Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

DEDICATION OF *PIK-CRIMINAL 3d*
2003 SUPPLEMENT TO
HONORABLE DAVID S. KNUDSON

Mark Twain said a "classic" is a book which people praise and don't read. In that sense, the PIK volumes, both civil and criminal, cannot be said to be classics. More importantly, the PIK books are as Martin Tupper said the "best of friends, the same–to–day and for ever." Those two volumes utility and reliability for judges and lawyers are due largely to the efforts of David Knudson.

Our beloved presiding officer first joined the PIK Committees in May 1986 and assumed the top position of both groups in May 1992. He retained that position until his resignation in May 2003. David could keep us on task in the most amiable way, despite having to deal with windy orations and prolix proposals. His understanding of procedure and knowledge of law is deep. His command of English is crisp and clear.

Judge Knudson has moved on to higher things now, such as jogging in the Grand Canyon, but his work remains as a well-read friend, "the same to–day and for ever." This supplement is testimony to just a part of the work of a judge dedicated to Kansas, its courts, and its people. We respectfully dedicate this to David S. Knudson in acknowledgment of his hard work, application, and friendship. Thank you David.

Hon. Stephen D. Hill, Chair,
Judicial Council PIK-Criminal
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52.05 STIPULATIONS AND ADMISSIONS

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

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

Notes on Use

This instruction is usually unnecessary, although it may be given if the trial court finds it helpful to the jury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), acknowledged that Kansas case law has not always been consistent on the question whether other crimes evidence is admissible to show intent when defendant simply denies that the acts charged ever occurred. The court concluded that the trend of the most recent cases is to require defendant to have asserted an innocent explanation for an acknowledged act before intent will be considered a disputed material issue. Thus, where defendant was charged with sexual abuse of his stepson, evidence that he previously had engaged in other forms of sexual abuse with two stepdaughters and

a sister-in-law was not admissible to prove intent or absence of mistake or accident where defendant denied that the incidents with the stepson occurred. Further, intent was not made an issue by defendant's statement to a KBI investigator admitting that unintentional touching had occurred on a separate occasion when defendant awakened to find his stepson in his bed.

Examples: Where a stabbing was susceptible of two interpretations, that defendant acted in self-defense or with the intent to kill, evidence of a prior conviction for aggravated battery was properly admitted to prove intent. *State v. Synoracki*, 253 Kan. 59, 74, 853 P.2d 24 (1993). Where the defendant had broken a jewelry store window, had taken the items on display, and had fled, it was clear that the crime was intentional and evidence of a prior crime should not have been admitted. *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1977). Intent is not at issue where there is clear evidence of malice and willfulness. *State v. Hensen*, 221 Kan. 635, 645, 562 P.2d 51 (1977). Intent was properly in issue where the charge of attempted burglary was supported by circumstantial evidence and the defense alleged that the defendant was on his way to see his girlfriend. *State v. Wasinger*, 220 Kan. at 602-603.

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

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

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), held it was reversible error in a prosecution for child sexual abuse to admit other crimes evidence to show plan based upon common modus operandi, where the similarities

between the charged crime and the other crimes "are present in nearly all . . . scenarios" in which the charged crime occurs and there are significant dissimilarities. Proof of plan by modus operandi requires a showing of "striking similarities." *Id.*

(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 ordinarily is not required but may nevertheless be given. See Section III, Admission Independent of K.S.A. 60-455.

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

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

* *Acquittal as a Collateral Estoppel. Dowling v. United States*, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990), holds that the doctrine of collateral estoppel implicit in the Double Jeopardy Clause of the Fifth Amendment ordinarily does not bar receipt of evidence of other crimes that is relevant for a purpose permitted by Federal Rule of Evidence 404(b), the counterpart of K.S.A. 60-455, even though criminal charges based upon that evidence resulted in an acquittal. Acquittal means only that the jury did not find defendant guilty beyond a reasonable doubt based upon the evidence. Under *Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771, 108 S.Ct. 1496 (1988), evidence need not satisfy the "beyond a reasonable doubt" standard to be admissible for a purpose identifed in Rulea 404(b). All that is required is evidence sufficient to permit a jury reasonably to conclude that the act occurred and that defendant was the actor. *Dowling* distinguished *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970), which held that defendant's acquittal of robbing one of six men playing poker in a home precluded, under the doctrine of collateral estoppel, subsequent prosecution of defendant for robbing a second of the six men. In *Ashe*, both

prosecutions involved the same ultimate facts; in *Dowling*, the second prosecution involved different ultimate facts.

A Kansas decision prior to *Dowling* applied collateral estoppel to preclude admission of other crimes evidence when *Dowling* would not exclude it. *See State v. Irons*, 230 Kan. 138, 630 P.2d 1116 (1981) (prior acquittal when alibi defense asserted bars admission of evidence of other crime to show identity). However, *State v. Searles*, *supra*, 246 Kan. at 579-582, cited *Dowling* with approval in holding that collateral estoppel did not bar admission of other crimes evidence to show identity where the prior acquittal was not based upon alibi. *Searles* does not explicitly overrule *Irons*, stating merely that admissibility for a relevant prupose is a matter of discretion if "the collateral estoppel doctrine does not bar its introduction."

**Standard of Proof of Other Crime.* No Kansas decision has determined whether the prima facie evidence standard of *Huddleston*, or some higher standard, applies in Kansas when evidence of prior crimes is offered for a purpose listed in K.S.A. 60-455.

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

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

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

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

* *Sex Offenses.* The Court in some cases has apparently taken a more liberal view regarding admission of evidence in prosecutions for sex crimes. See *State v. Rucker*, 267 Kan. 816, 987 P.2d 1080 (1999); *State v. Damewood*, 245 Kan. 676,

783 P.2d 1249 (1989); State *v. Fisher*, 222 Kan. 76, 563 P.2d 1012 (1977). For commentary, see Purinton, *Call it a "Plan" and a Defendant's Prior (Similar) Sexual Misconduct Is In: The Disappearance of K.S.A. 60-455*, JKBA Vol. 70, No. 8, Sept. 2001, and Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. at 175-76.

A more recent decision, *State v. Davidson, supra*, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003) applied K.S.A. 60-455 to a prosecution for child sexual abuse in the same way it applies in other cases. The court held it was reversible error to admit other crimes evidence to show identity or plan when defendant was charged with abusing his stepson, even though the other offenses involved defendant's stepdaughters and had some similarities with the crime charged.

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

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

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

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

(1) *Rebuttal of Good Character Evidence.* Sections 60-446, 60-447 and 60-448 of the Kansas Code of Civil Procedure allow evidence to be introduced by the defendant regarding a trait of his or her character either as tending to prove conduct on a specified occasion or as tending to prove guilt or innocence of the offense charged. (See specifically, K.S.A. 60-447). Only after the defendant has introduced evidence of good character may the State introduce evidence relevant only to show a bad character trait of defendant on the issue of guilt. The State is limited in is use of specific instances of conduct for this purpose as follows:

(a) *Cross-Examination of Character Witness.* The State may cross-examine defendant's good character witnesses about defendant's prior convictions and specific instances of defendant's conduct that did not result in conviction, if they are inconsistent with the good trait of character offered by defendant. *State v. Hinton*, 206 Kan. 500, 479 P.2d 910 (1971), sets forth standards trial judges should use in determining whether to permit such cross-examination.

(b) *Evidence of Specific Instances of Bad Conduct.* In rebuttal, the State may prove prior convictions showing the trait to be bad but may not offer evidence of specific instances of conduct that did not result in conviction. K.S.A. 60-447.

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

See generally, *State v. Price*, 275 Kan. 78, 61 P.3d 676 (2003); *State v. Bright*, 218 Kan. 476, 477-479, 543 P.2d 928 (1975); Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. at 105-108.

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

(3) *Res Gestae.* Prior to adoption of the Kansas rules of evidence, the common law doctrine of *res gestae* often was used to justify admission of other crimes evidence. According to this doctrine, acts done or declarations made before, during, or after the happening of the principal fact may be admissible as part of the *res gestae* where the acts are so closely connected with it as to form in reality a part of the occurrence. *State v. Davis*, 256 Kan. 1, 21, 883 P.2d 735 (1994).

The Kansas rules of evidence do not mention *res gestae* as a basis for admitting evidence. They limit admissibility to evidence having "any tendency in reason to prove any material fact [K.S.A. 60-401(b); 60-407(f)] and in K.S.A. 60-455 exclude evidence of other crimes when its only relevance is to prove defendant's disposition to commit crime. Nevertheless, Kansas decisions continued to invoke *res gestae* to support admission of other crimes evidence. *State v. Sanders*, 258 Kan. 409, 423, 904 P.2d 951 (1995) ("*Res gestae* evidence is evidence which, though not constituting a part of the crimes charged, has a natural, necessary, or logical connection to the crime.") *State v. Edwards*, 264 Kan. 177, Syl. ¶ 15, 955 P.2d 1276 (1998). ("*Res gestae* includes circumstances or acts which are automatic and undesigned incidents of the particular litigated act and which may be separated from the particular act by lapse of time, but are illustrative of that act. *Res gestae* is the whole of the transaction under investigation or being litigated.") *State v. Spresser*, 257 Kan. 664, 667, 896 P.2d 1005(1995) (the admission of *res gestae* evidence does not require a limiting instruction).

In many instances, evidence of other crimes that are part of the *res gestae* will satisfy the code's requirement of relevance, such as by showing opportunity, intent or some other purpose listed in K.S.A. 60-455. *State v. Edwards*, *supra*, or when other evidence relevant to prove the crime charged necessarily discloses the other crime, as discussed in subsection (6), *infra*.

Reliance upon the *res gestae* doctrine to admit other crimes evidence that does not meet requirements for admissibility set forth in the evidence code has been criticized by members of the Court, *State v. Edwards*, *supra*, at 203 (Six

concurring), and by commentators. See Steven Joseph, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455,* 49 KAN. L. REV. 145, 172-183 (2000); Dennis D. Prater and Virginia M. Klemme, *Res Gestae Raises Its Ugly Head,* J. KAN. B.A. 24 (Oct. 1996).

Several recent decisions have acknowledged that "Acts done or declarations made as part of the *res gestae* are not admitted into evidence without limitation but are governed by the procedural rules and rules of evidence set out by Chapter 60, Article 4, of the Kansas Statutes Annotated." *State v. Edwards*, 264 Kan. at Syl. ¶ 16.

State v. Ward, 31 Kan. App. 2d 284, 288, 64 P.3d 972 (2003), recognized that the Kansas Supreme Court has not clearly abolished the *res gestae* doctrine. However, it held that mere temporal proximity of the other crime to the crime charged is insufficient to invoke the doctrine. The court reversed the trial court for admitting as *res gestae* evidence of a drug transaction that preceded the charged sex offense where the drug crime was "not logically related to one or more of the material facts in issue," since it did not explain why the charged crime occurred, did not facilitate it, and was not naturally, necessarily or logically connected with it or illustrative of it. *Ward* further suggests that *res gestae* evidence should be excluded when its probative value is substantially outweighed by the risk of prejudice.

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim is admissible independent of K.S.A. 60-455 if the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. *State v. Lumley*, 266 Kan. 939, 954, 976 P.2d 486 (1999); *State v. Carr*, 265 Kan. 608, 624, 963 P.2d 421 (1998); *State v. Jones*, 247 Kan. 537, 547, 802 P.2d 533 (1990).

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

(5) *Other Crime as Element of Crime Charged.* Evidence of a prior conviction is admissible independent of K.S.A. 60-455 if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972). Where evidence of a prior conviction is admitted for this purpose, the trial court should give a limiting instruction on its use by the jury, although the failure to do so is not reversible error in the absence of a request for such an instruction. *State v. Humphrey*, 258 Kan. 372, 367, 905 P.2d 664 (1995).

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

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

(7) *Rebuttal of Credibility Evidence.* After the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior convictions for the purpose of impeaching the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a *conviction* of a crime involving *dishonesty* or *false statement.* The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Tucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Tucker v. Lower*, 200 Kan. at 5. See also, *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976); *State v. Johnson*, 21 Kan. App. 2d 576, 907 P.2d 144 (1995).

(8) *Other Crimes of a Person Other Than a Defendant. State v. Bryant,* 228 Kan. 239, 613 P.2d 1348 (1980) held that K.S.A. 60-455 does not apply in a criminal case to a person other than the accused, and evidence that such a person may have committed a crime or civil wrong may not be introduced thereunder. Neither the text of K.S.A. 60-455 nor the policies underlying it support restricting admission of prior crimes evidence to those of the criminal defendant. Exclusion of evidence of third party crimes is justified in many cases for the distinct reason that the risk such evidence will mislead the jury or confuse the issues substantially outweighs its limited probative value, as where defendant offers evidence of other crimes to show a third party had a motive to kill the victim but offers no other evidence linking the third party to the crime. However, where there is conflicting evidence whether defendant or a third party killed the victim, evidence that the third party had killed others in the same distinctive way would be highly probative on the issue of identity. *Bryant* and related cases are criticized in Dennis Prated and Tammy M. Somogye, *Some Other Dude Did It (But Will You Be Allowed to Prove It?),* 65 J. KAN. B.A. 28, 35 (May 1998). Authority under the Federal Rules of Evidence counterpart to K.S.A. 60-455 admits third party crimes evidence in these

circumstances. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404 [15], p. 404-94 (1995) ["A defendant in order to prove mistaken identity may show that other crimes similar in detail have been committed at or about the same time by some person other than himself," citing *United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978), and *Holt v. United States*, 342 F.2d 163, 166 (5th Cir, 1965)]

State v. Evans, 275 Kan. 95, 105, 63 P. 3d 220 (2003), held that even when the State offers direct evidence from an eyewitness that defendant shot the victim, "Circumstantial evidence that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim." While *Evans* did not involve evidence of third party crimes, its reasoning may be applied to such cases.

Evidence of prior criminal convictions of a witness against a criminal defendant is subject to the restrictions found in K.S.A. 60-421. The credibility of a witness can only be impeached by crimes involving dishonesty or false statement.

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

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

IV. CONCLUSIONS AND RECOMMENDATIONS

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

52.07 MORE THAN ONE DEFENDANT - LIMITED ADMISSIBILITY OF EVIDENCE

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

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

Notes on Use

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

Comment

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

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. See, for example, *State v. Gaines*, 260 Kan. 752, 755, 926 P.2d 641 (1996), where the trial court modified PIK 52.20 by removing factor 6.

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.

In *State v. Mann*, 274 Kan. 670, 56 P3d 212 (2002), the court held in any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is serious questions 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. However, where the witness personally knows the individual being identified, the cautionary eyewitness identification instruction is not necessary and the accuracy of the identification can be sufficiently challenged through cross-examination.

Kansas previously applied the factors in *Neil v. Biggers*, 409 U.S. 188, 199-20, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972), to evaluate the reliability of an eyewitness identification. *State v. Hunt*, 275 Kan. 811, 69 P.3d 571 (2003), dealt with admissibility of eyewitness identification and not the sufficiency of the jury instruction. *Hunt* adopted the factors in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). In *Ramirez*, the court enumerated five factors for evaluating the reliability of eyewitness identifications: (1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; (3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained

consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly. In *Hunt*, the court stated, "[O]ur acceptance [of the *Ramirez* model] should not be considered as a rejection of the *Biggers* model, but, rather, as a refinement in the analysis."

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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. 738, 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

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

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

Notes on Use

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

Comment

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

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

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

Mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green*, 237 Kan. 146, 697 P.2d 1305 (1985). This language from *Green*, however, may properly be refused as an additional instruction by the trial judge, since PIK 3d 54.05 clearly informs the jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting. *State v. Hunter*, 241 Kan. 629, 639, 740 P.2d 559 (1987); *State v. Scott*, 250 Kan. 350, 361, 827 P.2d 733 (1992); *State v. Ninci*, 262 Kan. 21, 46, 936 P.2d 1364 (1997); *State v. Jackson*, 270 Kan. 755, 19 P.3d 121 (2001); *State v. Pink*, 270 Kan. 728, 20 P.3d 31 (2001).

See *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974), wherein it was held "to be guilty of aiding and abetting in the commission of a crime the defendant must willfully and knowingly associate himself with the unlawful venture and willfully participate in it as he would in something he wishes to bring about or to make succeed." In *State v. Wakefield*, 267 Kan. 116, 121, 977 P.2d 941 (1999), the court states that the trier of facts may consider the failure of a person to oppose the commission of a crime in connection with other circumstances as evidence of aiding

and abetting. As with the language from *Green*, the Committee believes that this language from *Wakefield* may properly be refused as an additional instruction by the trial judge because PIK3d 54.05 is adequate. However, inclusion of this language along with the PIK instruction does not improperly permit the jury to find defendant guilty of several crimes by aiding or abetting in the commission of only one of them. *State v. Bradford*, 272 Kan. 523, 538, 34 P.3d 434 (2001).

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

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

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

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

54.12-A VOLUNTARY INTOXICATION - SPECIFIC INTENT CRIME

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

Notes on Use

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

Comment

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

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

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

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

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

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

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

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

In *State v. Kleypas*, 272 Kan. 894, 943-7, 40 P.3d 139 (2001), the Supreme Court considered and rejected the defendant's contentions that the trial court's voluntary intoxication instruction based upon PIK 54.12-A changed voluntary intoxication into an affirmative defense and prohibited the jury from aggregating intoxication with other evidence of mental disorder which also affected the defendant's capacity to form the necessary intent.

In *State v. Bradford*, 272 Kan. 523, 535, 34 P.3d 434 (2001), the voluntary intoxication defense was applicable to both intent and state of mind elements of multiple charges, including capital murder, first degree murder, felony murder and aggravated battery. The trial court altered the final two lines of the instruction so that it read: "was incapable of forming the necessary [premeditation or intent to kill...or intent to commit the underlying felonies]."

Bradford rejected defendant's claim that this instruction is inconsistent with K.S.A. 21-3208, noting that the legislature has not chosen to modify the Court's interpretation of the statute. The Court also found no error in the trial court's failure to modify this instruction to make voluntary intoxication one factor out of several for the jury to consider when determining if he was capable of the requisite intent or state of mind. There was no evidence in the record that defendant was of low intelligence or that any other aspect of his character or background affected his ability to form the requisite intent.

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

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

Notes on Use

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

Comment

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

In *State v. Bradford*, 272 Kan. 523, 535, 34 P.3d 434 (2001), the voluntary intoxication defense was applicable to both intent and state of mind elements of multiple charges, including capital murder, first degree murder, felony murder and aggravated battery. The trial court altered the final two lines of the instruction so that it read: "was incapable of forming the necessary [premeditation or intent to kill...or intent to commit the underlying felonies]."

Bradford rejected defendant's claim that this instruction is inconsistent with K.S.A. 21-3208, noting that the legislature has not chosen to modify the Court's interpretation of the statute. The Court also found no error in the trial court's failure to modify this instruction to make voluntary intoxication one factor out of several for the jury to consider when determining if he was capable of the requisite intent or state of mind. There was no evidence in the record that defendant was of low intelligence or that any other aspect of his character or background affected his ability to form the requisite intent.

54.12-B DIMINISHED MENTAL CAPACITY

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

Notes on Use

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

Comment

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

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

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

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

54.16 RESTITUTION

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

Comment

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

54.17 USE OF FORCE IN DEFENSE OF A PERSON

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

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

Notes on Use

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

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

In certain cases defendant may claim the use of force was justified both as self-defense and as the defense of another person. The first paragraph of this instruction may be modified by inserting "and" between "self-defense" and "the defense of another person." However, the second paragraph must be modified by inserting the word "or" between "(himself)(herself)" and "(another)" to make it clear that the jury may find justification as self-defense alone or as the defense of another person alone and need not find both justifications. *State v. Scott*, 271 Kan. 103, 115, 21 P.3d 516 (2001).

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent." The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor

whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." See also, *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

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

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

54.17-A NO DUTY TO RETREAT

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

Notes on Use

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

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. 894, 940-41, 40 P.3d 139 (2001), the Supreme Court recommended that PIK 55.01 be amended to include the term "overt act" rather than "act" and to include language indicating that mere preparation is insufficient to constitute an overt act. The Committee's definitional paragraph also includes language from *State v. Gobin*, 216 Kan. at Syl. 3.

Where the crime charged is completed, there is no basis for an instruction on an attempted crime. *State v. Grauerholz*, 232 Kan. 221, 230, 654 P.2d 395 (1982).

Where there was an overt act by the defendant but failure to complete the crime, a defense of voluntary abandonment was rejected by the Court of Appeals in *State v. Morfitt*, 25 Kan. App. 2d 8, 956 P.2d 719, *rev. denied* 265 Kan. 888 (1998).

The trial court has a duty to instruct on lesser included offenses established by the evidence, even though the instructions have not been requested. Such an instruction must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant. The duty to so instruct exists only where the defendant might reasonably be convicted of the lesser offense. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). K.S.A. 22-3414(3) codifies the duty of the court to instruct on lesser included offenses; however, no party may assign as error the giving or failure to give an instruction, including a lesser included offense instruction, unless the party objects thereto or unless the instruction or failure to give an instruction is clearly erroneous.

For purposes of K.S.A. 21-3107(2), the offenses of attempted second-degree murder and attempted voluntary manslaughter are included crimes of a lesser degree of attempted first-degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

In order to convict a defendant of an attempt to commit a crime, the State must show the commission of an overt act plus the actual intent to commit that particular

crime. See *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985). One cannot intend to commit an accidental, negligent, or reckless homicide. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Following the premise that one cannot intend to commit an unintentional act, Kansas does not recognize an attempt to commit involuntary manslaughter. *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995). For a discussion of whether Kansas recognizes an attempted assault or attempted aggravated assault, see *Spencer v. State*, 264 Kan. 4, 954 P.2d 1088 (1998).

The general principles for determining whether charges are multiplicitous or duplicitous with attempted crimes have been discussed in several cases. In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), a charge of aggravated sexual battery was held not to be multiplicitous with charges of attempted aggravated sodomy or attempted rape. However, aggravated battery has been held to be multiplicitous with a charge of attempted murder. *State v. Perry*, 266 Kan. 224, 968 P.2d 674 (1998); *State v. Cathey*, 241 Kan. 715, 741 P.2d 738 (1987); *State v. Turbeville*, 235 Kan. 993, 686 P.2d 138 (1984); and *State v. Garnes*, 229 Kan. 368, 372, 373, 624 P.2d 448 (1981). In *State v. Cory*, supra, the Court held that possession of burglary tools is separate and distinct from the commission of an overt act in perpetration of a burglary. They are not duplicitous, and separate convictions for both offenses arising from the same conduct are proper. Burglary with the intent to commit rape is not duplicitous with the crime of an attempt to commit rape. *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973).

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

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

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

In *State v. Martens*, 273 Kan. 179, 42 P.3d 142, *modified* 274 Kan. 459, 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. 217, 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 756, 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

OR

(f) That the premeditated and intentional killings of _____ and (_other victim[s]_) were (part of the same act or transaction) (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. 894, 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. 894, 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.**

   In order to find that a crime is committed in an especially heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted 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. 894, 1029, 40 P.3d 139 (2001).

Also contained in *Kleypas*, 272 Kan. at 1019-25, 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." 172 Kan. at 1082-3.

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. 894, 1075, 40 P.3d 139 (2001). The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the death sentence proceeding.

Comment

In *State v. Kleypas*, 272 Kan. 1034-6, 40 P.3d 139 (2001), the Supreme Court approved the trial court's instruction to the jury on the exercise of mercy as a mitigating circumstance. The Court also approved an instruction using language similar to that found in the first paragraph and first sentence of the third paragraph of PIK 56.00-D. 272 Kan. at 1073-5. The Court also recommended that language

similar to the last two sentences of the third paragraph of 56.00-D be adopted. 272 Kan. at 1078. The Court held that the jury need not find mitigating factors in writing. 272 Kan. at 1054.

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. 894, 1081-2, 40 P.3d 139 (2001).

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

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

Notes on Use

For authority, see K.S.A. 21-4625 and *State v. Kleypas*, 272 Kan. 894, 1018, 40 P.3d 139 (2001).

Comment

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

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

In making the determination whether aggravating circumstances exist that outweigh 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. 894, 1018, 1074, 40 P.3d 139 (2001). This instruction should be given in all death sentence proceedings to provide guidance to the jury that their decision should not be determined solely by the number of aggravating or mitigating circumstances that are shown to exist.

Comment

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

56.00-G CAPITAL MURDER - DEATH SENTENCE - REASONABLE DOUBT

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh 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. 894, 1018, 1063-4, 1078, 40 P.3d 139 (2001).

Comment

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

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

56.00-H CAPITAL MURDER - DEATH SENTENCE - SENTENCING RECOMMENDATION

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

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

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh 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. 894, 1018, 1063-4, 40 P.3d 139 (2001).

56.01 MURDER IN THE FIRST DEGREE

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

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. 1143, 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. 894,1009, 40 P.3d 139 (2001).

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

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

Notes on Use

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

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

Comment

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

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

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, 272 Kan. 894, 1009, 40 P.3d 139 (2001).

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

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

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

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

In *State v. Kleypas*, 272 Kan. 894, 938, 40 P.3d 139 (2001), the Supreme Court held "in the commission of," "attempt to commit," and "flight from," as used in K.S.A. 21-3401, are temporal requirements delineating when a killing may occur and still be part of the underlying felony.

This instruction was cited with approval in *State v. Lamae*, 268 Kan. 544, 998 P.2d 106 (2000); *State v. Beach*, 275 Kan. 603, 67 P.3d 121 (2003).

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. 1143, 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

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

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

56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

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

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

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

(b) Premeditation.

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

For authority, see *State v. Holmes*, 272 Kan. 491, 498-9, 33 P.3d 856 (2001); *State v. Jamison*, 269 Kan. 564, 573, 7 P.3d 1204 (2000); and *State v. Moncla*, 262 Kan. 58, 70-73, 936 P.2d 727 (1997).

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

(c) Willfully.

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

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

(d) **Intentionally.**

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

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

(e) **Heat of Passion.**

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

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

(f) **Reckless.**

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

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

56.05 VOLUNTARY MANSLAUGHTER

A. **The defendant is charged with the crime of voluntary manslaughter. The defendant pleads not guilty.**

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

1. **That the defendant intentionally killed _____;**
2. **That it was done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

OR

B. **In determining whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter. Voluntary manslaughter is an intentional killing done (upon a sudden quarrel) (in the heat of passion) (upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of [a person] [a dwelling] [property]).**

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

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).

State v. Abu-Fakher, 274 Kan. 584, 56 P.3d 166 (2002) distinguished *State v. Cribbs* and held that under the facts of the case it was not "clearly erroneous" to give Alternative A instead of Alternative B, because when the defendant has been convicted of first degree murder, the case is over and the jury does not have to consider the lesser charges.

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. 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. 1143, 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

56.18 AGGRAVATED BATTERY

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

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

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

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

Notes on Use

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

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

The bracketed definition of "deadly weapon" may be used when appropriate.

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

Comment

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

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

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

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

In *State v. Valentine*, 260 Kan. 431, 921 P.2d 770 (1996), the Supreme Court contrasted level 4 aggravated battery (great bodily harm) and level 7 aggravated battery (bodily harm). The court determined that when an assailant shoots a victim, severing the spinal cord and causing paralysis, the resulting injury qualifies as level 4 "great bodily harm" as a matter of law. Similarly, a "through and through" bullet wound in the abdomen is great bodily harm as a matter of law. Thus, in these circumstances the district court did not err by failing to instruct the jury on level 7 aggravated battery as a lesser included offense of level 4 aggravated battery. Also see *State v. Brice*, 31 Kan. App. 2d 293, 64 P.3d 444 (2003).

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

56.26 INTERFERENCE WITH PARENTAL CUSTODY

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

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

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

Notes on Use

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

Comment

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

Cited with approval. *State v. Wiggett*, 273 Kan. 438, 44 P.3d 381 (2002).

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

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

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

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

Notes on Use

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

56.27 INTERFERENCE WITH THE CUSTODY OF A COMMITTED PERSON

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

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

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

Notes on Use

For authority, see K.S.A. 21-3423. Interference with the custody of a committed person is a class A, nonperson misdemeanor.

Comment

The status of a committed person is usually a question of law to be determined by the Court.

56.28 CRIMINAL RESTRAINT

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

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

1. **That the defendant knowingly and without legal authority restrained _____ so as to interfere substantially with (his)(her) liberty; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

(A merchant, [his][her] agent or employee, who has probable cause to believe that a person [has actual possession of] [has wrongfully taken] [is about to wrongfully take] merchandise from [his][her] mercantile establishment, may detain such person [on the premises] [in the immediate vicinity thereof] in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession.)

Notes on Use

For authority, see K.S.A. 21-3424. Criminal restraint is a class A, person misdemeanor.

The parenthetical material should be used only in those cases where evidence has been introduced to support the merchant's defense.

Cited with approval. *State v. Timms*, 29 Kan. App. 2d 770, 31 P.3d 323 (2001).

CHAPTER 57.00

SEX OFFENSES

In *State v. Cantrell*, 234 Kan. 426, 434, 673 P.2d 1147 (1983), the Kansas Supreme Court held that the crime of rape under K.S.A. 21-3502 did not require a specific intent to commit rape. Language to the contrary in *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974), and in *State v. Carr*, 230 Kan. 322, 634 P.2d 1104 (1981) was overruled. Since rape is a general intent crime and PIK 3d 57.01 follows the language of the statute, the lack of the word "intentionally" in the instruction is proper. *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997).

For a discussion about some fundamental changes made by the Kansas Legislature to the rape statute see 52 J.B.A.K. 99, 104 (1983).

In *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978), the Supreme Court held that additional convictions for attempted rape and aggravated sodomy were multiple convictions for the same offense when the defendant had already been convicted on one count for both offenses.

Unless the defense is consent and the expert presenting the testimony has special training in psychiatry, evidence of the rape trauma syndrome is inadmissible. Even if the evidence is admissible, the expert is not permitted to express an opinion as to whether the victim was raped. See *State v. Bressman*, 236 Kan. 296, 303, 304, 689 P.2d 901 (1984).

Lewd and lascivious behavior consists of elements separate and distinct from the crime of rape. The trial court committed no error when it failed to give an instruction on lewd and lascivious behavior when the defendant was charged with rape. *State v. Davis*, 236 Kan. 538, 542, 694 P.2d 418 (1985).

Two acts of rape perpetrated by the same accused against the same victim on the same afternoon may support two separate rape convictions. *State v. Wood*, 235 Kan. 915, 920, 686 P.2d 128 (1984). The result in this case is distinguished from *State v. Dorsey*, 224 Kan. at 152. See also, *State v. Richmond*, 250 Kan. 375, 379, 827 P.2d 743 (1992).

In *Keim v. State*, 13 Kan. App. 2d 604, 608, 777 P.2d 278 (1989), the Court held that legislation prohibiting intercourse with a victim incapable of giving consent because of mental deficiency or disease was not unconstitutionally vague.

Adultery is not a lesser included offense of forcible rape because it is a crime of consenting parties and would require that at least one of the parties be married. *State v. Platz*, 214 Kan. 74, 77, 519 P.2d 1097 (1974).

Rape is not a lesser included offense of aggravated kidnapping. *State v. Schriner*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

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

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

The crime of indecent liberties with a child is not a lesser included offense of rape. *State v. Belcher,* 269 Kan. 2, 4 P.3d1137 (2000). Language to the contrary in *State v. Burns*, 23 Kan. App. 2d 352, 931 P.2d 1258, rev. denied 262 Kan. 964 (1997), was specifically disapproved. The *Belcher* opinion further warns that *State v. Lilley*, 231 Kan. 694, 647 P.2d 1323 (1982) and *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983) were decided prior to the extensive changes to Kansas rape, indecent liberties, sodomy, and sexual battery laws enacted in 1993.

Evidence of similar crimes with proper limiting instructions under K.S.A. 60-455 may be relevant and admissible in prosecutions for rape. See Comment to PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence.

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

57.01-A RAPE - DEFENSE OF MARRIAGE

It is a defense to the charge of rape of a child under 14 years of age that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3502(b). This instruction should be given only with respect to a prosecution of rape of a child under 14 years of age pursuant to 21-3502(a)(2) and not in cases of nonconsensual sexual intercourse.

Effective July 1, 2002, Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-101(b).

57.02 SEXUAL INTERCOURSE - DEFINITION

Sexual intercourse means any penetration of the female sex organ by (a finger) (the male sex organ) (any object). Any penetration, however slight, is sufficient to constitute sexual intercourse.

(Sexual intercourse does not include penetration of the female sex organ by a finger or object in the course of the performance of:

(a) Generally recognized health care practices; or

(b) a body cavity search conducted in accordance with the law.)

Notes on Use

For authority, see K.S.A. 21-3501. This instruction should be given in all rape prosecutions. The applicable parenthetical reference should be selected.

Comment

The Kansas Legislature amended the definition of sexual intercourse in 1983 to include rape by an object or a finger. The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). See also, *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936), and 65 Am. Jur. 2d, Rape, § 3.

The trial court's failure to give a definition of sexual intercourse was not reversible error when no objection was raised at trial and the instruction given was complete. *State v. James*, 217 Kan. 96, 100, 535 P.2d 991 (1975).

See also, Wason, *Survey of Kansas Law: Criminal Law*, 32 Kan. L. Rev. 395 (1984).

A charge of attempted rape may be proven without evidence of attempted penetration if the surrounding circumstances provide sufficient evidence from which a rational factfinder could conclude that the attacker intended to rape the victim. *State v. Hanks*, 236 Kan. 524, 694 P.2d 407 (1985).

Actual penetration of the vagina or rupturing of the hymen is not required; penetration of the vulva or labia is sufficient to constitute sexual intercourse. *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

age is rape under K.S.A. 21-3502(a)(2). Sexual intercourse with children 14 to 16 years of age and "lewd fondling or touching" of children under 14 years of age are both covered by K.S.A. 21-3504, Aggravated indecent liberties with a child. See PIK 3d 57.06, Aggravated Indecent Liberties With a Child.

Evidence of similar crimes, with proper limiting instructions under K.S.A. 60-455, may be relevant and admissible in prosecutions for indecent liberties with a child. See Comment to PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence.

In *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977), the Supreme Court construed the meaning to be given to the words "lewd fondling or touching" under the provisions of K.S.A. 21-3503 and held that the statute did not require the State to prove a lewd fondling or touching of the *sexual organs* of the child or the offender as an element of the crime.

Time is not an indispensable ingredient of the offense of indecent liberties with a child if the offense was committed within the statute of limitations, and the defendant's defense was not prejudiced by the allegation concerning the date of the crime. See *State v. Wonser*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App. 2d 349, 578 P.2d 1147 (1978).

Lewd and lascivious behavior is not a lesser included offense of aggravated sodomy nor indecent liberties with a child. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

In *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461 (1981), the Kansas Supreme Court held that ". . . in cases of crimes involving illicit sexual relations or acts between an adult and a child, evidence of prior acts of similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."

The decision of the trial court in permitting a mother to testify to statements made by her 4-year-old child who was the victim of the crime of indecent liberties with a child was upheld in *State v. Rodriquez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983). The Court determined that the testimony was admissible under K.S.A. 60-460(d)(2). Since that holding, the Legislature has enacted K.S.A. 60-460(dd) that specifically permits such testimony when certain findings are made by the trial court.

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Supreme Court held that the child hearsay exception, K.S.A. 60-460(dd), did not violate the defendant's Sixth Amendment right to confrontation. The case also lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. See also, *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

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

The authority statute was further amended in 1987 to enlarge the crime to include solicitation of a child to engage in any lewd fondling or touching of another person.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties. In 1992, the Legislature deleted subsection (1)(b) from K.S.A. 21-3503; therefore, these offenses are no longer identical. Both Criminal sodomy, K.S.A. 21-3505, and Aggravated indecent liberties with a child, K.S.A. 21-3504, include sexual relations with a child at least 14 but less than 16 years of age. However, K.S.A. 21-3504 specifies "sexual intercourse" while K.S.A. 21-3505 specifies oral or anal sexual relations.

Aggravated sexual battery is not a lesser included offense of indecent liberties with a child. *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989); and *State v. Damewood*, 245 Kan. 676, 783 P.2d 1249 (1989).

57.05-A INDECENT LIBERTIES WITH A CHILD - SODOMY

This instruction has been deleted due to the 1985 amendment of K.S.A. 21-3503. The Legislature deleted the section in K.S.A. 21-3503 which referred to sodomy since the crime of sodomy with a child was covered by K.S.A. 21-3506, Aggravated criminal sodomy. See PIK 3d 57.07, Criminal Sodomy and PIK 3d 57.08, Aggravated Criminal Sodomy - Nonmarital Child Under 14.

57.05-B AFFIRMATIVE DEFENSE TO INDECENT LIBERTIES WITH A CHILD

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

Notes on Use

For authority, see K.S.A. 21-3503(b). This instruction should be given only with respect to a prosecution of indecent liberties with a child in which the defendant is charged with:

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

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

Pursuant to K.S.A. 21-3503(b), this defense is not applicable to prosecutions in which the defendant is charged with soliciting the child to engage in any lewd fondling or touching of the person of another.

Comment

For common-law marriages entered into prior to July 1, 2002, *State v. Sedlack*, 246 Kan. 305, 787 P.2d 709 (1990), and *State v. Wade*, 244 Kan. 136, 766 P.2d 811 (1989) held that the common-law rule that males aged 14 and females aged 12 have the capacity to form a common-law marriage is the rule in Kansas. The elements of common-law marriage are set forth in *State v. Johnson*, 216 Kan. 445, 448, 532 P.2d 1325 (1975).

Effective July 1, 2002, Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-101(b).

57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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

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

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

OR

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

   or

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

   or

   That the defendant caused _____ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of _____, the defendant or another;
2. **That at the time of the act _____ was a child 14 or more years of age but less than 16 years of age; and**
3. **That _____ did not consent to such fondling or touching; and**

OR

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

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

or

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

or

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

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. 738, 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.

Effective July 1, 2002, Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-101(b).

57.07 CRIMINAL SODOMY

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

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

1. **That the defendant engaged in sodomy with an animal; and**

   or

   That the defendant engaged in sodomy with a child who was 14 or more years of age but less than 16 years of age; and

   or

   That the defendant caused a child 14 or more years of age but less than 16 years of age to engage in sodomy with (any person) (an animal); and

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

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

Notes on Use

For authority, see K.S.A. 21-3505. Criminal sodomy between the defendant and a person of the same sex and 16 or more years of age or between the defendant and an animal is a class B, nonperson misdemeanor. Criminal sodomy with a child 14 or more years of age but less than 16 years of age or causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with a person or animal is a severity level 3, person felony. For a definition of "sodomy," see K.S.A. 21-3501(2) and PIK 3d 57.18, Sex Offenses - Definitions.

If the crime is sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

Sodomy between consenting adults is not a crime.

In 2002, the Legislature amended K.S.A. 23-101 to provide that the State of Kansas shall not recognize a common-law marriage contract if either party to the marriage is under 18 years of age.

In 2003, the U.S. Supreme Court held that a Texas statute which prohibited certain sexual conduct between adults of the same sex was unconstitutional. *Lawrence v. Texas*, 538 U.S. ____, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

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57.07-A AFFIRMATIVE DEFENSE TO CRIMINAL SODOMY

It is a defense to the charge of criminal sodomy that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3505(b). This instruction should be given only with respect to a prosecution of criminal sodomy in which the defendant is charged with sodomy with a child (second alternative to paragraph 1). Pursuant to K.S.A. 21-3505(b), this defense is not applicable to prosecutions in which the defendant is charged with sodomy with a member of the same sex or with causing a child to engage in sodomy with any person or animal.

Effective July 1, 2002, Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-101(b).

57.08 AGGRAVATED CRIMINAL SODOMY - CHILD UNDER 14

The defendant is charged with aggravated criminal sodomy. The defendant pleads not guilty.

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

1. **That the defendant engaged in sodomy with a child who was under 14 years of age; and**
   or
   That the defendant caused a child under 14 years of age to engage in sodomy with (any person) (an animal); and
2. **That the act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

Notes on Use

For authority, see K.S.A. 21-3506(a). Aggravated criminal sodomy is a severity level 2, person felony.

Comment

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

Aggravated criminal sodomy is a general intent crime. *State v. Plunkett*, 261 Kan. 1024, 934 P.2d 113 (1997).

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

In *State v. Wilson*, 247 Kan. 87, 95, 795 P.2d 336 (1990), the Court stated: "We approve of the use of PIK 2d 57.08 in this case. We find no error in the use of the phrase anal sexual relations in place of the term anal copulation in the pattern instruction on aggravated criminal sodomy."

In *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989), the Court held that oral-genital stimulation between the tongue of a male and the genital area of a female is not sodomy under K.S.A. 21-3501(2). The Legislature amended the statute in L. 1990, ch. 149, § 2. A new definition of sodomy has been included in PIK 3d 57.18, Sex Offenses - Definitions.

In *State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987), the Court held that indecent liberties with a child, K.S.A. 1984 Supp. 21-3503(1)(b), and aggravated criminal sodomy were identical offenses except that indecent liberties was a class C felony and aggravated criminal sodomy was a class B felony. The Court indicated that while indecent liberties was not a lesser included offense, the defendant could only be sentenced to the lesser penalty and that it would have been better practice to instruct on indecent liberties.

57.08-A AGGRAVATED CRIMINAL SODOMY - CAUSING CHILD UNDER FOURTEEN TO ENGAGE IN SODOMY WITH A PERSON OR AN ANIMAL

This instruction has been consolidated into PIK 3d 57.08, Aggravated Criminal Sodomy - Child Under 14.

57.08-B AGGRAVATED CRIMINAL SODOMY - NO CONSENT

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

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

1. **That the defendant engaged in sodomy with _____;**

   or

   That the defendant caused _____ to engage in sodomy with (any person) (an animal);
2. **That the act of sodomy was committed without the consent of _____ under circumstances when:**
   (a) **(she)(he) was overcome by (force) (fear); and**

   or

   (b) **(she)(he) was unconscious or physically powerless; and**

   or

   (c) **(she)(he) was incapable of giving a valid consent because of mental deficiency or disease, which condition was known by the defendant or was reasonably apparent to the defendant; and**

   or

   (d) **(she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Sodomy means: (See PIK 3d 57.18, Sex Offenses - Definitions, for appropriate definition).

Notes on Use

For authority, see K.S.A. 21-3506(a)(3). The crime of aggravated criminal sodomy is a severity level 2, person felony.

If the crime involves sexual intercourse with an animal, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

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

Aggravated criminal sodomy is a general intent crime. *State v. Plunkett*, 261 Kan. 1024, 934 P.2d 113 (1997).

The provisions of K.S.A. 21-4619(c) provide that there shall be no expungement of convictions for the offense of aggravated criminal sodomy. In addition, the provisions of K.S.A. 21-3106 provide that a prosecution for the crime of aggravated criminal sodomy must be commenced within five years after its commission.

Use of an instruction that differed from PIK 3d 57.08-B was held erroneous in *State v. Castoreno*, 255 Kan. 401, 874 P.2d 1173 (1994).

57.08-C AFFIRMATIVE DEFENSE TO AGGRAVATED CRIMINAL SODOMY

It is a defense to the charge of aggravated criminal sodomy that at the time of the offense the child was married to the accused.

Notes on Use

For authority, see K.S.A. 21-3506(b). This instruction should be given only with respect to a prosecution of aggravated criminal sodomy in which the defendant is charged with engaging in sodomy with a child under 14 years of age (PIK 3d 57.08, Aggravated Criminal Sodomy - Child Under 14, first alternative to paragraph 1). Pursuant to K.S.A. 21-3506(b), this defense is not applicable to prosecutions in which the defendant is charged with causing a child under 14 years of age to engage in sodomy with any person or animal or is charged with nonconsensual sodomy under K.S.A. 21-3506(a)(3).

Comment

Effective July 1, 2002, Kansas does not recognize a common-law marriage contract if either party to the marriage is under 18 years of age. See K.S.A. 23-101(b).

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

In *State v. Zabrinas,* 271 Kan. 422, 24 P.3d 77 (2001), the Kansas Supreme Court held that K.S.A. 21-3516 is not unconstitutionally overbroad. The Kansas Supreme Court held that the words "exhibition in the nude" do not make the statute unconstitutionally broad when read in conjunction with the surrounding language.

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.

Possessing a floppy disk containing tow or more sexually explicit images of a minor is a single act and cannot be divided into two or more distinct acts for prosecution. *State v. Donham*, 29 Kan. App. 2d 78, 24 P.3d 750 (2001).

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.

(e) Criminal sodomy.

Criminal sodomy means: (1) sodomy between a person and an animal; or (2) sodomy with a child who is 14 or more years of age but under 16 years of age; or (3) causing a child 14 or more years of age but under 16 years of age to engage in sodomy with any person or animal.

(f) Aggravated criminal sodomy.

Aggravated criminal sodomy means: (1) sodomy with a child who is under 14 years of age; (2) causing a child under 14 years of age to engage in sodomy with any person or an animal; or (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under conditions when: (a) the victim is overcome by force or fear; (b) the victim is unconscious or physically powerless; (c) the victim is incapable of giving consent because of mental deficiency or disease, which was known by the offender or was reasonably apparent to the offender; or (d) the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

(g) Lewd and lascivious behavior.

Lewd and lascivious behavior means: (1) publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others, or (2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with an intent to arouse or gratify the sexual desires of the offender or another.

(h) Sexual battery.

Sexual battery means the intentional touching of the person of another who is 16 or more years of age, who is

not the spouse of the offender and who does not consent to the touching, with the intent to arouse or to satisfy the sexual desires of the offender or another.

(i) Aggravated sexual battery.

Aggravated sexual battery means the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or to satisfy the sexual desires of the offender or another under any of the following circumstances: (1) when the victim is overcome by force or fear; (2) when the victim is unconscious or physically powerless; (3) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by or was reasonably apparent to the offender; (4) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance which condition was known by the offender or was reasonably apparent to the offender.

Notes on Use

Authority for the definitions is contained in several statutes: Rape, K.S.A. 21-3502; Indecent liberties with a child, K.S.A. 21-3503; Aggravated indecent liberties with a child, K.S.A. 21-3504; Sodomy, K.S.A. 21-3501(2); Criminal sodomy, K.S.A. 21-3505; Aggravated criminal sodomy, K.S.A. 21-3506; Lewd and lascivious behavior, K.S.A. 21-3508; Sexual battery, K.S.A. 21-3517; and Aggravated sexual battery, K.S.A. 21-3518.

In defining the term "spouse", only the applicable language should be used. The Committee emphasizes this definition is only applicable to PIK 3d Chapter 57.00-Sex Offenses.

57.19 SEXUAL BATTERY

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

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

1. **That the defendant intentionally touched the person of _____;**
2. **That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;**
3. **That _____ was not the spouse of defendant;**
4. **That _____ did not consent to the touching;**
5. **That _____ was then 16 or more years of age; and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3517. Sexual battery is a class A, person misdemeanor. The definition of a spouse, as contained in PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

Sexual battery is not a lesser included crime of aggravated kidnapping, attempted aggravated sodomy, or attempted rape. *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992).

57.20 AGGRAVATED SEXUAL BATTERY - FORCE OR FEAR

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

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

1. **That the defendant intentionally touched the person of _____;**
2. **That the touching was done with the intent to arouse or to satisfy the sexual desires of the defendant or another;**
3. **That _____ was then 16 or more years of age;**
4. **That the touching was committed without the consent of _____ under circumstances when _____ was overcome by force or fear; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3518(a)(1). Aggravated sexual battery is a severity level 5, person felony.

Comment

Aggravated sexual battery is not a lesser included crime of rape. *State v. Gibson*, 246 Kan. 298, 787 P.2d 1176 (1990).

Aggravated sexual battery is not a lesser included offense of indecent liberties with a child. *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989).

Aggravated sexual battery is not a lesser included offense of aggravated criminal sodomy. *State v. Damewood*, 245 Kan. 676, 783 P.2d 1249 (1989).

The State does not need to prove that the victim was physically harmed or that the victim had no freedom of movement to prove that the touching was not consensual. *State v. Blount*, 13 Kan. App. 2d 347, 770 P.2d 852 (1989).

The Court of Appeals in *Blount* also held that K.S.A. 21-3518 was not unconstitutionally vague or overbroad as the language put a person of ordinary intelligence on notice of the prohibited conduct.

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. 459, 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. 459, 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.

62.12 UNLAWFUL SMOKING - DEFENSE OF SMOKING IN DESIGNATED SMOKING AREA

It is a defense to the charge of unlawful smoking that defendant smoked in a public place in an area designated and posted as a smoking area by the person in control of the premises.

Notes on Use

For authority, see K.S.A. 21-4010. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 3d 62.11-A, Failure to Post Smoking Prohibited and Designated Smoking Area Signs.

62.13 IDENTITY THEFT

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

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

1. **That the defendant knowingly and with intent to defraud for economic benefit (obtained) (possessed) (transferred) (used) (attempted to obtain, possess, transfer, or use) one or more identification documents or personal identification numbers of another person other than that issued lawfully for the use of the possessor.**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Identification documents means any card, certificate or document which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be drivers' licenses, non-drivers' identification cards, birth certificates, social security cards and employee identification cards.

Notes on Use

For authority, see K.S.A. 21-4018. Identity theft is a severity level 7 person felony. Intent to defraud is defined in K.S.A. 21-3110(9).

Comment

In *City of Liberal v. Vargas*, 28 Kan. App. 2d 867 (2001), Vargas, an illegal alien, had purchased false identity papers to obtain employment. Misrepresentation of his true identity to the employer gave rise to identity theft charges. The Court of Appeals affirmed the District Court's acquittal of Vargas, noting that a review of the legislative history of K.S.A. 21-4018 revealed no legislative intent to protect a third party (here, the employer) from identity theft.

Additionally, the Court noted that the assumption of a false identity is not identity theft unless a real person's identity has, in the process, been "stolen" and that, in any event, Vargas' use of the false documents to obtain employment did not constitute an intent to defraud for economic benefit as required by the statute.

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. 593, 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

prosecution and have not been included as part of the elements of those alternatives. See *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. 888 (1998). Likewise, the negative statutory requirement of alternative C, that the defendant did not have the conviction expunged or had not been pardoned for the crime, does not need to be proven as part of the state's case. See *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994).

The prior crime addressed in Alternative A is a person felony or a violation of the Uniform Controlled Substances Act with no time limit. The prior crime addressed in Alternative B is any felony not addressed in Alternative C with a 5-year time limit. The prior crime addressed in Alternative C is specified by statute number in K.S.A. 21-4204(a)(4)(A) with a 10-year time limit. The prior crime addressed in Alternative D is a nonperson felony with a 10-year time limit.

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

Comment

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

In view of the case law set forth above and the statutes just cited, it seems clear that in order to establish the offense of criminal possession of a firearm, it must be proved that the possession was knowing and intentional.

When a prior conviction is an element of the crime charged it is error to refuse to give a limiting instruction as to evidence of the prior conviction. *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995).

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

In *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994), the Supreme Court sustained the trial court and negated any requirement of the state to prove the statutory negative in alternative C above that the defendant had not been pardoned or had the prior conviction expunged. Likewise, the Kansas Court of Appeals in *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. 888 (1998), noted that when a defendant is charged under K.S.A. 21-4204(a)(3), alternative B above, the state has no obligation to present proof that the defendant was found not to have been in possession of a firearm at the time of the commission of the prior felony.

In *State v. Pollard*, 273 Kan. 706, 44 P.3d 1261 (2002), the court held that Kansas law will apply in determining whether or not a defendant's out-of-state criminal proceeding constitutes a conviction as a predicate to prosecution for the Kansas crime of felony criminal possession of a firearm under K.S.A. 21-4204. In *Pollard*, the defendant had plead guilty to a prior act of felony first-degree burglary in Missouri, was found guilty by the Missouri trial court, and was given a "suspended imposition of sentence" with two years of probation. The terms of his probation included prohibitions against the possession or control of firearms. Under Missouri law, however, a "suspended imposition of sentence" is not a conviction as Missouri does not consider such to be a final judgment. The *Pollard* court held that, despite the peculiarities of Missouri law, the question is whether or not the Missouri matter constituted the equivalent of a conviction in Kansas. The *Pollard* court concluded, after examining (1) the legal definition of conviction under statute and case law; (2) the procedural posture of Pollard's predicate felony; and (3) the construction of the term "conviction" for criminal history scoring purposes, that the Missouri court had actually established the defendant's factual guilt, and the Missouri matter was the equivalent of a conviction in Kansas which could be used as a predicate conviction for K.S.A. 21-4204.

65.05 PROMOTING OBSCENITY - AFFIRMATIVE DEFENSES

It is a defense to the charge of promoting obscenity that the persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental justification for possessing or reviewing the same.

or

It is a defense to the charge of promoting obscenity that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity that the allegedly obscene material or obscene device was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity that the defendant was a projectionist, or assistant projectionist, having no financial interest in the show or in the place of presentation other than regular employment as a projectionist, or assistant projectionist, and had no personal knowledge of the contents of the motion picture and the motion picture was shown commercially to the general public.

Notes on Use

For authority, see K.S.A. 21-4301.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

65.05-A PROMOTING OBSCENITY TO A MINOR - AFFIRMATIVE DEFENSES

It is a defense to the charge of promoting obscenity to a minor that the defendant had reasonable cause to believe that the minor involved was 18 years old or over and such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such minor was 18 years old or more.

or

It is a defense to the charge of promoting obscenity to a minor that the allegedly obscene material or obscene device was purchased, leased, or otherwise acquired by a public, private, or parochial school, college or university, and that such material was either sold, leased, distributed, or disseminated by a teacher, instructor, professor, or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

or

It is a defense to the charge of promoting obscenity to a minor that the defendant was an officer, director, trustee, or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body.

or

It is a defense to the charge of promoting obscenity to a minor that an exhibition in a state of nudity was for a bona fide scientific or medical purpose or for an educational or cultural purpose for a bona fide school, museum, or library.

Notes on Use

For authority, see K.S.A. 21-4301a.

In a particular case, the appropriate instruction should be given pertaining to the applicable affirmative defense.

If this instruction is given, PIK 3d 58.02, Affirmative Defenses - Burden of Proof, should be given.

Comment

In *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985), K.S.A. 21-4301(4) was upheld against allegations the section unconstitutionally violated equal protection because it distinguished between projectionists, which were excluded from prosecution, and similar employees such as bookstore clerks.

65.10-A DEALING IN GAMBLING DEVICES - DEFENSE

It is a defense to this charge that:

(1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950;
or

(2) The gambling device or sub-assembly or essential part thereof was manufactured, transferred or possessed by a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171 *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:
(a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;
(b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;
(c) In a state other than the State of Kansas;
or
(d) In tribal gaming.

Notes on Use

For authority, see K.S.A. 21-4306(d). If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

65.11 DEALING IN GAMBLING DEVICES - PRESUMPTION FROM POSSESSION

If you find that the defendant had possession of any device designed exclusively for gambling purposes, which was not set up for use or which was not in a gambling place, there is a presumption that the defendant had possession with the intent to transfer the same. The presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4306(b).

65.12 POSSESSION OF A GAMBLING DEVICE

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

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

1. **The defendant knowingly possessed or had custody or control as (owner) (lessee) (agent) (employee) (bailee) (_other_) of a gambling device; and**
2. **That this act occurred on or about the ____ day of_____, ____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4307. Possession of a gambling device is a class B, nonperson misdemeanor. Appropriate definitions in PIK 3d 65.07, Gambling - Definitions, should be given with this instruction.

Comment

In *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984), the State sought to sell or destroy confiscated electronic video card games. The Kansas Supreme Court held the State may not seek sale or destruction of property under K.S.A. 22-2512 without a notice or hearing for those having a property interest in the machines.

65.12-A POSSESSION OF A GAMBLING DEVICE - DEFENSE

It is a defense to this charge that:

(1) The gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured before the year 1950.
or

(2) The gambling device is possessed or under custody or control of a manufacturer registered under the Federal Gambling Devices Act of 1962 (15 U.S.C. 1171, *et seq.*) or a transporter under contract with such manufacturer with intent to transfer for use:
(a) By the Kansas Lottery or Kansas Lottery retailers as authorized by laws and rules and regulations adopted by the Kansas Lottery Commission;
(b) By a licensee of the Kansas Racing Commission as authorized by law and rules and regulations adopted by the Commission;
(c) In a state other than the State of Kansas;
or
(d) In tribal gaming.

Notes on Use

For authority, see K.S.A. 21-4307. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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. 1422 (2001); *State v. Alvarez*, 29 Kan. App. 2d 368, 28 P.3d 404, *rev. denied* 272 Kan. 1419 (2001); *State v. Fortune*, 28 Kan. App. 2d 559, 20 P.3d 74, *rev. denied* 271

Kan. 1039 (2001); and *State v. Fulton*, 28 Kan. App. 2d 815, 23 P.3d 167, *rev. denied* 271 Kan. 1039 (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."

67.16 STIMULANTS, DEPRESSANTS, HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - POSSESSION

The defendant is charged with the crime of unlawfully (possessing) (controlling) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid]. The defendant pleads not guilty.

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

1. **That the defendant (possessed) (had under [his][her] control) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];**
2. **That the defendant did so intentionally; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4162. K.S.A. 65-4162 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d), 65-4107(g) and 65-4109(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4162(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

A violation of K.S.A. 65-4162 is a class A, nonperson misdemeanor. If a person has a prior conviction under 65-4162, a conviction for a substantially similar offense from another jurisdiction, or a conviction of a violation of an ordinance of any city or resolution of any county for a substantially similar offense if the substance involved was marijuana or tetrahydrocannabinol as designated in subsection (d) of K.S.A. 65-4105 and amendments thereto, the person is guilty of a drug severity level 4 felony.

"Prior conviction of possession of narcotics is not an element of the class B felony defined by K.S.A. 65-4127a, but serves only to establish the class of the felony and, thus, to enhance the punishment. Proof of prior conviction, unless otherwise admissible, should be offered only after conviction and prior to sentencing." *State v. Loudermilk*, 221 Kan. 157, Syl. ¶ 1, 557 P.2d 1229 (1976).

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

Comment

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

In *State v. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), the Court held that possession of cocaine is a lesser included offense of possession with intent to sell cocaine.

In *State v. Lundquist*, 30 Kan. App. 2d 1148, 55 P.3d 929 (2002), the Court of Appeals held that it was not error for the trial court to expand that PIK instruction for possession of marijuana to include a statement that "the proof of the possession of any amount of marijuana is sufficient even though such amount may not be measurable or usable." Said modification of the PIK instruction was a correct statement of the law. *State v. Brown*, 245 Kan. 604, 613-14, 783 P.2d 1278 (1989). However, trial courts were reminded that PIK instructions and recommendations should be followed unless the particular facts of the case require modification.

In *State v. Martens*, 274 Kan. 459, 54 P.3d 960 (2002), the Kansas Supreme Court modified *State v. Martens*, 273 Kan. 139, 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. 217, 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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67.24 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. 1419 (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 398, 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 398, 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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CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS

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68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, _____

Notes on Use

For authority, see K.S.A. 22-3421. Absent special circumstances, this concluding instruction should be used in every criminal trial.

Comment

"The authority for this instruction is based on the fundamental right of any accused to a trial by jury, §§ 5 and 10 of the Kansas Constitution Bill of Rights, and K.S.A. 22-3403, together with our statute requiring a unanimous verdict under K.S.A. 22-3421." *State v. Cheek*, 262 Kan. 91, 108, 936 P.2d 749 (1997).

68.09 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 mark the appropriate verdict.

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 of first degree murder. However, absent evidence to support recklessness, there is no duty to instruct. *State v. Pierce*, 260 Kan. 859, 865, 927 P.2d 929 (1996).

2. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied* 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986). *State v. Arteaya*, 257 Kan. 874, 896 P.2d 1035 (1995). The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).
3. **Second Degree Murder** - The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987). The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).
4. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
5. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987). Because an attempt requires a specific intent to commit the crime charged, there is no such crime as attempted involuntary manslaughter, an unintentional killing. *State v. Collins*, 257 Kan. 408, 418, 893 P.2d 217 (1995).
6. **Attempted Murder** - Aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977). The offenses of attempted second degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). There is no such crime as attempted felony murder. *State v. Robinson*, 256 Kan. 133, 136, 883 P.2d 764 (1994). Aggravated assault is not a lesser included crime of attempted murder. *State v. Saiz*, 269 Kan. 657, Syl. 3, 7 P.3d 1214 (2000).
7. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816

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

8. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).
9. **Aggravated Robbery** - Robbery is a lesser included offense only where there is in issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required. Theft by threat, or extortion, is not a lesser included offense of aggravated robbery. *State v. McCloud*, 257 Kan. 1, 15, 891 P.2d 324 (1995).
10. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974). However, theft by threat, or extortion, is not a lesser included offense of robbery. *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994).
11. **Aggravated Assault** - Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976); *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
12. **Aggravated Battery** - Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976). Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). Aggravated battery classified as a severity level 4 felony includes the lesser offenses of the same crime classified as severity level 5, 7 or 8 felonies. *State v. Ochoa*, 20 Kan. App. 2d 1014, 895 P.2d 198 (1995). Under evidence that the victim had suffered bodily harm which was either the result of intentional or reckless conduct, the court held it was not error to give a lesser included instruction for a level 8 aggravated battery when the defendant is charged in the information with committing a level 7 aggravated battery. *State v. Jackson*, 262 Kan. 119, 142-43, 936 P.2d 761 (1997).

13. **Aggravated Assault on Law Enforcement Officer** - Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).
14. **Aggravated Battery on Law Enforcement Officer** - Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
15. **Aggravated Burglary** - Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
16. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984). Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
17. **Theft** - Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), reversing *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980). Theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are forms of the same crime of larceny and the former is a lesser included offense of the latter (assuming, of course, that the property is of a value of at least $500.) *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992).
18. **Theft by Deception** - Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991).
19. **Sale of Narcotics** - "Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976). "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilbanks*, 224 Kan. 66, 579 P.2d 132 (1978). *State v. Collins, infra.*
20. **Possession With Intent to Sell** - "Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
21. **Rape** - Indecent liberties with a minor is a lesser included offense. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Aggravated 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. 738, 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. 593, 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. 438, 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).
5. **Battery or Aggravated Battery** - A severity level 7 aggravated battery charge that a defendant intentionally caused bodily harm to another person in any manner whereby great bodily harm, disfigurement, or death could be inflicted is a lesser included offense of a severity level 4 aggravated battery charge that the defendant intentionally caused great bodily harm to another person because all elements of the level 7 aggravated battery are identical to some of the elements of the level 4 aggravated battery. K.S.A. 21-3107(2)(b). *State v. Winters*, 276 Kan. 34, 72 P.3d 564 (2003).

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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 circumstances where the State could have proceeded under multiple counts but chose not to do so, this instruction must be used. 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) and *State v. Davis*, 275 Kan. 107, 61 P. 3d 701 (2003).

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).

68.14-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. 894, 1009, 40 P.3d 139 (2001).

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

SENTENCING VERDICT

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

_____

_____

_____

_____

_____

_____

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

_____

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, 272 Kan. 894, 1018, 40 P.3d 139 (2001).

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

SENTENCING VERDICT

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

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

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

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

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

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

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

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

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

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

_____

Presiding Juror

_____, _____.

Notes on Use

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

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

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

Comment

"In *State v. Spain*, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that [K.S.A. 1999 Supp. 21-4635(c)] was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death." *State v. Kleypas*, 272 Kan. 894, 1009, 40 P.3d 139 (2001).

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

SENTENCING VERDICT

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

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

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

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

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

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

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

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

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

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

_____

Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, 272 Kan. 894 , 1018, 1078, 40 P.3d 139 (2001).

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

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

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

SENTENCING VERDICT

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

_____
Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e) and *State v. Kleypas*, 272 Kan. 894, 1064, 40 P.3d 139 (2001). If the jury does not reach a verdict of death upon conviction of capital murder, the court *may* sentence the defendant to the mandatory minimum 40-year term, or for crimes committed on or after July 1, 1999, to a 50-year term. K.S.A. 21-4635.

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

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You should decide the case by applying these instructions to the facts as you find them. (PIK 3d 51.02)

Instruction No. 2.

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

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

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

(PIK 3d 56.01)

Instruction No. 3.

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

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

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

Your Presiding Juror should then mark the appropriate verdict. (PIK 3d 68.09)

Instruction No. 4.

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

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

that the defendant is guilty. The State's burden of proof does not shift to the defendant.
(PIK 3d 52.08)

Instruction 4.

Entrapment is a defense if the defendant is induced to commit a crime which the defendant had no previous disposition to commit. It is not a defense if the defendant originated the plan to commit the crime or when he had shown a predisposition for committing the crime and was merely afforded an opportunity to consummate the crime and was assisted by law enforcement officers.

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

A person's previous disposition or intention to commit a crime may be shown by evidence of the circumstances at the time of the sale, setting of the price of the marijuana by the defendant, solicitation by defendant to make his sale, prior sales by defendant, or ease of access to the marijuana by defendant.
(PIK 3d 54.14)

Instruction No. 5.

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

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find the defendant not guilty; if you have

no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty.
(PIK 3d 52.02)

Instruction No. 6

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

Instruction No. 7.

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

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

Your agreement upon a verdict must be unanimous.
(PIK 3d 68.01)

_____
District Judge

_____, _____

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 mark the appropriate verdict.

(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.

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

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

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

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

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

Notes on Use

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

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

A first conviction is a class B misdemeanor. A second conviction is a class A misdemeanor. A third or subsequent conviction is a nonperson, nongrid felony.

Comment

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

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

The word "operate" as used in K.S.A. 8-1567(a) has been construed to require either direct or circumstantial evidence that the defendant was driving the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980); *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

Movement of the vehicle is not required in order to convict a defendant of driving under the influence under the theory that the defendant attempted to operate the vehicle. *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

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

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

K.S.A. 8-1567(a)(1) is not unconstitutionally vague. *State v. Larson*, 12 Kan. App. 2d 198, 201, 737 P.2d 880 (1987).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

Driving while under the influence of alcohol under certain circumstances is a lesser included offense of involuntary manslaughter where: (1) Driving under the influence is alleged as the underlying misdemeanor in the information or complaint; and (2) all of the elements of driving under the influence are alleged in the information or complaint and are necessarily proved to establish the greater offense of involuntary manslaughter. *State v. Adams*, 242 Kan. 20, Syl. ¶ 2, 744 P.2d 833 (1987).

70.01-A TRAFFIC OFFENSE - ALCOHOL CONCENTRATION .08 OR MORE

The defendant is charged with the crime of (operating) (attempting to operate) a vehicle while the alcohol concentration in (his)(her) blood or breath is .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]. The defendant pleads not guilty.

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

1. **That the defendant (drove) (attempted to drive) a vehicle;**
2. **That the defendant, while (driving) (attempting to drive) had an alcohol concentration in (his)(her) blood or breath of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle]; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

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

Notes on Use

For authority, see K.S.A. 8-1567(a)(1) and (2), and K.S.A. 8-1005.

The bracketed clause in Element No. 2 dealing with operating a vehicle within two hours should not be given if the prosecution is pursuant to K.S.A. 8-1567 (a)(1).

Comment

The Committee is of the opinion the alcohol concentration in the defendant's blood or breath must result from alcohol consumed before or while operating or attempting to operate a vehicle.

Definition of alcohol concentration in K.S.A. 8-1005 is applicable to a city ordinance. *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 584-585, 730 P.2d 364 (1986), *rev. denied* 241 Kan. 838 (1987).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993).

The result of any alcohol concentrations test performed more than two hours after the defendant last operated or attempted to operate a motor vehicle is admissible if the prosecution is pursuant to K.S.A. 8-1567(a)(1). See *State v. Silva*, 25 Kan. App. 2d 437, 962 P.2d 1146 (1998).

Intent is not an element of the crime of driving under the influence of alcohol or drugs. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d, 966 P.2d 339 (2000).

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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. 562, 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.

Comment

In *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), the court vacated an upward durational departure sentence imposed by the trial court. The case was tried in district court shortly after the Kansas statutes for imposing upward departure sentences were declared unconstitutional in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), but prior to the legislature amending the statutes to address the constitutional concerns. In *Kessler*, although the trial court conducted a separate hearing to obtain a jury determination of aggravating factors beyond a reasonable doubt, the court vacated the upward durational departure sentence on the basis that, at the time of trial, there was no statutory authority for the trial court's procedure.

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PIK CRIMINAL INDEX

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