Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

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

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

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

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

Notes on Use

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

Comment

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

51.10 PENALTY NOT TO BE CONSIDERED BY JURY

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

Notes on Use

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

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

See PIK 3d 51.10-A for an alternative instruction to be used in death penalty cases, durational departure cases, and pre-July 1, 1994, "Hard 40" cases.

51.10-A PENALTY NOT TO BE CONSIDERED BY JURY - CASES THAT INCLUDE A SENTENCING PROCEEDING

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.

Notes on Use

This instruction should be used as an alternative to PIK 3d 51.10 in death penalty cases, durational departure cases, and pre-July 1, 1994, "Hard 40" cases since these cases may include a separate sentencing proceeding involving the jury.

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51.11 CAMERAS IN THE COURTROOM

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

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

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

Comment

See Kansas Supreme Court Rule 1001.

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. 582, 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

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. 582, 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.

v. Moody, 223 Kan. 699, 576 P.2d 637 (1978). See also, *State v. Crume*, 271 Kan. 87, 93-95, 22 P.3d 1057 (2001); 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. *State v. Saenz*, 271 Kan. 339, 346-48, 22 P.3d 151 (2001).

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

Comment

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

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

In *State v. Simpson*, 29 Kan. App. 2d 862, 32 P.3d 1226 (2001), the court held that failure to give the eyewitness identification instruction was clearly erroneous, and reversed a conviction even though the instruction was not requested at trial. The court found under the facts of the case that the eyewitness identification was a critical part of the prosecution's case and there was a serious question about the reliability of the identification.

52.21 CHILD'S HEARSAY EVIDENCE

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

Notes on Use

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

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

Comment

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

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

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

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

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

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). Definition approved and further held that lewd fondling or touching is not the equivalent of rude or insulting touching as found in K.S.A. 21-3412, battery. *State v. Banks*, 273 Kan. __, 46 P.3d 546, 553 (2002).

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). This definition, which focuses on control, was approved in *State v. Curry*, 29 Kan. App. 2d 392, 395, 28 P.3d

1019 (2001). 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).

54.12-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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 70-76), 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.

54.25 USE OF FORCE IN RESISTING ARREST

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

Notes on Use

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

This instruction should not be given when the defendant claims that the officer used excessive force in making the arrest. *State v. Heiskell*, 8 Kan. App. 2d 667, Syl. ¶ 4, 666 P.2d 207 (1983).

Comment

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

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CHAPTER 55.00

ANTICIPATORY CRIMES

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 do not agree that the defendant is guilty of _____, you should then consider the lesser included offense 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 67), 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).

In *State v. Martens*, 273 Kan. ___, 42 P.3d 142, *modified* 274 Kan. ___, 54 P.3d 960 (2002), the Supreme Court reversed a conviction under K.S.A. 1997 Supp. 65-4159 because the district court seemingly convicted the defendant of both attempted manufacture and actual manufacture of methamphetamine. Although K.S.A. 1997 Supp. 65-4159 deals with the sentence for both the manufacture and attempted manufacture of methamphetamine, the Court held that convicting the defendant of both is a violation of K.S.A. 21-3107(2). In *State v. Peterson*, 273 Kan. __, 42 P.3d 137 (2002), the Court held that attempting to manufacture methamphetamine is a lesser included offense of the crime of manufacturing methamphetamine, and held that the failure to give a separate instruction on attempt to manufacture methamphetamine was reversible error.

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).

55.06 CONSPIRACY - ACT IN FURTHERANCE DEFINED

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

Notes on Use

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

Comment

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

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

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

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

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

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978). However, a complaint that fails to allege any specific overt act committed in furtherance of the conspiracy is fatally flawed and does not confer jurisdiction to try the defendant on the conspiracy charge. *State v. Sweat*, 30 Kan. App. 2d __, 48 P.3d 8, *rev. denied* 274 Kan. __ (2002).

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

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

CHAPTER 56.00
CRIMES AGAINST PERSONS

56.00 CAPITAL MURDER - PRE-VOIR DIRE INSTRUCTION

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. [Each of you have received questionnaires concerning your respective views regarding capital punishment.] I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time concerning the number of years the defendant will serve in prison if not sentenced to death. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty.

Notes on Use

This is an optional instruction which the trial court may wish to use prior to commencement of voir dire in a capital murder case. In districts where the practice includes the use of a questionnaire, the Committee recommends that such questionnaire include a prefatory statement similar to the above.

For additional introductory and cautionary instructions, see PIK 3d Chapter 51.

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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*, 272 Kan. __, 40 P.3d 139 (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*, 272 Kan. ___, 40 P.3d 139 (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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at Syl. 54-55.

Also contained in *Kleypas*, (Slip op. 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 op. 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 254). 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 193-96), 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 op. 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 op. at 254.) The Court held that the jury need not find mitigating factors in writing. (Slip op. 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 258).

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 any mitigating circumstances found to exist.

Notes on Use

For authority, see K.S.A. 21-4625 and *State v. Kleypas*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172).

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 any 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172, 243). 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 any 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172, 234-35, 254).

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 any 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172, 234-35).

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

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

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

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

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

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

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. __, 38 P.3d 715 (2002).

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

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

Notes on Use

For authority, see K.S.A. 1993 Supp. 21-4624(a), (b), and (c).

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

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

Effective July 1, 1994, a "Hard 40" sentence may be imposed if the defendant is convicted of capital murder but sentence of death is not imposed or if the defendant is convicted of first degree premeditated murder. The decision to impose a "Hard 40" sentence is a question for the court, not the jury. K.S.A. 21-4635. This instruction is retained for crimes committed prior to 1994.

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

Comment

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

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

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. 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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 159).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 159).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 64), 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).

56.03 MURDER IN THE SECOND DEGREE

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

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

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

1. That the defendant intentionally killed _____; and

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

Notes on Use

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

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

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

Comment

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

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

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. __, 38 P.3d 715 (2002).

56.03-A MURDER IN THE SECOND DEGREE-UNINTENTIONAL

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

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

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

1. That the defendant killed _____ unintentionally but recklessly under circumstances showing extreme indifference to the value of human life; and

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

Notes on Use

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

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

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

Comment

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

Under the facts of the case it was "clearly erroneous" to give Alternative A instead of Alternative B because Alternative B would have instructed the jury to consider the possibility of convicting on the lesser included offense as it deliberated on the greater. *State v. Cribbs*, 29 Kan. App. 2d 919, 34 P.3d 76 (2001).

56.06 INVOLUNTARY MANSLAUGHTER

A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)

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

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

1. That the defendant unintentionally killed _____;

2. That it was done:

(a) recklessly;

or

(b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) _____;

or

(c) during the commission of a lawful act in an unlawful manner; and

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

Notes on Use

For authority, see K.S.A. 21-3404. Involuntary manslaughter is a severity level 5, person felony.

If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher degree, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree With Lesser Included Offenses, for lead-in instructions on lesser included offenses. K.S.A. 21-3404(b) provides that a felony or a misdemeanor can serve as the basis for an involuntary manslaughter charge if the statute was enacted for the protection of

human life or safety and is not an inherently dangerous felony as defined in K.S.A. 21-3436. K.S.A. 8-1566 and 8-1568 are specifically cited as misdemeanors which were enacted for the protection of human life or safety.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.06, Involuntary Manslaughter.

Comment

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

The use of excessive force may be found to be an "unlawful manner" of committing the "lawful act" of self-defense, and thereby supply an element of involuntary manslaughter. *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). *State v. Warren*, 5 Kan. App. 2d 754, 624 P.2d 476, *rev. denied* 229 Kan. 671 (1981).

In *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995), the court ruled that Kansas does not recognize the crime of attempted involuntary manslaughter.

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

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

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. __, 38 P.3d 715 (2002).

56.06-A INVOLUNTARY MANSLAUGHTER - DRIVING UNDER THE INFLUENCE

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

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

1. **That the defendant unintentionally killed _____;**
2. **That it was done (in the commission of) (while attempting to commit) (while in flight from [committing][attempting to commit]) the act of operating any vehicle in this state**
   (a) **While under the influence of (alcohol)(a drug)(a combination of drugs)(a combination of alcohol and any drug[s]) to a degree that rendered (him)(her) incapable of safely driving a vehicle;**

   and/or

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

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

and/or

   (c) **By a person who is a habitual user of any (narcotic) (hypnotic)(somnifacient)(stimulating) drug; and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

The definitions of bodily harm used in aggravated kidnapping cases are appropriate for use in differentiating between aggravated robbery and robbery. Some trivial injuries can happen in the course of a robbery, but bodily harm that leaves permanent scarring or unnecessary acts of violence committed upon a victim transform the robbery into aggravated robbery. *State v. Bryant*, 22 Kan. App. 2d 732, 922 P.2d 1118 (1996).

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

When there is an issue as to whether the defendant was armed with a dangerous weapon, it is "error not to include the recommended PIK definition for a dangerous weapon." *State v. Robbins*, 272 Kan. 158, 32 P.3d 171 (2001).

56.32 BLACKMAIL

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

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

1. **That the defendant threatened to communicate (accusations) (statements) about _____ that would subject _____ to public (ridicule) (contempt) (degradation);**
2. **That the defendant did so to ([gain] [attempt to gain] something of value from _____) (compel _____ to act against [his][her] will); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3428. Blackmail is a severity level 7, nonperson felony. The elements of this crime were modified effective July 1, 1993.

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

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

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

Battery is not a lesser included offense of aggravated indecent liberties with a child. *State v. Banks*, 273 Kan. __, 46 P.3d 546 (2002).

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

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

Notes on Use

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

(a) sexual intercourse with a child;

(b) fondling or touching a child in a lewd manner;

(c) submitting to lewd fondling or touching by a child.

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

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

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

Notes on Use

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

Comment

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

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

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

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) (employee of a contractor who was under contract to provide supervision services for persons on parole, conditional release or post-release supervision);

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.

57.28 - 57.39 RESERVED FOR FUTURE USE.

57.40 SEXUAL PREDATOR/CIVIL COMMITMENT

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

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

1. **That the respondent has been (convicted of) (charged with) _____, a sexually violent offense;**
2. **That the respondent suffers from a (mental abnormality) (personality disorder) which makes the respondent likely to engage in repeat acts of sexual violence; and**
3. **That the respondent's (mental abnormality) (personality disorder) makes it seriously difficult for (him) (her) to control (his) (her) dangerous behavior.**

OR

1. **That the respondent has been convicted of _____;**
2. **That the crime was sexually motivated;**
3. **That the respondent suffers from a (mental abnormality) (personality disorder) which makes the respondent likely to engage in repeat acts of sexual violence; and**
4. **That the respondent's (mental abnormality) (personality disorder) makes it seriously difficult for (him) (her) to control (his) (her) dangerous behavior.**

Notes on Use

For authority, see K.S.A. 59-29a01, *et seq.* The first alternative should be used when the crime is specifically listed as a sexually violent offense under K.S.A. 59-29a02(e)(1) through (e)(12). The second alternative should be used when the crime is not specifically listed, but is alleged to be sexually motivated under K.S.A. 59-29a02(e)(13).

Comment

While designated a civil commitment, the burden of proof in this type of case is beyond a reasonable doubt. The matter may be tried to a jury of 12 pursuant to K.S.A. 22-3403, and the defendant is entitled to appointed counsel if indigent.

The legislature borrowed extensively from Washington State's Community Protection Act of 1990, codified at RCW 71.09. The Supreme Court of Washington upheld the constitutionality of the act in *In Re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). However, in *Young*, the court held inter alia that if the proceeding is brought against a person living in the community immediately prior to the initiation of proceedings, due process requires that the State plead and prove the existence of a recent overt act to support a "dangerousness" showing, citing the United States Supreme Court's holding in *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed. 2d 437 (1992). [Syl. 8, pp.1006-07; 1008-09] The Kansas Act, like the Washington legislation, does not require proof of a recent overt act.

In *Kansas v. Hendricks*, 521 U.S. 346, 138 L.Ed. 2d 501, 117 S.Ct. 2072 (1997), the United States Supreme Court reversed the Kansas Supreme Court and held that the Kansas sexually violent predator act's definition of mental abnormality satisfied substantive due process requirements and the act did not violate either the double jeopardy clause or the ex post facto clause of the Federal Constitution.

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

On January 22, 2002, the United States Supreme Court, with two justices dissenting and urging outright reversal, vacated the Kansas Supreme Court's judgment in *In re Care and Treatment of Crane*, supra. The Court ruled, "[I]t is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002).

57.41 SEXUAL PREDATOR/CIVIL COMMITMENT - DEFINITIONS

The following definitions of words and phrases are applicable in this proceeding:

Mental abnormality means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

"Likely to engage in repeat acts of sexual violence" means the respondent's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

[Sexually motivated means that one of the purposes for which the defendant committed the crime was the defendant's sexual gratification.]

Notes on Use

For authority, see K.S.A. 59-29a02. The bracketed definition should only be given when that is an allegation for the jury to decide.

The term "personality disorder" is not defined by the statute. For a psychiatric definition, see American Psychiatric Ass'n. *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 1994). The constellation of various conditions recognized by the American Psychiatric Association as constituting personality disorders make impossible a pattern definition. Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual.

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).

However, the holding of *VanHecke* has been negated by a 2002 amendment to K.S.A. 38-1502(c) which removed the language "regardless of the age of the child" from the statute. It was this language that the *VanHecke* court relied upon in reaching its decision.

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. 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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59.11 FORGERY - MAKING OR ISSUING A FORGED INSTRUMENT

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

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

1. **That the defendant knowingly made, altered or endorsed a _____ so it appeared to have been (made) (endorsed) (by _____) (at another time) (with different provisions) (by the authority of _____, who did not give such authority);**

   or

   That the defendant issued or delivered a _____ which (he)(she) knew had been made, altered or endorsed so that it appeared to have been (made) (endorsed) (by _____) (with different provisions) (by the authority of _____, who did not give such authority);
2. **That the defendant did this act with the intent to defraud; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3710(a)(1) and (2). Forgery is a severity level 8, nonperson felony. This instruction should not be used for K.S.A. 21-3710(a)(3).

For a definition of "intent to defraud," see K.S.A. 21-3110(9).

K.S.A. 21-3710(c) provides that in any prosecution under 21-3710 it may be alleged in the complaint or information that it is not known whether a purported person is real or fictitious, and in such case there shall be a rebuttable presumption that such purported person is fictitious.

The PIK Committee recommends that whenever this presumption is applied in a forgery case, the jury be instructed in regard to the presumption as follows: "This presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden of

proof. This burden never shifts to the defendant." See generally, *State v. Colbert*, 26 Kan. App. 2d 177, 987 P.2d 1110 (1999), and *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983).

Comment

In *State v. Norris*, 226 Kan. 90, 595 P.2d 1110 (1979), K.S.A. 21-3710(a)(1) and (2) were held to be constitutional against a claim of being vague and indefinite.

In *State v. Hicks*, 11 Kan. App. 2d 76, 714 P.2d 105 (1986), the Court said that although the forgery instruction given was not clearly erroneous, it would have been preferable if the trial court had relied upon the substance of PIK 2d 59.11 to define the elements of forgery.

In *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991), the Court held that, under the facts of the case, convictions for forgery and theft by deception were multiplicitous, applying the second prong of the two-prong test as stated in *State v. Fike*, 243 Kan. 365, 368, 757 P.2d 724 (1988). The Court also held that, under the facts of the case, the delivery of a forged check was an included offense of theft by deception.

A valid debt or claim against the person whose name is forged is not a defense to a charge of forgery. *State v. Meyer*, 17 Kan. App. 2d 59, 832 P.2d 357 (1992).

In *State v. Colbert*, 26 Kan. App. 2d 177, 987 P.2d 1110 (1999), the defendant was charged in the information with forgery under K.S.A. 21-3710, alleging that David T. Mangione is "either a real or a fictitious person." Instruction No. 6 stated that it must be proved that the defendant issued or delivered a bank check which he knew had been made, altered or endorsed so that it appeared to have been made by David T. Mangione, a fictitious person. In Instruction No. 7, the jury was instructed, "As to the allegation that David T. Mangione is a fictitious person, you may presume that David T. Mangione is a fictitious person. This presumption may be overcome by evidence to the contrary." The defendant argued that Instruction 7 was erroneous because it did not instruct the jury that the State had the burden of proving that Mangione was a fictitious person. The Court of Appeals reversed the conviction and ordered a new trial, holding that one of the elements of the crime required to be proved by the State was that the maker of the check was a fictitious person and that it was reversible error not to instruct the jury that the State had the burden of proving that Mangione was a fictitious person. This opinion is consistent with *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983), which holds that a rebuttable statutory presumption in a criminal action constitutes a rule of evidence and is constitutional; however, the jury must be clearly instructed as to the nature and extent of the presumption and that it does not shift the burden of proof to the defendant.

Making a false information, K.S.A. 21-3711, involves a person making a false representation, or causing it to be made, while acting within his or her own identity. Forgery involves making an instrument which appears to have been made by another. K.S.A. 21-3710. *State v. Gotti*, 273 Kan. __, 43 P.3d 812 (2002).

general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged.

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

Making a false information, K.S.A. 21-3711, involves a person making a false representation, or causing it to be made, while acting within his or her own identity. Forgery involves making an instrument which appears to have been made by another. K.S.A. 21-3710. *State v. Gotti*, 273 Kan. __, 43 P.3d 812 (2002).

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

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

59.14 DESTROYING A WRITTEN INSTRUMENT

The defendant is charged with the crime of destroying a written instrument. The defendant pleads not guilty.

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

1. **That the defendant knowingly destroyed a _____ by (tearing) (cutting) (burning) (erasing) (obliterating) in whole or in part;**
2. **That the defendant did so with the intent to defraud; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3712. Destroying a written instrument is a severity level 9, nonperson felony.

See *Kansas Judicial Council Bulletin*, April 1968, p.71.

59.20-A ARSON (AFTER JULY 1, 2000)

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

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

1. **That the defendant intentionally damaged (a 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);

   or

   That the defendant accidentally damaged (a building) (property) by means of fire or explosive as a result of manufacturing or attempting to manufacture [insert name of controlled substance].

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

[3. That the property was a dwelling;] and

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

Notes on Use

For authority, see K.S.A. 21-3718. This instruction should be used only for crimes committed on or after July 1, 2000. If the defendant intentionally damages a dwelling, the crime is a severity level 6 person felony. If the defendant accidentally damages a dwelling while manufacturing or attempting to manufacture a controlled substance, the crime is a severity level 7 person felony. If the damaged property is not a dwelling, the crime is a severity level 7 nonperson felony.

Comment

The 2000 amendment removed the value of the property as an element of the crime of arson.

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

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

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

1. **That the defendant intentionally damaged _____ by means of (fire) (an explosion);**
2. **That _____ was an insurer of the (building) (property); or**
   That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. **That the defendant did so with the intent to (injure) (defraud) _____; and**
4. **That the property damage was ($50,000 or more) (at least $25,000 but less than $50,000) (less than $25,000); and**
5. **That this act occurred on or about the _____ day of _____, ____, in _____ County, Kansas.**

Notes on Use

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

For authority, see K.S.A. 21-3718(a)(2). Arson is a severity level 5, nonperson felony if the damage is $50,000 or more. If the damage is at least $25,000 but less than $50,000, it is a severity level 6, nonperson felony. If the damage is less than $25,000, it is a severity level 7, nonperson felony. This section should not be used for K.S.A. 21-3718(a)(1).

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

Comment

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

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

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

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

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

1. **That the defendant intentionally damaged _____ by means of (fire) (an explosion);**
2. **That _____ was an insurer of the (building) (property); or**
   That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;
3. **That the defendant did so with the intent to (injure) (defraud) _____;**

[4. That the property was a dwelling;] and

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

Notes on Use

For authority, see K.S.A. 21-3718. This instruction should be used only for crimes committed on or after July 1, 2000. The crime is a severity level 6 person felony if the property is a dwelling and a severity level 7 nonperson felony if it is not.

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

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

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

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

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

Notes on Use

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

59.67-A POSSESSION OF A THEFT DETECTION SHIELDING DEVICE

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

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

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

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

Notes on Use

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

59.67-B REMOVAL OF A THEFT DETECTION DEVICE

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

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

Notes on Use

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

59.68 COUNTERFEITING MERCHANDISE OR SERVICES

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

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

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

   or

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

   and

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

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

Notes on Use

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

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60.35 AIRCRAFT IDENTIFICATION - FRAUDULENT ACTS

The defendant is charged with the crime of fraudulent acts relating to aircraft identification numbers. The defendant pleads not guilty.

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

1. **That the defendant knowingly [(bought) (sold) (offered for sale) (received) (disposed of) (concealed) (possessed) (operated)] [(attempted to buy) (attempted to sell) (attempted to offer for sale) (attempted to receive) (attempted to dispose of) (attempted to conceal) (attempted to possess) (attempted to operate)] an aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations; and**

   or

   That the defendant knowingly (possessed) (manufactured) (sold) (exchanged) (offered for sale or exchange) (supplied in blank) (gave away) a counterfeit manufacturer's aircraft identification number plate or decal used for the identification of an aircraft; and

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

Notes on Use

For authority, see K.S.A. 21-3842. Fraudulent acts regarding aircraft identification numbers is a severity level 8, nonperson felony. See Title 14, Chapter 1, parts 47.15 and 47.16 of the Code of Federal Regulations for requirements of the Federal Aviation Administration as to assigned identification numbers. The trial judge will need to draft an appropriate instruction as to the relevant requirements based upon the evidence.

60.36 VIOLATION OF A PROTECTIVE ORDER

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

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

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

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

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

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

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

   [(e) an order issued as a condition of release after conviction or as a condition of an appeal bond that orders the defendant to refrain from having direct or indirect contact with another person] or

   [(f) a protection from stalking order issued pursuant to Kansas law]; and

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

Notes on Use

For authority, see K.S.A. 21-3843. Violation of a protective order is a class A misdemeanor.

62.14 UNLAWFULLY PROVIDING INFORMATION ON AN INDIVIDUAL CONSUMER

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

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

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

As used in this instruction:

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

The term "consumer" means an individual.

Notes on Use

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

62.15 OBTAINING CONSUMER INFORMATION

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

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

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

As used in this instruction:

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

The term "consumer" means an individual.

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

Notes on Use

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

Notes on Use

For authority, see K.S.A. 21-4113. Harassment by telephone is a class A nonperson misdemeanor. The statute provides that "telephone communication" includes telefacsimile communication. For a criminal charge of refusal to yield a party line, see PIK 3d 64.13. For criminal threat, see PIK 3d 56.23.

Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

In *State v. Thompson*, 237 Kan. 562, 701 P.2d 694 (1985), intent to harass was determined to be an element of the crime of harassment by telephone under K.S.A. 21-4113(1)(a).

The Kansas Supreme Court in *State v. Schuette*, 273 Kan. __, 44 P.3d 459 (2002), discussed at length the evidentiary foundation necessary to admit caller ID information and also determined that the caller ID device display was not hearsay. The Court further found that the defendant's convictions of both telephone harassment and criminal threat were not multiplicitous.

63.14-A (HARASSMENT OF COURT BY TELEFACSIMILE previously appeared at this location. It has been moved to 60.31.)

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

64.01 CRIMINAL USE OF WEAPONS - FELONY

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

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

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

   or

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

   or

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

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

Notes on Use

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

Comment

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

64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

It is a defense to the charge of (criminal use of weapons) (aggravated weapons violation) that (list here any relevant exemptions contained in K.S.A. 21-4201(b) through (f)).

Notes on Use

For authority, see K.S.A. 21-4201 (b) through (f) which list persons exempt from the application of the act. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972), which involved a charge of possession of marijuana in violation of K.S.A. 65-2502, it was held that the accused had the burden of introducing evidence as a matter of defense that he was within an exception or exemption in the statute.

State v. Lassley, 218 Kan. 758, 545 P.2d 383 (1976), holds that a construction worker who carried a six-inch knife which he used as a tool of his trade did not come within the exempt status expressly recognized in K.S.A. 21-4201(2). The fact that the knife may have been used in his trade was not a defense to the prescribed act of knowingly carrying a dangerous knife concealed on his person.

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

64.05 CRIMINAL DISPOSAL OF FIREARMS

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

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

A. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to _____;

2. That _____ was a person under 18 years of age; and

OR

B. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ was both addicted to and an unlawful user of _____, a controlled substance; and

OR

C. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding five years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and

OR

D. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

2. That the defendant knew _____ had, within the preceding 10 years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony, and had not had the conviction of the crime [expunged] [pardoned]); and

OR

E. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;

65.01 PROMOTING OBSCENITY

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

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

1. **That the defendant knowingly or recklessly (manufactured) (issued) (sold) (gave) (provided) (lent) (mailed) (delivered) (transmitted) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) obscene material or an obscene device; and**

   or

   That the defendant knowingly or recklessly possessed (obscene material) (an obscene device) with intent to (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) such (material) (device); and

   or

   That the defendant knowingly or recklessly (offered) (agreed) to (manufacture) (issue) (sell) (give) (provide) (lend) (mail) (deliver) (transfer) (transmit) (publish) (distribute) (circulate) (disseminate) (present) (exhibit) (advertise) obscene material or an obscene device; and

   or

   That the defendant knowingly or recklessly (produced) (presented) (directed) an obscene performance or participated in a portion thereof which was obscene or which contributed to its obscenity; and

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

Notes on Use

For authority, see K.S.A. 21-4301. Promoting obscenity is a class A, nonperson misdemeanor for the first conviction. For second and subsequent convictions, this offense is a severity level 9, person felony. For affirmative defenses, see PIK 3d 65.05. For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

For definition of "recklessness," see K.S.A. 21-3201(c).

The statutory definition of obscenity as originally contained in K.S.A. 21-4301 was based upon the tests of obscenity as stated by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304 (1957). In June of 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), which substantially altered the obscenity standards which both state and federal courts must apply. In *Miller*, the Supreme Court held that state statutes designed to regulate obscene material must be limited to works which depict or describe *sexual* conduct. The prohibited conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." Furthermore, *Miller* held that statutes prohibiting obscenity must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller* rejected the standard that the work must be utterly without redeeming social value. Additionally, the Court rejected a national standard for obscene material within the context of the First Amendment.

In March, 1976 in *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976), the Kansas Supreme Court, following *Miller*, upheld the constitutionality of the then existing obscenity statute by construing the word "obscenity" as a word of constitutional meaning. In 1976, the Kansas Legislature amended K.S.A. 21-4301 and 21-4301a to change the statutory definition of obscenity to comply with the judicial definition of obscenity as contained in these cases. The 1976 statute, however, did not change the basic elements of the offense of promoting obscenity other than redefining the term "obscenity" itself.

In *State v. Allen & Rosebaugh*, 1 Kan. App. 2d 32, 562 P.2d 445 (1977), the Kansas Court of Appeals overturned the 1974 convictions of two defendants charged under K.S.A. 21-4301 because the definition of "obscene" prior to 1976 was found to be unconstitutionally overbroad. It held that the decision in *State v. A Motion Picture Entitled "The Bet,"* supra, redefining the word "obscenity" could not be applied retroactively to the conduct of the defendants in 1974.

In *State v. Loudermilk*, 221 Kan. 157, 160, 557 P.2d 1229 (1976), the Court referred to 21-4301 and 21-4301a (promoting obscenity) as crimes in which a previous conviction is not an element of the substantive crime but serves only to enhance punishment.

In *New York v. Ferber*, 458 U.S. 747, 73 L.Ed 2d 1113, 102 S.Ct. 3348 (1982), which upheld a New York criminal statute prohibiting the knowing promotion of sexual performances by children under 16, by distribution of material depicting such performances, the Court followed the obscenity standards of *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973). *Ferber* held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than in the case of adults.

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301 was upheld against allegations that the statute was unconstitutional as a violation of due process, because the definition of "obscenity" was vague and overbroad and the statute was an invalid exercise of the police power.

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office. In *DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 953 P.2d 231 (1998), at page 718, *State v. Hughes* is discussed in some detail in determining that a municipal ordinance regulating nudity in a drinking establishment was not unconstitutionally vague.

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

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

65.02 PROMOTING OBSCENITY TO A MINOR

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

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

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

Notes on Use

For authority, see K.S.A. 21-4301a. Promoting obscenity to a minor is a class A, nonperson misdemeanor, for the first conviction. For second and subsequent convictions, this offense is a severity level 8, person felony. For affirmative defenses, see PIK 3d 65.05-A.

For definitions, see PIK 3d 65.03, Promoting Obscenity - Definitions.

Comment

See Comment to PIK 3d 65.01, Promoting Obscenity, in regard to the statutory changes made in 21-4301 and 21-4301a by the 1976 Legislature as a result of the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed 2d 419, 93 S.Ct. 2607 (1973), and the decision of the Supreme Court of Kansas in *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976), which redefine the term "obscenity." The Legislature amended K.S.A. 21-4301a to conform to the new definition mandated by those decisions.

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

65.06 GAMBLING

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

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

1. **That the defendant (made a bet) (entered or remained in a gambling place with intent to [make a bet] [participate in a lottery] [play a gambling device]); and**
2. **That this act occurred on or about the ____ day of _____, ____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4303. Gambling is a class B, nonperson misdemeanor. PIK 3d 65.07, Gambling-Definitions, should be given with this instruction.

Comment

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

65.06-A ILLEGAL BINGO OPERATION

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

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

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

Bingo means a game in which: (1) Each player pays a charge; (2) a prize or prizes are awarded to the winner or winners; (3) each player receives one or more cards or faces; and (4) each player covers the squares on each card or face as the operator of such game announces a number, letter or combination of numbers and letters appearing on an object selected by chance, either manually or mechanically from a receptacle in which have been placed objects bearing numbers, letters or combinations of numbers and letters corresponding to the system used for designating the squares. The winner of each game is the player or players first covering properly a predetermined and announced pattern of squares upon the card or face being used by such player or players.

Notes on Use

For authority, see K.S.A. 21-4303a. An illegal bingo operation is a class A nonperson misdemeanor. The definition of bingo set forth in the instruction is that contained in K.S.A. 79-4701(f).

Comment

An illegal bingo operation could include any violation of a statutory provision pertaining to bingo as contained in K.S.A. 79-4701 through 79-4711 or of any regulation adopted pursuant to K.S.A. 79-4708. In a prosecution under this section, Element No. 2 of the instruction should include a statement describing the specific statute or regulation with which the defendant failed to comply.

In *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), the Kansas Supreme Court construed K.S.A. 79-4701 *et seq.*, to permit a class A private club to fall within the definition of a bona fide fraternal organization, thereby making the club eligible for a bingo license.

65.07 GAMBLING - DEFINITIONS

"Bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.

"Consideration" means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration.

"Gambling device" is any so-called "slot machine" or any other machine, mechanical device, electronic device or other contrivance an essential part of which is a drum or reel with insignia thereon, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any other machine, mechanical device, electronic device or other contrivance (including, but not limited to, roulette wheels and similar devices) which is equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or is otherwise designed, manufactured or altered primarily for use in connection with gambling, and (i) which when operated may deliver, as the result of chance, any money or property, or (ii) by the operation of which a person may become entitled to receive, as the result of chance, any money or property; any subassembly or essential part intended to be used in connection with any such machine, mechanical device, electronic device or other contrivance, but which is not attached to any such machine, mechanical device, electronic device or other contrivance as a constituent part; or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not

CHAPTER 67.00

CONTROLLED SUBSTANCES

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, *rev. denied* 249 Kan. 777 (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; *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. See also *State v. Marion*, 29 Kan. App. 2d 287, 27 P.3d 924, *rev. denied* 272 Kan. __ (2001); *State v. Alvarez*, 29 Kan. App. 2d 368, 28 P.3d 404, *rev. denied* 272 Kan. ___ (2001); *State v. Fortune*, 28 Kan. App. 2d 559, 20 P.3d 74, *rev. denied* 271 Kan. ___ (2001); and *State v. Fulton*, 28 Kan. App. 2d 815, 23 P.3d 167, *rev. denied* 271 Kan. ___ (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."

67.17 SIMULATED CONTROLLED SUBSTANCES, DRUG PARAPHERNALIA, ANHYDROUS AMMONIA OR PRESSURIZED 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, anhydrous ammonia or pressurized 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 or pressurized ammonia 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. K.S.A. 65-4152(b). 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(c) and (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), *rev denied* 250 Kan. 806 (1992).

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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 337, 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*, 274 Kan. __, 54 P.3d 960 (2002), the Kansas Supreme Court modified *State v. Martens*, 273 Kan. __, 42 P.3d 142 (2002) *overruling State v. Martens*, 29 Kan. App. 2d 361, 28 P.3d 408 (2001). In *Martens II*, the Court held that despite the statute's title which includes the term "attempting," K.S.A. 65-4159 criminalizes only the manufacture of controlled substances or analogs thereof. However, the Court interpreted the term "manufacture" to include not only the completed manufacture of a controlled substance, but also facts showing that the manufacturing could have been successfully completed.

In *Martens II*, the Court further held that although prosecution for attempted manufacture is a separate offense controlled by K.S.A. 21-3301(a), this offense is nonetheless a lesser included crime of manufacturing, citing *State v. Peterson*, 273 Kan. __, 42 P.3d 137 (2002). The *Martens II* Court stated that although the better or preferred practice is to charge the attempted manufacture alternatively, such is not required. A defendant may be charged in the complaint with violating K.S.A. 65-4159 and subsequently convicted of the lesser crime of attempt to manufacture. The penalties for the two offenses, however, are the same. K.S.A. 65-4159(b).

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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 337, 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 361, 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).

67.24 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 392, 28 P.3d 1019 (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 368, 28 P.3d 404, *rev. denied* 272 Kan. ___ (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 METHAMPHETAMINE COMPONENTS - POSSESSION WITH INTENT TO MANUFACTURE

The defendant is charged with the crime of possession of (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (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 to manufacture a controlled 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) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (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 to manufacture a controlled 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. 65-7006. Although the statute provides that a violation thereof is a drug severity level 1 felony, *State v. Frazier*, 30 Kan. App. 2d __, 42 P.3d 188, *rev. denied* 274 Kan. ___ (2002), holds that a violation of K.S.A. 2001 Supp. 65-7006(a) is a drug severity level 4 felony because the elements thereof are identical to K.S.A. 65-4152, a drug severity level 4 felony. For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

Comment

K.S.A. 65-7006(a) is a general statute that addresses not only pure ephedrine or pseudoephedrine, but also drug products containing ephedrine or pseudoephedrine. *State v. Frazier*, 30 Kan. App. 2d __, 42 P.3d 188, *rev. denied* 274 Kan. __ (2002).

67.28 METHAMPHETAMINE COMPONENTS - MARKETING, SALE, ETC.

The defendant is charged with the crime of unlawfully (marketing) (selling) (distributing) (advertising) (labeling) a drug product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above). The defendant pleads not guilty.

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

1. **That the defendant knowingly (marketed) (sold) (distributed) (advertised) (labeled) a drug product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above); and**
2. **That the defendant knew or reasonably should have known that the purchaser would use the product to manufacture a controlled substance,**
   or
   That the product was sold for stimulation, mental alertness, weight loss, appetite control, energy (or other use) not approved by federal law; and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-7006. A violation of this section is a drug severity level 1 felony.

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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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 234-35).

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

68.06 NOT GUILTY BECAUSE OF MENTAL DISEASE OR DEFECT

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

_____

Presiding Juror

Notes on Use

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

Comment

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

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

68.07 MULTIPLE COUNTS - VERDICT INSTRUCTION

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

Notes on Use

This instruction should be given when multiple counts are charged.
See PIK 3d 68.08, Multiple Counts - Verdict Forms.

Comment

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

The trial court erred in failing to give this pattern in *State v. Macomber*, 244 Kan. 396, 405-6, 769 P.2d 621, *cert. denied* 493 U.S. 842 (1989), *overruled on other grounds State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996). However, the failure was not reversible error under the circumstances of the case because it did not prejudicially affect the substantial rights of the defendant.

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

The trial court's failure to give PIK Crim. 3d 68.07 is not clearly erroneous where there is no real possibility that the jury would have reached a different result had the instruction been given. *State v. Gould*, 271 Kan. 394, 401, 23 P.3d 801 (2001).

68.09 LESSER INCLUDED OFFENSES

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3107, substantially amended under L. 1998, ch. 185, § 1. Under the amendments, the information/evidence test as enunciated in *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), has been eliminated.

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

Comment
(Cases before July 1, 1998)

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

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

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

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). However, in *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987), the Supreme Court held it was not reversible error to fail to give such an instruction.

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

Solicitation was not held to be a lesser included offense of aiding and abetting first degree murder. *State v. DePriest*, 258 Kan. 596, 604, 907 P.2d 868 (1995). See also, *State v. Webber*, 260 Kan. 263, 280-2, 918 P.2d 609 (1996), *cert. denied* 519 U.S. 1090, 136 L.Ed 2d 711, 117 S.Ct. 764 (1997), holding no error by the trial court in failing to instruct on criminal solicitation as a lesser included offense of either conspiracy to commit first degree murder or aiding and abetting first degree murder.

Examples of lesser included offenses are:

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

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). Nor is battery a lesser included offense of aggravated indecent liberties with a child because "lewd" is not equivalent to "rude or insulting." *State v. Banks*, 273 Kan. __, 46 P.3d 546 (2002).

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).

(Cases after July 1, 1998)

1. **Criminal Threat** - Conviction for criminal threat and harassment by telephone are not multiplicitous. *State v. Schuette*, 273 Kan. __, 44 P.3d 459 (2002).

2. **Kidnapping or Aggravated Kidnapping** - The crimes of interference with parental custody and criminal restraint are not lesser included offenses of kidnapping. *State v. Wiggett*, 273 Kan. __, 44 P.3d 381 (2002).

3. **Robbery or Aggravated Robbery** - Obtaining by threat control over property is not a lesser included crime of robbery or aggravated robbery. However, theft of lost or mislaid property is a lesser included crime. *State v. Sandifer*, 270 Kan. 591, 17 P.3d 921 (2001).
4. **Sexual Exploitation of a Child** - Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

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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. 929, 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 940.

A multiple acts case is distinguishable from a multiple means case. Unanimity is not required as to the means by which a crime was committed so long as substantial evidence supports each alternative means. *State v. Timley*, 255 Kan. 286, Syl. ¶ 1.

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

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

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

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

or

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

_____
Presiding Juror

Notes on Use

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

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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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 159).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 159).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 172, 254).

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*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 234-35). 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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69.04 CAPITAL MURDER--GUILT AND PENALTY PHASES

Summary of the Facts and Issues

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

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

Suggested Instruction to be Given Before Voir Dire:

PIK 3d 56.00, Capital Murder - Pre-Voir Dire Instruction

Outline of Suggested Instructions in Sequence - Guilt Phase:

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

PIK 3d 51.05, Rulings of the Court.
PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

Instruction 2. **PIK 3d 56.00-A, Capital Murder.**

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

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

Instruction 5. **PIK 3d 56.05, Voluntary Manslaughter.**

Instruction 6. **PIK 3d 56.06, Involuntary Manslaughter.**

Instruction 7. **PIK 3d 56.04, Homicide Definitions.**

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

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

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

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

Instruction 12. **PIK 3d 51.10-A, Penalty not to be Considered by Jury - Cases that Include a Sentencing Proceeding.**

Instruction 13. **PIK 3d 68.01, Concluding Instructions.**

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

TEXT OF SUGGESTED INSTRUCTION TO BE GIVEN BEFORE VOIR DIRE

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. Each of you have received questionnaires concerning your respective views regarding capital punishment. I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time concerning the number of years the defendant will serve in prison if not sentenced to death. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty. (PIK 3d 56.00)

TEXT OF SUGGESTED INSTRUCTIONS - GUILT PHASE

Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the

instructions. You must decide the case by applying these instructions to the facts as you find them.
(PIK 3d 51.02)

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

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

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

Instruction No. 2.

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

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

1. **That the defendant intentionally killed Joe Jones.**
2. **That such killing was done with premeditation.**
3. **That the defendant was an inmate or prisoner confined in a state correctional institution; and**
4. **That this act occurred on or about the 5th day of July, 1998, in Butler County, Kansas.**

(PIK 3d 56.00-A)

Instruction No. 3.

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

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

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

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

Instruction No. 4.

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

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

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

(PIK 3d 56.03)

Instruction No. 5.

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

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. The disposition of the case thereafter is not to be considered in arriving at your verdict.
(PIK 3d 51.10-A)

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)

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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)

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 any mitigating circumstances found to exist.
(PIK 3d 56.00-E)

Instruction No. 9

In making the determination whether aggravating circumstances exist that outweigh any 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 any 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 any 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)

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. 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. 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. 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.

CHAPTER 71.00

UPWARD DURATIONAL DEPARTURE

71.01 UPWARD DURATIONAL DEPARTURE - SENTENCING PROCEEDING

The laws of Kansas provide for a separate sentencing proceeding when a defendant has been found guilty of a crime and the State seeks an increase in the defendant's sentence above the presumptive sentence provided by law. At the proceeding, the trial jury shall consider aggravating factors relevant to the question of the sentence.

The State contends that the following aggravating factors exist in this case:

[List aggravating factors set forth in the State's written notice.]

Notes on Use

For authority, see K.S.A. 21-4716, 21-4717 and 21-4718. This instruction should be given in all upward durational departure hearings to guide deliberations on the existence of aggravating factors. It is the trial court's responsibility to determine whether aggravating factors are substantial and compelling reasons to depart as a matter of law.

This instruction may be preceded by the applicable introductory and cautionary instructions contained in PIK 3d 51.02, 51.04, 51.05 and 51.06, as modified to fit this proceeding.

In *State v. McClennon*, 273 Kan. __, 45 P.3d 848 (2002), the Kansas Supreme Court noted that under K.S.A. 2001 Supp. 21-4716(b)(3), if a factual aspect of a crime is a statutory element of the crime, that aspect of the current crime of conviction may be used as an aggravating factor for sentencing purposes only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by that aspect of the crime. This subsection applies to all aggravating factors. If the trial court is instructing a jury on an aggravating factor that is also an element of the crime of conviction, the court should instruct the jury that the aggravating factor found to exist must be "significantly different" than the usual criminal conduct involved in such an act. The Committee has prepared no pattern instruction since the language would necessarily be fact-specific for each case.

71.02 BURDEN OF PROOF

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating factors. In deciding whether the State has met its burden, you may consider all the evidence presented at the trial [and the additional evidence presented at this hearing].

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings. The bracketed language should be included if the parties offered additional evidence after the trial on the existence of aggravating factors.

71.03 UNANIMOUS VERDICT

The jury must unanimously agree as to each finding of an aggravating factor. If you find beyond a reasonable doubt that there are one or more aggravating factors, you must designate upon the verdict form with particularity the aggravating factors unanimously agreed upon by the jury.

If you are unable to agree that any aggravating factors exist, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict on any aggravating factors.

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.04 EFFECT ON SENTENCE

If you unanimously find beyond a reasonable doubt that there are one or more aggravating factors, then the Court may increase the defendant's sentence above the presumptive sentence provided by law. The length of the defendant's sentence, including any increase due to the existence of aggravating factors, is a matter for determination by the Court.

If you are unable to agree that any aggravating factors exist, then the defendant will receive the presumptive sentence provided by law.

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.05 CONCLUDING INSTRUCTION

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 finding any aggravating factors must be unanimous.

_____
District Judge

_____
Date

Notes on Use

For authority, see K.S.A. 21-4718. This instruction should be given in all upward durational departure hearings.

71.06 VERDICT FORM FINDING AGGRAVATING FACTOR(S)

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously find beyond a reasonable doubt that the following aggravating factors have been established by the evidence. [The presiding juror shall place an X in the square in front of such aggravating factor(s).]

☐ **[factor]**

☐ **[factor]**

☐ **[etc.]**

_____

Presiding Juror

_____

Date of Verdict

Notes on Use

For authority, see K.S.A. 21-4718. The applicable aggravating factors as set forth in the instructions should be included in the verdict form.

71.07 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 on any aggravating factors.

_____
Presiding Juror

_____
Date of Verdict

Notes on Use

For authority, see K.S.A. 21-4718. If, after a reasonable time for deliberation, the jury is unable to reach a verdict finding any specific factors, the court shall dismiss the jury whether or not this verdict form is signed. In this case, the court shall only impose a sentence as provided by law.

PIK CRIMINAL INDEX