exception.

In *State v. Martens*, 29 Kan. App. 2d __, 28 P.3d 408 (2001), the Court held that manufacturing and attempting to manufacture a controlled substance are separate offenses under K.S.A. 65-4159. In *Martens*, the State argued that under the statute, manufacturing and attempting to manufacture were a single offense. The Court disagreed and held that an attempt to manufacture a controlled substance is controlled by the element of attempt set forth in K.S.A. 21-3301, with the exception of the penalty provision in 21-3301(d).

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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). However, in *State v. Gunn*, 29 Kan. App. 2d __, 26 P.3d 710 (2001), the Court addressed the issue of manufacturing for "own use" as a possible exception under K.S.A. 65-4101(n), rather than distinguishing it as the *Bowen* court did, and held that the defendant failed to present sufficient evidence to bring her within the exception.

In *State v. Martens*, 29 Kan. App. 2d __, 28 P.3d 408 (2001), the Court held that manufacturing and attempting to manufacture a controlled substance are separate offenses under K.S.A. 65-4159. In *Martens*, the State argued that under the statute, manufacturing and attempting to manufacture were a single offense. The Court disagreed and held that an attempt to manufacture a controlled substance is controlled by the element of attempt set forth in K.S.A. 21-3301, with the exception of the penalty provision in 21-3301(d).

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. K.S.A. 65-4164 covers unlawful acts relating to medicinals with a lower potential for abuse designated in K.S.A. 65-4113.

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

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

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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. However, in *State v. Curry*, 29 Kan. App. 2d __, __ P.3d __ (2001), the Court disagreed with *Edwards* and held that if a defendant is in possession of the drug, the statute requires that the tax stamp be affixed immediately. In *State v. Alvarez*, 29 Kan. App. 2d __, 28 P.3d 404 (2001), the Court joined the *Curry* court in disagreeing with the *Edwards* court.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

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).

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).

"A conviction under K.S.A. 79-5201 *et seq.* is not dependent on a conviction of any other crimes and does not depend on proving 'intent to sell' or whether, in fact, a defendant is a 'dealer' as that term is commonly understood." *State v. Engles*, 270 Kan. 530, 17 P.3d 355 (2001).

_____, _____, 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.

For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS

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68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, _____

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).

68.01-A CONCLUDING INSTRUCTION - CAPITAL MURDER - SENTENCING PROCEEDING

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

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

Your agreement upon a verdict sentencing the defendant to death must be unanimous.

_____

District Judge

_____, _____

Notes on Use

For authority, see K.S.A. 21-4624(b) which provides in part that ". . . The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable." See also *State v. Kleypas*, Slip opinion at 234-35 (Docket no. 80,920, filed Dec. 28, 2001).

68.02 GUILTY VERDICT - GENERAL FORM

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

_____

Presiding Juror

Notes on Use

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

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

Comment

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

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

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

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 64, 785 P.2d 963 (1990), that "`[w]hen an accused is charged in one count of an information with

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 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. In *State v. Burns*, 23 Kan. App. 2d 352, 931 P.2d 1258 (1997), the court held aggravated indecent liberties with a child is a lesser included offense of rape under the information/evidence prong of the *Fike* test. However, in *State v. Belcher*, 269 Kan. 2, 4 P.3d 1137 (2000), the Supreme Court held aggravated indecent liberties with a child under K.S.A. 21-3504(a)(3)(A) is not a lesser included offense of rape based upon sexual intercourse with a child under 14 years of age. The *Burns* decision was disapproved to the extent it held otherwise. Nevertheless, based upon the narrow holding in *Belcher*, the committee believes aggravated indecent liberties with a child under K.S.A. 21-3504(a)(1) (sexual intercourse with a child who is 14 or more years of age but less than 16 years of age) is a lesser included offense of rape under the information/evidence prong of *Fike*.

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).

The structural error analysis used in *Timley* and *Barber* was rejected by the Supreme Court in *State v. Hill*, 271 Kan. __, 26 P.3d 1267 (2001), where the court applied instead a harmless error analysis. Nonetheless, the court warned, "This holding should not be interpreted to give prosecutors carte blanche to rely on harmless error review, and it is strongly encouraged that prosecutors elect a specific act or the trial court issue a specific unanimity instruction. In many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless." 271 Kan. at __.

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).

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

SENTENCING VERDICT

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

_____

_____

_____

_____

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

_____
Presiding Juror

_____, _____.

Notes on Use

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

Comment

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, Slip opinion at 159 (Docket no. 80,920, filed Dec. 28, 2001).

68.14-A-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH

SENTENCING VERDICT

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

_____

_____

_____

_____

_____

_____

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

_____

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, Slip opinion at 172 (Docket no. 80,920, filed Dec. 28, 2001).

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

SENTENCING VERDICT

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

☐ **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]**

☐ **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**

☐ **[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**

☐ **[That the defendant authorized or employed another person to commit the crime.]**

☐ **[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**

☐ **[That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]**

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

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

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

_____

Presiding Juror

_____, _____.

Notes on Use

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

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

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

Comment

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, Slip opinion at 159 (Docket no. 80,920, filed Dec. 28, 2001).

68.14-B-1 CAPITAL MURDER - VERDICT FORM FOR SENTENCE OF DEATH (Alternative Verdict)

SENTENCING VERDICT

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

☐ **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.]**

☐ **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**

☐ **[That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**

☐ **[That the defendant authorized or employed another person to commit the crime.]**

☐ **[That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]**

☐ **[That the defendant committed the crime in an especially heinous, atrocious or cruel manner.]**

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

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

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

_____

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, Slip opinion at 172, 254 (Docket no. 80,920, filed Dec. 28, 2001).

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

This is an alternative sentencing verdict form to the form contained in PIK 3d 68.14-A-1 that requires the Presiding Juror to print the aggravating circumstances that have been established by the evidence that outweigh the mitigating circumstances.

68.17 CAPITAL MURDER - VERDICT FORM FOR SENTENCE AS PROVIDED BY LAW

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict sentencing the defendant to death.

_____
Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, Slip opinion at 234-35 (Docket no. 80,920, filed Dec. 28, 2001). If the jury does not reach a verdict of death upon conviction of capital murder, the court *may* sentence the defendant to the mandatory minimum 40-year term, or for crimes committed on or after July 1, 1999, to a 50-year term. K.S.A. 21-4635.

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

(PIK 3d 56.03)

Instruction No. 5.

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

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

(PIK 3d 56.05)

Instruction No. 6.

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

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

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

(PIK 3d 56.06)

Instruction No. 7.

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

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of

premeditation requires more than the instantaneous, intentional act of taking another's life.

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

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

Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable," "negligence," "wanton negligence" and "wantonness" are included within "reckless."
(PIK 3d 56.04)

Instruction No. 8.

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 9.

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met

its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 3d 54.01)

Instruction No. 10.

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.
(PIK 3d 51.05)

Instruction No. 11.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.
(PIK 3d 51.06)

Instruction No. 12.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified. (PIK 3d 52.09)

Instruction No. 13.

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected

will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, _____.

(PIK 3d 68.01)

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

Instruction No. 6.

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

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

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

(PIK 3d 56.06)

Instruction No. 7.

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

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

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

(PIK 3d 56.04)

Instruction No. 8.

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

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself against such aggressor's imminent use of unlawful force. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.
(PIK 3d 54.17)

Instruction No. 9.

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 10.

The defendant raises self-defense as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.
(PIK 3d 52.08)

Instruction No. 11.

Ordinarily, a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.
(PIK 3d 54.01)

Instruction No. 12.

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

Instruction No. 13.

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

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

Your agreement upon a verdict must be unanimous.

_____
District Judge

_____, _____

(PIK 3d 68.01)

VERDICT FORMS

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

We, the jury, find the defendant not guilty.

_____
Presiding Juror

(PIK 3d 68.10)

Outline of Suggested Instructions in Sequence - Penalty Phase:

Instruction 1. **PIK 3d 56.00-B, Capital Murder-Death Sentence-Sentencing Proceeding.**

Instruction 2. **PIK 3d 51.04, Consideration of Evidence, Revised.**

Instruction 3. **PIK 3d 51.05, Rulings of the Court.**

Instruction 4. **PIK 3d 51.06, Statements and Arguments of Counsel.**

Instruction 5. **PIK 3d 52.09, Credibility of Witnesses.**

Instruction 6. **PIK 3d 56.00-C, Capital Murder-Aggravating Circumstances.**

Instruction 7. **PIK 3d 56.00-D, Capital Murder-Mitigating Circumstances.**

Instruction 8. **PIK 3d 56.00-E, Capital Murder-Burden of Proof.**

Instruction 9. **PIK 3d 56.00-F, Capital Murder-Aggravating and Mitigating Circumstances-Theory of Comparison.**

Instruction 10. **PIK 3d 56.00-G, Capital Murder-Reasonable Doubt.**

Instruction 11. **PIK 3d 56.00-H, Capital Murder-Sentencing Recommendation.**

Instruction 12. **PIK 3d 68.01-A, Concluding Instruction-Capital Murder-Sentencing Proceeding.**

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

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

TEXT OF SUGGESTED INSTRUCTIONS - PENALTY PHASE

Instruction No. 1.

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.
(PIK 3d 56.00-B)

Instruction No. 2.

In your determination of sentence, you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.
(PIK 3d 51.04, Revised)

Instruction No. 3

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.
(PIK 3d 51.05)

Instruction No. 4

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.
(PIK 3d 51.06)

Instruction No. 5

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.
(PIK 3d 52.09)

Instruction No. 6

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

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

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

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

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

Instruction No. 7

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

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

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

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

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

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.
(PIK 3d 56.00-D)

Instruction No. 8

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist.
(PIK 3d 56.00-E)

Instruction No. 9

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

Instruction No. 10

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.

However, if one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court as otherwise provided by law.
(PIK 3d 56.00-G)

Instruction No. 11

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

You have been provided two verdict forms which provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, and sentencing the defendant to death;

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.

(PIK 3d 56.00-H)

Instruction No. 12

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

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

Your agreement upon a verdict sentencing the defendant to death must be unanimous.

_____

District Judge

_____, _____

(PIK 3d 68.01-A)

VERDICT FORMS

SENTENCING VERDICT

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

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

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

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

_____
Presiding Juror

_____, _____.

(PIK 3d 68.14-B-1)

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict sentencing the defendant to death.

_____
Presiding Juror

_____, _____.

(PIK 3d 68.17)

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CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

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

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

70.03 TRANSPORTING AN ALCOHOLIC BEVERAGE IN AN OPENED CONTAINER

The defendant is charged with the crime of transporting an alcoholic beverage in an opened container. The defendant pleads not guilty.

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

1. **That the defendant transported a container of alcoholic beverage in a vehicle upon a highway or street;**
2. **That the container had been opened;**
3. **That the container was not in a locked outside compartment (or rear compartment) which was inaccessible to the defendant or any passenger while the vehicle was in motion;**
4. **That the defendant knew or had reasonable cause to know (he)(she) was transporting an opened container of alcoholic beverage; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1599. Transportation of liquor in an open container is a traffic misdemeanor punishable by a fine of not more than $200, or by imprisonment for not more than six months, or both. K.S.A. 8-1599(c). For a second or subsequent conviction, the Court shall suspend the person's driving license or privilege to operate a motor vehicle for one year. K.S.A. 8-1599(d).

Alcoholic beverage is defined in K.S.A. 8-1599(a) to mean any alcoholic liquor, as defined by K.S.A. 41-102 or any cereal malt beverage, as defined in K.S.A. 41-2701.

Highway and street are defined in K.S.A. 8-1424 and K.S.A. 8-1473.

Comment

The case of *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952), held that a defendant cannot be guilty hereunder if he does not know or have reason to know that an opened container is in the vehicle.

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 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) (revoked because the division of motor vehicles determined the defendant to be an habitual violator). 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;]

OR

[2. That the defendant's privilege to obtain a driver's license was suspended or revoked;]

OR

[2. That the division of motor vehicles 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) (habitual violator status) to the defendant at the last known address shown by the division's records and a reasonable time to deliver the notice by mail had passed;]

OR

[3. That the defendant had actual knowledge that (his) (her) driving privileges had been (canceled) (suspended) (revoked) by the division of motor vehicles;]

OR

[3. That the defendant had actual knowledge of (his) (her) status as an habitual violator;] and

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

Notes on Use

For authority, see K.S.A. 8-262 *et seq.* (driving while canceled, suspended or revoked) and K.S.A. 8-285 *et seq.* (driving while an habitual violator).

Driving after being determined an habitual violator is a class A nonperson misdemeanor. A first conviction for driving while canceled, suspended or revoked is a class B nonperson misdemeanor, subsequent convictions are class A nonperson misdemeanors.

For the definitions of cancellation see K.S.A. 8-1408, suspension see K.S.A. 8-1474, and revocation see K.S.A. 8-1452.

Comment

K.S.A. 2000 Supp. 8-287 specifies that an habitual violator may only violate the statute by operating a motor vehicle, unlike our driving while intoxicated statute (K.S.A. 2000 Supp. 8-1567). The driving while an habitual violator statute does not criminalize attempting to operate a motor vehicle. *State v. Thomas*, 28 Kan. App. 2d 655, 20 P.3d 82 (2001).

K.S.A. 2000 Supp. 8-262 was amended in 2001 to prohibit individuals from driving during that period of time when their privilege to obtain a driver's license has been suspended or revoked. L. 2001, ch. 112, sec. 4.

70.10-A AFFIRMATIVE DEFENSE TO DRIVING WHILE LICENSE IS CANCELED, SUSPENDED OR REVOKED

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.

Notes on Use

For authority, see K.S.A. 8-262 as amended by L. 2001, ch. 112, sec. 4.

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

Effective July 1, 1999, the legislature designated driving while habitual violator as a class A nonperson misdemeanor. Also, effective July 1, 1999, driving on a canceled, suspended or revoked license was designated as a misdemeanor even on third or subsequent convictions. Therefore, for the prosecution of all misdemeanor violations after July 1, 1999, under either K.S.A. 8-262 *et seq.* or K.S.A. 8-285 *et seq.*, the instruction at PIK 3d 70.10 is appropriate.

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