

**Pattern
Instructions for Kansas—**

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

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

© 2005

KANSAS JUDICIAL COUNCIL

ALL RIGHTS RESERVED

Detailed Table of Contents

CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

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

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS CONSIDERATION

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

Credibility Of Witnesses	52.09
Defendant As A Witness	52.10
Number Of Witnesses	52.11
Testimony Taken Before Trial	52.12
Defendant's Failure To Testify	52.13
Expert Witness	52.14
Impeachment	52.15
Circumstantial Evidence	52.16
Confession	52.17
Testimony Of An Accomplice	52.18
Testimony Of An Informant - For Benefits	52.18-A
Alibi	52.19
Eyewitness Identification	52.20
Child's Hearsay Evidence	52.21

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

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

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

CHAPTER 55.00

ANTICIPATORY CRIMES

	PIK Number
Attempt	55.01

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

CHAPTER 56.00

CRIMES AGAINST PERSONS

	PIK Number
Capital Murder - Pre-voir Dire Instruction	56.00
Capital Murder	56.00-A
Capital Murder - Death Sentence -Sentencing Proceeding ..	56.00-B
Capital Murder - Death Sentence -Aggravating Circumstances	56.00-C
Capital Murder - Death Sentence -Mitigating Circumstances	56.00-D
Capital Murder - Duty To Inform Jury Of Alternative Sentence Absent Death Sentence	56.00-D-1
Capital Murder - Death Sentence -Burden Of Proof	56.00-E
Capital Murder - Death Sentence -Aggravating And Mitigating Circumstances - Theory Of Comparison	56.00-F
Capital Murder - Death Sentence -Reasonable Doubt	56.00-G
Capital Murder - Death Sentence - Sentencing Recommendation	56.00-H
Murder In The First Degree	56.01
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Sentencing Proceeding	56.01-A
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Aggravating Circumstances	56.01-B
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Mitigating Circumstances	56.01-C
Murder In The First Degree - Mandatory Minimum 40 Year Sentence -Burden Of Proof	56.01-D

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

Aggravated Criminal Threat	56.23-B
Kidnapping	56.24
Aggravated Kidnapping	56.25
Interference With Parental Custody	56.26
Aggravated Interference With Parental Custody By	
Parent's Hiring Another	56.26-A
Aggravated Interference With Parental Custody By Hiree .	56.26-B
Aggravated Interference With Parental Custody -	
Other Circumstances	56.26-C
Interference With The Custody Of A Committed Person ..	56.27
Criminal Restraint	56.28
Mistreatment Of A Confined Person	56.29
Robbery	56.30
Aggravated Robbery	56.31
Blackmail	56.32
Disclosing Information Obtained In Preparing Tax Returns	56.33
Defense To Disclosing Information Obtained In	
Preparing Tax Returns	56.34
Aircraft Piracy	56.35
Hazing	56.36
Mistreatment Of A Dependent Adult	56.37
Affirmative Defense To Mistreatment Of A Dependent	
Adult	56.38
Stalking	56.39
Unlawfully Exposing Another To A Communicable	
Disease	56.40
Injuring A Pregnant Woman	56.41
Injury To A Pregnant Woman By Vehicle	56.42

CHAPTER 57.00

SEX OFFENSES

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

Rape, Corroboration Of Prosecutrix's Testimony	
Unnecessary	57.04
Indecent Liberties With A Child	57.05
Indecent Liberties With A Child - Sodomy	57.05-A
Affirmative Defense To Indecent Liberties With A Child ..	57.05-B
Aggravated Indecent Liberties With A Child	57.06
Affirmative Defense To Aggravated Indecent Liberties With A Child	57.06-A
Criminal Sodomy	57.07
Affirmative Defense To Criminal Sodomy	57.07-A
Aggravated Criminal Sodomy - Child Under 14	57.08
Aggravated Criminal Sodomy - Causing Child Under Fourteen To Engage In Sodomy With A Person Or An Animal	57.08-A
Aggravated Criminal Sodomy - No Consent	57.08-B
Affirmative Defense To Aggravated Criminal Sodomy ...	57.08-C
Adultery	57.09
Lewd And Lascivious Behavior	57.10
Enticement Of A Child	57.11
Indecent Solicitation Of A Child	57.12
Sexual Exploitation Of A Child	57.12-A
Promoting Sexual Performance By A Minor	57.12-B
Aggravated Indecent Solicitation Of A Child	57.13
Prostitution	57.14
Promoting Prostitution	57.15
Promoting Prostitution - Child Under 16	57.15-A
Habitually Promoting Prostitution	57.16
Patronizing A Prostitute	57.17
Sex Offenses - Definitions	57.18
Sexual Battery	57.19
Aggravated Sexual Battery - Force Or Fear	57.20
Aggravated Sexual Battery - Child Under 16	57.21
Aggravated Sexual Battery - Dwelling	57.22
Aggravated Sexual Battery - Victim Unconscious Or Physically Powerless	57.23
Aggravated Sexual Battery - Mental Deficiency Of Victim	57.24
Aggravated Sexual Battery - Intoxication	57.25
Unlawful Sexual Relations With Inmates, Etc.	57.26
Unlawful Voluntary Sexual Relations	57.27
RESERVED FOR FUTURE USE	57.28 - 57.39

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

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

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

CHAPTER 59.00

CRIMES AGAINST PROPERTY

	PIK Number
Theft	59.01
Theft - Knowledge Property Stolen	59.01-A
Theft - Welfare Fraud	59.01-B
Theft - Multiple - Value Not In Issue	59.01-C
Theft Of Lost Or Mislaid Property	59.02
Theft Of Services	59.03
Criminal Deprivation Of Property	59.04
Fraudulently Obtaining Execution Of A Document	59.05
Worthless Check	59.06
Statutory Presumption Of Intent To Defraud - Knowledge Of Insufficient Funds	59.06-A
Worthless Check - Defenses	59.07
Habitually Giving A Worthless Check Within Two Years .	59.08
Habitually Giving Worthless Checks - On Same Day	59.09
Causing An Unlawful Prosecution For Worthless Check ..	59.10
Forgery - Making Or Issuing A Forged Instrument	59.11
Forgery - Possessing A Forged Instrument	59.12
Making False Information	59.13
Destroying A Written Instrument	59.14
Altering A Legislative Document	59.15
Possession Of Forgery Devices	59.16
Burglary	59.17
Aggravated Burglary	59.18
Possession Of Burglary Tools	59.19
Arson (Before July 1, 2000)	59.20
Arson (After July 1, 2000)	59.20-A
Arson - Defraud An Insurer Or Lienholder (Before July 1, 2000)	59.21
Arson - Defraud An Insurer or Lienholder (After July 1, 2000)	59.21-A
Aggravated Arson	59.22
Criminal Damage To Property - Without Consent	59.23

Criminal Damage To Property - With Intent To	
Defraud An Insurer Or Lienholder	59.24
Criminal Trespass	59.25
Criminal Trespass - Health Care Facility	59.25-A
Criminal Trespass On Railroad Property	59.25-B
Littering - Public	59.26
Littering - Private Property	59.27
Tampering With A Landmark	59.28
Tampering With A Landmark - Highway Sign Or Marker	59.29
Tampering With A Traffic Signal	59.30
Aggravated Tampering With A Traffic Signal	59.31
Injury To A Domestic Animal	59.32
Criminal Hunting	59.33
Unlawful Hunting - Posted Land	59.33-A
Criminal Hunting - Defense	59.33-B
Criminal Use Of Financial Card of Another	59.34
Criminal Use Of Financial Card - Cancelled	59.35
Criminal Use Of Financial Card - Altered Or Nonexistent	59.36
Unlawful Manufacture Or Disposal Of False Tokens	59.37
Criminal Use Of Explosives	59.38
Possession Or Transportation Of Incendiary Or	
Explosive Device	59.39
Criminal Use Of Noxious Matter	59.40
Impairing A Security Interest - Concealment Or	
Destruction	59.41
Impairing A Security Interest - Sale Or Exchange	59.42
Impairing A Security Interest - Failure To Account	59.43
Fraudulent Release Of A Security Agreement	59.44
Warehouse Receipt Fraud - Original Receipt	59.45
Warehouse Receipt Fraud - Duplicate Or	
Additional Receipt	59.46
Unauthorized Delivery Of Stored Goods	59.47
Automobile Master Key Violation	59.48
Posting Of Political Pictures Or Advertisements	59.49
Opening, Damaging Or Removing Coin-Operated	
Machines	59.50
Possession Of Tools For Opening, Damaging Or	
Removing Coin-Operated Machines	59.51
Casting An Object Onto A Street Or Road - Damage	
To Vehicle, Resulting In Bodily Injury	59.52

Casting An Object Onto A Street Or Road - Bodily Injury	59.53
Casting An Object Onto A Street Or Road - Vehicle Damage	59.54
Casting An Object Onto A Street Or Road - No Damage . . .	59.55
Sale Of Recut Tires	59.56
Theft Of Cable Television Services	59.57
Piracy Of Recordings	59.58
Dealing In Pirated Recordings	59.58-A
Piracy of Recordings - Defenses	59.59
Non-Disclosure Of Source Of Recordings	59.60
Defrauding An Innkeeper	59.61
Grain Embezzlement	59.62
Making False Public Warehouse Records And Statements . .	59.63
Making False Public Warehouse Reports	59.63-A
Adding Dockage Or Foreign Material To Grain	59.63-B
Computer Crime	59.64
Computer Crime - Defense	59.64-A
Computer Trespass	59.64-B
Violation Of The Kansas Odometer Act - Tampering, Etc. . .	59.65-A
Violation Of The Kansas Odometer Act - Conspiring	59.65-B
Violation Of The Kansas Odometer Act - Operating A Vehicle	59.65-C
Violation Of The Kansas Odometer Act - Unlawful Device	59.65-D
Violation Of The Kansas Odometer Act - Unlawful Sale . . .	59.65-E
Violation Of The Kansas Odometer Act - Unlawful Service, Repair Or Replacement	59.65-F
Promoting a Pyramid Promotional Scheme	59.66
Manufacture, Sale or Distribution of a Theft Detection Shielding Device	59.67
Possession of a Theft Detection Shielding Device	59.67-A
Removal of a Theft Detection Device	59.67-B
Counterfeiting Merchandise or Services	59.68
RESERVED FOR FUTURE USE	59.69
Value In Issue	59.70
Counterfeiting Merchandise or Services - Value or Units in Issue	59.70-A

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

	PIK Number
Treason	60.01
Sedition	60.02
Practicing Criminal Syndicalism	60.03
Permitting Premises To Be Used For Criminal Syndicalism	60.04
Perjury	60.05
Corruptly Influencing A Witness	60.06
Intimidation Of A Witness Or Victim	60.06-A
Aggravated Intimidation Of A Witness Or Victim	60.06-B
Unlawful Disclosure Of Authorized Interception Of Communications	60.06-C
Compounding A Crime	60.07
Obstructing Legal Process	60.08
Obstructing Official Duty	60.09
Escape From Custody	60.10
Aggravated Escape From Custody	60.11
Aiding Escape	60.12
Aiding A Felon Or Person Charged As A Felon	60.13
Aiding A Person Convicted Of Or Charged With Committing A Misdemeanor	60.14
Failure To Appear Or Aggravated Failure To Appear	60.15
Attempting To Influence A Judicial Officer	60.16
Interference With The Administration Of Justice	60.17
Corrupt Conduct By Juror	60.18
Falsely Reporting A Crime	60.19
Performance Of An Unauthorized Official Act	60.20
Simulating Legal Process	60.21
Tampering With A Public Record	60.22
Tampering With Public Notice	60.23
False Signing Of A Petition	60.24
False Impersonation	60.25
Aggravated False Impersonation	60.26
Traffic In Contraband In A Correctional Institution	60.27
Criminal Disclosure Of A Warrant	60.28

Interference With The Conduct Of Public Business	
In A Public Building	60.29
Dealing In False Identification Documents	60.30
Harassment Of Court By Telefacsimile	60.31
Aircraft Registration	60.32
Fraudulent Registration Of Aircraft	60.33
Fraudulent Aircraft Registration - Supplying False Information	60.34
Aircraft Identification - Fraudulent Acts	60.35
Violation of a Protective Order	60.36

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

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

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

	PIK Number
Eavesdropping	62.01
Eavesdropping - Defense Of Public Utility Employee	62.02

Breach Of Privacy - Intercepting Message	62.03
Breach Of Privacy - Divulging Message	62.04
Denial Of Civil Rights	62.05
Criminal Defamation	62.06
Criminal Defamation - Truth As A Defense	62.07
Circulating False Rumors Concerning Financial Status	62.08
Exposing A Paroled Or Discharged Person	62.09
Hypnotic Exhibition	62.10
Unlawfully Smoking In A Public Place	62.11
Failure To Post Smoking Prohibited And Designated Smoking Area Signs	62.11-A
Unlawful Smoking - Defense Of Smoking In Designated Smoking Area	62.12
Identity Theft	62.13
Unlawfully Providing Information on an Individual Consumer	62.14
Obtaining Consumer Information	62.15

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

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

Harassment Of Court By Telefacsimile	63.14-A
Desecration Of Flags	63.15

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

	PIK Number
Criminal Use Of Weapons - Felony	64.01
Criminal Use Of Weapons - Misdemeanor	64.02
Criminal Discharge Of A Firearm - Misdemeanor	64.02-A
Criminal Discharge Of A Firearm - Felony	64.02-A-1
Criminal Discharge Of A Firearm - Affirmative Defense ..	64.02-B
Aggravated Weapons Violation	64.03
Criminal Use Of Weapons - Affirmative Defense	64.04
Criminal Disposal Of Firearms	64.05
Criminal Possession Of A Firearm - Felony	64.06
Criminal Possession Of A Firearm - Misdemeanor	64.07
Possession Of A Firearm (In)(On The Grounds Of)	
A State Building Or In A County Courthouse	64.07-A
Criminal Possession Of A Firearm By A Juvenile	64.07-B
Criminal Possession Of A Firearm By A Juvenile -	
Affirmative Defenses	64.07-C
Defacing Identification Marks Of A Firearm	64.08
Failure To Register Sale Of Explosives	64.09
Failure To Register Receipt Of Explosives	64.10
Explosive - Definition	64.10-A
Criminal Disposal Of Explosives	64.11
Criminal Possession Of Explosives	64.11-A
Criminal Possession Of Explosives - Defense	64.11-B
Carrying Concealed Explosives	64.12
Refusal To Yield A Telephone Party Line	64.13
Creating A Hazard	64.14
Unlawful Failure To Report A Wound	64.15
Unlawfully Obtaining Prescription-Only Drug	64.16

Unlawfully Obtaining Prescription-Only Drug	
For Resale	64.17
Selling Beverage Containers With Detachable Tabs	64.18
Failure To Register As An Offender	64.19

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

	PIK Number
Promoting Obscenity	65.01
Promoting Obscenity To A Minor	65.02
Promoting Obscenity - Definitions	65.03
Promoting Obscenity - Presumption Of Knowledge And Recklessness From Promotion	65.04
Promoting Obscenity - Affirmative Defenses	65.05
Promoting Obscenity To A Minor - Affirmative Defenses	65.05-A
Gambling	65.06
Illegal Bingo Operation	65.06-A
Gambling - Definitions	65.07
Commercial Gambling	65.08
Permitting Premises To Be Used For Commercial Gambling	65.09
Dealing In Gambling Devices	65.10
Dealing In Gambling Devices - Defense	65.10-A
Dealing In Gambling Devices - Presumption From Possession	65.11
Possession Of A Gambling Device	65.12
Possession Of A Gambling Device - Defense	65.12-A
Installing Communication Facilities For Gamblers	65.13
False Membership Claim	65.14
Cruelty To Animals	65.15
Cruelty To Animals - Defense	65.16
Unlawful Disposition Of Animals	65.17
Unlawful Conduct Of Dog Fighting	65.18
Attending An Unlawful Dog Fight	65.19
Illegal Ownership Or Keeping Of A Dog	65.20
RESERVED FOR FUTURE USE	65.21 - 65.29
Conflicts Of Interest - Commission Member Or Employee	65.30
Conflicts Of Interest - Retailer Or Contractor	65.31

Forgery Of A Lottery Ticket	65.32
Unlawful Sale Of A Lottery Ticket	65.33
Unlawful Purchase Of A Lottery Ticket	65.34
Lottery - Definitions	65.35
Violations Of The Tribal Gaming Law	65.36
RESERVED FOR FUTURE USE	65.37 - 65.50
Violation Of The Kansas Parimutuel Racing Act	65.51
Parimutuel Racing Act - Definitions	65.52

CHAPTER 66.00

CRIMES AFFECTING BUSINESS

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

CHAPTER 67.00

CONTROLLED SUBSTANCES

	PIK Number
REPEALED	67.01 - 67.12
Narcotic Drugs And Certain Stimulants - Possession	67.13
Controlled Substances - Sale Defined	67.13-A
Narcotic Drugs And Certain Stimulants - Sale, Etc.	67.13-B
Narcotic Drugs And Certain Stimulants - Possession Or Offer To Sell With Intent To Sell	67.13-C
Possession Of A Controlled Substance Defined	67.13-D

Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Possession Or Offer To Sell With Intent To Sell	67.14
Stimulants, Depressants, And Hallucinogenic Drugs Or Anabolic Steroids - Sale, Etc.	67.15
Stimulants, Depressants, Hallucinogenic Drugs Or Anabolic Steroids - Possession	67.16
Simulated Controlled Substances, Drug Paraphernalia, Anhydrous Ammonia Or Pressurized Ammonia - Use Or Possession With Intent To Use	67.17
Possession Or Manufacture Of Simulated Controlled Substance	67.18
Delivery Of Drug Paraphernalia	67.18-A
Simulated Controlled Substance and Drug Paraphernalia Defined	67.18-B
Drug Paraphernalia-Factors to be Considered	67.18-C
Promotion Of Simulated Controlled Substances Or Drug Paraphernalia	67.19
Representation That A Noncontrolled Substance Is A Controlled Substance	67.20
Representation That Noncontrolled Substance Is Controlled Substance - Presumption	67.20-A
Unlawfully Manufacturing A Controlled Substance (After July 1, 1999)	67.21
Unlawfully Manufacturing A Controlled Substance (Before July 1, 1999)	67.21-A
Unlawful Use Of Communication Facility To Facilitate Felony Drug Transaction	67.22
Substances Designated Under K.S.A. 65-4113 - Selling, Offering To Sell, Possessing With Intent To Sell Or Dispensing To Person Under 18 Years Of Age	67.23
Possession By Dealer - No Tax Stamp Affixed	67.24
Receiving Or Acquiring Proceeds Derived From A Violation Of The Uniform Controlled Substances Act	67.25
Controlled Substance Analog - Possession, Sale, Etc.	67.26
Methamphetamine Components - Possession With Intent To Manufacture	67.27
Methamphetamine Components - Marketing, Sale, Etc.	67.28

CHAPTER 68.00

CONCLUDING INSTRUCTIONS AND VERDICT FORMS

	PIK Number
Concluding Instruction	68.01
Concluding Instruction - Capital Murder - Sentencing Proceeding	68.01-A
Guilty Verdict - General Form	68.02
Not Guilty Verdict - General Form	68.03
Punishment - Class A Felony	68.04
Verdicts - Class A Felony	68.05
Not Guilty Because Of Mental Disease Or Defect	68.06
Multiple Counts - Verdict Instruction	68.07
Multiple Counts - Verdict Forms	68.08
Lesser Included Offenses	68.09
Alternative Charges	68.09-A
Multiple Acts	68.09-B
Lesser Included Offenses - Verdict Forms	68.10
Verdict Form - Value In Issue	68.11
Verdict Form - Counterfeiting Merchandise or Services - Value or Units in Issue	68.11-A
Deadlocked Jury	68.12
Post-Trial Communication With Jurors	68.13
Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 15 Years	68.14
Murder In The First Degree - Mandatory 40 Year Sentence - Verdict Form For Life Imprisonment With Parole Eligibility After 40 Years	68.14-A
Capital Murder - Verdict Form For Sentence Of Death	68.14-A-1
Murder In The First Degree - Mandatory Minimum 40 Year Sentence - Verdict Form For Life Imprisonment with Parole Eligibility After 40 Years (Alternative Sentencing Verdict)	68.14-B
Capital Murder - Verdict Form For Sentence Of Death (Alternative Verdict)	68.14-B-1

Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Instruction	68.15
Murder In The First Degree - Premeditated Murder And Felony Murder In The Alternative - Verdict Form	68.16
Capital Murder - Verdict Form For Sentence As Provided By Law	68.17

CHAPTER 69.00

ILLUSTRATIVE SETS OF INSTRUCTIONS

	PIK Number
Murder In The First Degree With Lesser Included Offenses	69.01
Theft With Two Participants	69.02
Possession Of Marijuana With Intent To Sell - Entrapment As An Affirmative Defense	69.03
Capital Murder--Guilt and Penalty Phases	69.04

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

	PIK Number
Traffic Offense - Driving Under The Influence Of Alcohol Or Drugs	70.01
Traffic Offense - Alcohol Concentration .08 Or More	70.01-A
B.A.T. .08 Or More Or DUI Charged In The Alternative ..	70.01-B
Driving Under The Influence - If Chemical Test Used	70.02
Transporting An Alcoholic Beverage In An Opened Container	70.03
Reckless Driving	70.04
Violation Of City Ordinance	70.05
Operating An Aircraft While Under The Influence Of Intoxicating Liquor Or Drugs	70.06

Operating An Aircraft While Under The Influence - If	
Chemical Test Is Used	70.07
Ignition Interlock Device Violation	70.08
Fleeing or Attempting to Elude a Police Officer	70.09
Driving While License Is Canceled, Suspended, Revoked, or While Habitual Violator	70.10
Affirmative Defense to Driving While License Is Canceled, Suspended or Revoked	70.10-A
Felony Driving While Privileges Canceled, Suspended, Revoked, or While Habitual Violator	70.11

CHAPTER 71.00

UPWARD DURATIONAL DEPARTURE

	PIK Number
Upward Durational Departure - Sentencing Proceeding	71.01
Burden of Proof	71.02
Unanimous Verdict	71.03
Effect on Sentence	71.04
Concluding Instruction	71.05
Verdict Form Finding Aggravating Factor(s)	71.06
Verdict Form for Sentence as Provided by Law	71.07

(THIS PAGE BLANK)

Cross Reference Table - Statutes To Instructions

Statutory Section	PIK 3d Number	Statutory Section	PIK 3d Number
3-1001	70.06	21-3214 (3) (a), (b)	54.22
3-1002	70.06	21-3215	54.23
3-1004	70.07	21-3216 (1)	54.24
3-1005	70.07	21-3217	54.25
8-262	70.10, 70.10-A, 70.11	21-3301	55.01
8-285 <i>et seq.</i>	70.11	21-3301 (b)	55.02
8-1005	70.01, 70.01-A, 70.02	21-3302	55.03
8-1006	70.02	21-3302 (a)	55.05, 55.06
8-1017	70.08	21-3302 (b)	55.04
8-1543	63.09	21-3303	55.09
8-1566	70.04	21-3303 (c)	55.10
8-1567	70.01, 70.01-B	21-3401	56.01, 56.02, 56.02-A
8-1567 (a)(1)	70.01-A	21-3402	56.03, 56.03-A
8-1568	70.09	21-3403	56.05
8-1599	70.03	21-3404	56.06
21-3106 (2)	57.12-A	21-3405	56.07
21-3107	56.05, 68.09,	21-3405a	56.07-A
21-3109	52.02, 52.03, 52.04,	21-3405b	56.07-B
21-3110 (8)	53.00	21-3406	56.08
21-3110 (24)	53.00	21-3407 (1)	56.10
21-3201 (a), (b)	54.01-A	21-3408	56.12
21-3201 (b), (c)	56.04	21-3409	56.13
21-3202	54.02	21-3410	56.14
21-3203 (1)	54.03	21-3411	56.15
21-3203 (2)	54.04	21-3412	56.16, 56.16-A
21-3204	54.01	21-3413	56.17
21-3205 (1)	54.05	21-3414	56.18
21-3205 (2)	54.06	21-3415	56.19
21-3205 (3)	54.07	21-3416	56.20
21-3206 (1), (2)	54.08	21-3417	56.21
21-3207 (1)	54.09	21-3418	56.22
21-3208 (1)	54.11	21-3419a	56.23-B
21-3208 (2)	54.12, 54.12-A, 54.12-A-1	21-3419	56.23, 56.23-A
21-3209	54.13	21-3420	56.24
21-3210	54.14	21-3421	56.25
21-3211	54.17	21-3422	56.26
21-3212	54.18	21-3422a	56.26-A, 56.26-B, 56.26-C
21-3213	54.19	21-3423	56.27
21-3214 (1)	54.20	21-3424	56.28
21-3214 (2)	54.21		

Statutory Section	PIK 3d Number	Statutory Section	PIK 3d Number
21-3425	56.29	21-3518 (a) (1)	57.20
21-3426	56.30	21-3518 (a) (2)	57.23
21-3427	56.31	21-3518 (a) (3)	57.24, 57.25
21-3428	56.32	21-3518 (b)	57.21
21-3430	56.33, 56.34	21-3518 (c)	57.22
21-3431	56.18-A	21-3519	57.12-B
21-3433	56.35	21-3520	57.26
21-3434	56.36	21-3522	57.27
21-3435	56.40	21-3601 (a)	58.01
21-3436	56.37	21-3601 (b)	58.02
21-3436 (b)	56.38	21-3602	58.03
21-3437	56.37	21-3603	58.04
21-3437 (b)	56.38	21-3604	58.05
21-3438	56.39	21-3604a	58.05-A
21-3439	56.00-A	21-3605 (a) (1)	58.06
21-3440	56.41	21-3605 (b) (1)	58.07
21-3441	56.42	21-3606	58.08
21-3442	56.06-A	21-3607	58.09
21-3443	56.16-B	21-3608 (a)	58.10
21-3501	57.02	21-3608 (b)	58.10-A
21-3501 (2)	57.18	21-3608a	58.10-B
21-3502	57.01	21-3609	58.11
21-3502 (b)	57.01-A	21-3610	58.12, 58.12-E
21-3503	57.05, 57.18	21-3610 (d)	58.12-C
21-3503 (b)	57.05-B	21-3610b	58.12-B
21-3504	57.06, 57.18	21-3612	58.14
21-3504 (b)	57.06-A	21-3701	59.01, 59.01-B, 59.01-C
21-3505	57.07, 57.18	21-3701 (a) (4)	59.01-A
21-3505 (b)	57.07-A	21-3702	54.01-B
21-3506	57.08-A	21-3703	59.02
21-3506 (a)	57.08	21-3704	59.03
21-3506 (a) (3)	57.08-B	21-3705	59.04
21-3506 (b)	57.08-C	21-3706	59.05
21-3507	57.09	21-3707	59.06
21-3508	57.10, 57.18	21-3707 (b)	59.06-A
21-3509	57.11	21-3707 (c)	59.07
21-3510	57.12	21-3708	59.08, 59.09
21-3511	57.13	21-3709	59.10
21-3512	57.14	21-3710 (a) (1), (2)	59.11
21-3513	57.15, 57.15-A	21-3710 (a) (3)	59.12
21-3514	57.16	21-3711	59.13
21-3515	57.17	21-3712	59.14
21-3516	57.12-A	21-3713	59.15
21-3517	57.18, 57.19	21-3714	59.16
21-3518	57.18	21-3715	59.17

Statutory Section	PIK 3d Number	Statutory Section	PIK 3d Number
21-3716	59.18	21-3750	59.60
21-3717	59.19	21-3752	59.57
21-3718	59.20-A, 59.21-A	21-3753	59.62
21-3718 (a) (1)	59.20	21-3754 (a)	59.63
21-3718 (a) (2)	59.21	21-3754 (b)	59.63-A
21-3719	59.22	21-3755 (b)(1)(B)	59.64
21-3720 (a) (1)	59.23	21-3755 (b)(3)	59.64-A
21-3720 (a) (2)	59.24	21-3755 (d)	59.64-B
21-3721	59.25, 59.33-B	21-3756	59.63-B
21-3721 (a) (2)	59.25-A	21-3757 (b)	59.65-A
21-3722 (a)	59.26	21-3757 (c)	59.65-B
21-3722 (b)	59.27	21-3757 (d)	59.65-C
21-3724 (a), (b), (c), (f)	59.28	21-3757 (e)	59.65-D
21-3724 (d), (e)	59.29	21-3757 (f)	59.65-E
21-3725	59.30	21-3757 (g)	59.65-F
21-3726	59.31	21-3761	59.25-B
21-3727	59.32	21-3762	59.66
21-3728	59.33, 59.33-B	21-3763	59.68, 68.11-A
21-3729 (a) (1)	59.34	21-3764	59.67, 59.67-A, 59.67-B
21-3729 (a) (2)	59.35	21-3801 (a)	60.01
21-3729 (a) (3)	59.36	21-3802	60.02
21-3730	59.37	21-3803	60.03
21-3731(a)	59.38	21-3804	60.04
21-3732	59.39	21-3805	60.05
21-3733	59.40	21-3806	60.06
21-3734 (a) (1)	59.41	21-3807	60.07
21-3734 (a) (2)	59.42	21-3808	60.08, 60.09
21-3734 (a) (3)	59.43	21-3809	60.10, 60.11, 60.12
21-3735	59.44	21-3810	60.11
21-3736 (a), (1), (2)	59.45	21-3811	60.12
21-3736 (a) (3)	59.46	21-3812 (a), (b)	60.13
21-3737	59.47	21-3812 (c)	60.14
21-3738	59.48	21-3813	60.15
21-3739	59.49	21-3814	60.15
21-3740	59.50	21-3815	60.16
21-3741	59.51	21-3816	60.17
21-3742 (a)	59.55	21-3817	60.18
21-3742 (b)	59.54	21-3818	60.19
21-3742 (c)	59.53	21-3819	60.20
21-3742 (d)	59.52	21-3820	60.21
21-3743	59.56	21-3821	60.22
21-3744	59.56	21-3822	60.23
21-3748	59.58	21-3823	60.24
21-3748 (c)	59.59	21-3824	60.25
21-3749	59.58-A	21-3825	60.26

Statutory Section	PIK 3d Number	Statutory Section	PIK 3d Number
21-3826	60.27	21-4110	63.10
21-3827	60.28	21-4111	63.11, 63.12, 63.13
21-3828	60.29	21-4113	63.14
21-3830	60.30	21-4114	63.15
21-3832	60.06-A	21-4201(a) (1) through (5)	64.02
21-3833	60.06-B	21-4201(a) (6), (7), (8)	64.01
21-3838	60.06-C	21-4201(a) (9)	64.02
21-3839	60.31	21-4201(b) through (f)	64.04
21-3840	60.32	21-4202	64.03
21-3841	60.33, 60.34	21-4203	64.05
21-3842	60.35	21-4204(a) (1), (5), (6)	64.07
21-3843	60.36	21-4204(a) (2), (3), (4), (A), (B)	64.06
21-3901	61.01	21-4204a	64.07-B, 64.07-C
21-3902	61.02	21-4205	64.08
21-3903	61.03, 61.04	21-4207	64.09
21-3904	61.05	21-4208	64.10
21-3905	61.06	21-4209	64.11
21-3906	61.07	21-4209a	64.11-A
21-3907	61.08	21-4209a (b)	64.11-B
21-3908	61.09	21-4209b	64.10-A
21-3909	61.10	21-4210	64.12
21-3910	61.11	21-4211	64.13
21-3911	61.12	21-4212	64.14
21-4001	62.01	21-4213	64.15
21-4001(c)	62.02	21-4214	64.16
21-4002	62.03, 62.04	21-4215	64.17
21-4003	62.05	21-4216	64.18
21-4004	62.06, 62.07	21-4217	64.02-A
21-4005	62.08	21-4218	64.07-A
21-4006	62.09	21-4219	64.02-B
21-4007	62.10	21-4301	65.01, 65.05,
21-4009	62.11, 62.11-A	21-4301(b)	65.04
21-4010	62.11, 62.11-A, 62.12	21-4301a	65.02, 65.04, 65.05-A
21-4011	62.11, 62.11-A	21-4302	65.07
21-4012	62.11, 62.11-A	21-4303	65.06
21-4018	62.13	21-4303a	65.06-A
21-4101	63.01	21-4304	65.08
21-4102	63.02	21-4305	65.09
21-4103	63.03	21-4306	65.10
21-4104	63.04	21-4306(b)	65.11
21-4105	63.05	21-4306(d)	65.10-A
21-4106	63.06, 63.07	21-4307	65.12
21-4107	63.07	21-4308	65.13
21-4108	63.08		
21-4109	63.09		

Statutory Section	PIK 3d Number	Statutory Section	PIK 3d Number
21-4309	65.14	22-4901	64.19
21-4310	65.15	32-1013(a)	59.33-A
21-4310(b)	65.16	36-206	59.61
21-4312	65.17	39-702(d)	59.01-B
21-4315	65.18, 65.19	39-720	59.01-B
21-4317	65.20	50-718	62.15
21-4401	66.01	50-719	62.14
21-4402	66.02	59-29a01	57.40
21-4403	66.03	59-29a02	57.41
21-4404	66.04	59-29a07	57.42
21-4405	66.05	60-401(d)	52.02
21-4406	66.06	60-439	52.13
21-4407	66.07	60-455	52.06
21-4408	66.08	60-460(i)(2)	55.07
21-4409	66.09	60-460(dd)	52.21
21-4410	66.10	65-4101(bb)	67.26
21-4619(c)	57.12-A	65-4113	67.23
21-4624(a), (b), (c)	56.00-B, 56.01-A	65-4141	67.22
21-4624(b)	56.01-A, 68.01-A	65-4142	67.25
21-4624(c)	56.00-D, 56.01-C	65-4150(c)	67.18-B
21-4624(e)	56.00-G, 56.00-H, 56.01-F, 56.01-G, 68.14, 68.14-A, 68.14-A-1, 68.14-B, 68.14-B-1, 68.17	65-4150(e)	67.18, 67.18-B
21-4625	56.00-C, 56.00-E, 56.01-B, 56.01-D	65-4151	67.18-C
21-4626	56.00-D, 56.01-C	65-4152	67.17
21-4628	68.14-A, 68.14-B	65-4153	67.18, 67.18-A
21-4716	71.01	65-4154	67.19
21-4717	71.01	65-4155	67.20
21-4718	71.01 et. seq.	65-4155(b)	67.20-A
22-3204	52.07	65-4159	67.21, 67.21-A
22-3211	52.05, 52.12	65-4159 (a), (b)	67.26
22-3212	52.05	65-4160	67.13
22-3213	52.05	65-4160 (e)	67.26
22-3217	52.05	65-4161	67.13, 67.13-B, 67.13-C
22-3218	52.19	65-4161 (f)	67.26
22-3220	54.10	65-4162	67.16
22-3221	68.06	65-4162 (c)	67.26
22-3403 (3)	51.02	65-4163	67.14, 67.15
22-3414 (3)	51.01, 52.01	65-4163 (d)	67.26
22-3415	52.09	65-4164	67.23
22-3421	68.01, 68.02, 68.09-B	65-7006	67.27, 67.28
22-3428	54.10-A	74-8702	65.35
		74-8716(a)	65.30
		74-8716(b)	65.31
		74-8717	65.32
		74-8718	65.33
		74-8719	65.19, 65.34

Statutory Section	PIK 3d Number
74-8802	65.52
74-8810	65.51
74-9801 <i>et seq.</i>	65.36
79-5201 <i>et seq.</i>	67.24
79-5208	67.24

PATTERN INSTRUCTIONS FOR KANSAS 3d

**52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE,
REASONABLE DOUBT**

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

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

Notes on Use

This instruction must be given in each criminal case and should follow the element instructions for the crime charged. See K.S.A. 21-3109 on presumption of innocence and reasonable doubt, and K.S.A. 60-401(d) on burden of proof.

This instruction does not need to be repeated for separate offenses. *State v. Peoples*, 227 Kan. 127, 135, 605 P.2d 135 (1980). The State's burden, however, should be mentioned when a rebuttable presumption is utilized. See *State v. Johnson*, 233 Kan. 981, 986, 666 P.2d 706 (1983); *State v. Marsh*, 9 Kan. App. 2d 608, 612, 684 P.2d 459 (1984).

No separate instruction should be given relating to presumption of innocence and reasonable doubt. (See Committee's recommendations under PIK 3d 52.03 and 52.04.)

Comment

This instruction was designed to eliminate verbose and meaningless instructions commonly given about "presumption of innocence" and about "reasonable doubt." The only issues that have arisen relate to the semantics of "innocent" as contrasted to "not guilty" and "should" as contrasted to "must." See *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994) and *State v. McCloud*, 257 Kan. 1, 891 P.2d 324 (1995).

The instruction complies with *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); and *State v. Maxwell*, 10 Kan. App. 2d 62, 69, 691 P.2d 1316, *rev. denied* 236 Kan. 876 (1984). See also, *State v. Dunn*, 249 Kan. 488, 492, 820 P.2d 412 (1991).

PATTERN INSTRUCTIONS FOR KANSAS 3d

This instruction accurately reflects the law of this State and properly advises the jury of the burden of proof, the presumption of innocence and reasonable doubt. *State v. Pierce*, 260 Kan. 859, 870, 927 P.2d 929 (1996), and *State v. Clark*, 261 Kan. 460, 931 P.2d 664 (1997).

In *State v. Walker*, 276 Kan. 939, 955-956, 80 P.3d 1132 (2003), the trial court, in response to a jury question, instructed the jury that reasonable doubt is “such a doubt as a juror is able to give a reason for.” The Supreme Court found this definition to be improper. The court reiterated the language in *State v. Acree*, 22 Kan. App. 2d 350, 356, 916 P.2d 61 (1996): “Efforts to define reasonable doubt, other than as provided in PIK Crim. 3d 52.02, usually leads to a hopeless thicket of redundant phrases and legalese, which tends to obfuscate rather than assist the jury in the discharge of its duty.”

In *State v. Wilkerson*, 278 Kan. 147, 91 P.3d 1181 (2004), the Supreme Court stated that instructing the jury it must acquit “until” convinced of defendant’s guilt should have read “unless” convinced of defendant’s guilt. However, use of the word “until” was not cause for reversal. Pursuant to *Wilkerson*, the Committee has modified the language of PIK Crim. 3d 52.02.

The Committee has also changed the word “any” to “each” in the last sentence of the instruction in order to be consistent with the instructions throughout PIK Crim. 3d which state, “To establish this charge, *each* of the following claims must be proved . . .”

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.05 STIPULATIONS AND ADMISSIONS

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

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

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

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. 168, 176, 523 P.2d 397 (1974). 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. 677, 686, 585 P.2d 1024 (1978); *State v. Marquez*, 222 Kan. 441, 447-448, 565 P.2d 245 (1977).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

If evidence of another crime is admissible independent of K.S.A. 60-455, see section III, *infra*, Kansas decisions ordinarily do not require a limiting instruction. Such an instruction may nevertheless be given and usually is the better practice. Indeed, K.S.A. 60-406 seems to require an instruction upon request. See *State v. Denney*, 258 Kan. 437, 446, 905 P.2d 657 (1995) (“we caution trial judges that a limiting instruction should be given when requested by the defendant in every case where prior crimes evidence is admissible for one purpose but not for another, as is mandated by K.S.A. 60-406.”).

When evidence is admissible both for a purpose listed in K.S.A. 60-455 and for a purpose independent of K.S.A. 60-455, *State v. Wilkerson*, 278 Kan. 147, Syl. ¶ 2, 91 P.3d 1181 (2004), states, “The better practice . . . is to give a modified limiting instruction - one that instructs the jury on those issues for which evidence may be considered and forbidding its consideration as evidence of defendant’s general propensity for criminal behavior.” The court found failure to give an instruction was not error, under the unique facts of the case, where the other crimes evidence was so interwoven with the commission of the crime and defendant’s arrest that there was little or no chance the jury would have used the evidence solely for the propensity inference.

Comment

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

I. INTRODUCTION

The admission of evidence of other crimes committed by a defendant, particularly that evidence purportedly admitted pursuant to K.S.A. 60-455, has proven to be one of the most troublesome areas in the trial of a criminal case. *State v. 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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."

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. *Id.*

In a 5-2 decision, *State v. Jones* 277 Kan. 413, 85 P.3d 1226 (2004), reversed a conviction for sex offenses with defendant’s child and stepchild because evidence was admitted to prove plan of an incident years earlier with a different stepchild. There were some similarities, many of them common to such offenses, and many dissimilarities. Defendant in *Jones* relied upon cases like *Davidson*, *supra*, suggesting that the showing required to admit other crimes evidence to prove plan by common modus operandi is that the details be “strikingly similar and be so distinct as to be a ‘signature.’” The prosecution relied upon other cases suggesting that the evidence need only show that the general method is “similar enough” to show a common approach. The majority doesn’t resolve the issue of which standard applies, concluding that “the facts of this case fail to meet either standard of similarity . . . [T]here simply was insufficient evidence presented to show a distinct method of operation that could be considered ‘signature’ or ‘strikingly similar’ or even ‘similar enough’ for K.S.A. 60-455 purposes.” Compare *State v. Kackley*, 32 Kan. App. 2d 927, 92 P.3d 1128 (2004), which distinguishes *Jones* and admits another incident of indecent liberties with a child to show plan where it involved striking similarities amounting to a signature.

(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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. *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 identified in Rule 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

explicitly overrule *Irons*, stating merely that admissibility for a relevant purpose 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.* Until recently, the Court appeared to take 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

More recent decisions, *State v. Davidson*, *supra*, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), and *State v. Jones*, *supra*, 277 Kan. 413, 85 P.3d 1226 (2004), have applied K.S.A. 60-455 to prosecutions for child sexual abuse in the same way it applies in other cases. These decisions reversed convictions because of the admission of evidence of sexual abuse of other of defendant's children, even though there were some similarities with the crime charged, where there also were numerous dissimilarities.

* *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 its 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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*. K.S.A. 60-449 and 60-450 make evidence of habit or custom, as distinguished from a trait of character, admissible to prove that behavior on a specified occasion conformed to the habit or custom. Evidence of other crimes or wrongs rarely will be admissible to prove the existence of a habit because they usually will not be sufficient in number to establish that a habit exists nor will they involve a sufficiently invariable response to a recurring, specific stimulus. See *State v. Gaines*, 260 Kan. 752, 765, 926 P.2d 641 (1996)(evidence of five instances of toe-sucking by defendant during marital intercourse over more than one year does not establish habit of toe-sucking during intercourse; number of instances insufficient and conduct not invariable practice).

(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*

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

State v. McHenry, 276 Kan. 513, 78 P.3d 403 (2003), explains more carefully than many earlier opinions why these “independent” non-propensity uses were relevant. The defense attacked the veracity of the victim and other family members, contending the rest of the family concocted allegations of sexual abuse to remove defendant from the home, and introduced evidence that the victim had stated she could get whatever she wanted from defendant by claiming he had sexually abused her. Evidence of the previous incidents thus aided the jury in assessing the defense by showing the timing of past complaints in the context of other family dynamics, that past complaints had not resulted in action by those in authority, and that a long-standing system of rewards might explain the victim’s initial failure to come forward.

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

(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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

IV. CONCLUSIONS AND RECOMMENDATIONS

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

v. Moody, 223 Kan. 699, 576 P.2d 637 (1978). See also, *State v. Crume*, 271 Kan. 87, 93-95, 22 P.3d 1057 (2001); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Ferguson*, 228 Kan. 522, 618 P.2d 1186 (1980).

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

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

Absent such objection, an appellate court may reverse only if the trial court's failure to give [or the giving of] the instruction was clearly erroneous. The failure to give [or the giving of] an instruction is clearly erroneous only if the reviewing court reaches a firm conviction that if the trial error had not occurred there was a real possibility the jury would have returned a different verdict." *State v. DeMoss*, 244 Kan. 387, 391-92, 77 P.2d 441 (1989).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

52.18-A TESTIMONY OF AN INFORMANT - FOR BENEFITS

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

Notes on Use

This instruction must be given if requested when an informant's testimony is substantially uncorroborated. *State v. Fuller*, 15 Kan. App. 2d 34, 41, 802 P.2d 599 (1990).

See Comments below for the definition of "informant."

Comment

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

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

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

In *State v. Barksdale*, 266 Kan. 498, 514, 973 P.2d 165 (1999), the court expanded the definition of informant to include a disclosed person. Whether disclosed or undisclosed, in order to qualify as an informant, the person must act as an agent for the State in procuring information. *State v. Saenz*, 271 Kan. 339, 346-48, 22 P.3d 151 (2001).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

In *State v. Lowe*, 276 Kan. 957, 963-64, 80 P.3d 1156 (2003), the court determined that an instruction on the testimony of an informant is unnecessary unless the witness was acting as an agent for the State *at the time the witness gained information* about the defendant. A witness who gains information about the defendant and later offers the information to the police in exchange for benefits is not considered an informant within the meaning of PIK Crim. 3d 52.18-A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

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

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).

The decision of the trial court in admitting a child victim's "contemporaneous statement" pursuant to K.S.A. 60-460(d)(2) was upheld in *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983). Subsequent to *Rodriguez*, the Legislature enacted K.S.A. 60-460(dd), which specifically permits such testimony when the prescribed findings are made by the trial court.

In *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985), the Kansas Supreme Court relied upon *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980), and held that the child hearsay exception embodied in K.S.A. 60-460(dd) did not violate the defendant's Sixth Amendment right to confrontation because the requirements of *Roberts* were incorporated into the statute. The case also lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. In accord, see *State v. Clark*, 11 Kan. App. 2d 586 (1986), which provides that PIK 52.21 should be given when a child hearsay statement is admitted pursuant to K.S.A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

60-460(dd) because a general witness instruction does not adequately focus the jury upon a child's hearsay testimony and is inadequate to advise a jury of the factors to be considered in assessing child hearsay testimony.

The rulings in *Rodriguez, Myatt* and *Clark*, however, have been called into question by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under *Roberts*, the U.S. Supreme Court had held that the Sixth Amendment did not bar admission of an unavailable witness's statement if the statement bears "adequate indicia of reliability," a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Crawford* holds *Roberts* cannot be used to admit testimonial hearsay that the Confrontation Clause plainly meant to exclude. Where testimonial hearsay of an unavailable declarant is in issue, the Sixth Amendment demands a prior opportunity for cross-examination. *Crawford* does not attempt to comprehensively define what constitutes "testimonial." Rather, the decision states that whatever else the term encompasses, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury or a former trial, and to police interrogations.

The *Crawford* opinion further acknowledges that its ruling "casts doubt" on the holding in *White v. Illinois*, 502 U.S. 346, 116 L.Ed. 2d 848, 112 S. Ct. 736 (1992), which involved statements of a child victim to an investigating police officer admitted at trial as spontaneous declarations. The only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. *White* did not address the testimonial nature of the hearsay statements and whether they had to be excluded even if the declarant was unavailable. Until Kansas courts have ruled upon the effect of *Crawford*, this area of law is uncertain.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

Procuring Agent	54.14-A
Condonation	54.15
Restitution	54.16
Use Of Force In Defense Of A Person	54.17
No Duty to Retreat	54.17-A
Use Of Force In Defense Of A Dwelling	54.18
Use of Force In Defense Of Property Other Than A Dwelling	54.19
Forcible Felon Not Entitled To Use Force	54.20
Provocation Of First Force As Excuse For Retaliation . . .	54.21
Initial Aggressor's Use Of Force	54.22
Law Enforcement Officer Or Private Person Summoned To Assist - Use Of Force In Making Arrest	54.23
Private Person's Use Of Force In Making Arrest - Not Summoned By Law Enforcement Officer	54.24
Use Of Force In Resisting Arrest	54.25

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.01 INFERENCE OF INTENT

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

Notes on Use

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

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

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

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

Notes on Use

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

Comment

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).

It is not required that a person, to be an aider and abettor, be physically present when the crime is committed. Likewise, there is no such requirement for a charge of felony murder based upon the defendant aiding and abetting the commission of the underlying felony. *State v. Gleason*, 277 Kan. 628, 88 P.3d 218, 227-8 (2004).

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. Schriener*, 215 Kan. 86, 523 P.2d 703 (1974), wherein it was held "to be guilty of aiding and abetting in the commission of a crime the defendant must willfully and knowingly associate himself with the unlawful venture and willfully participate in it as he would in something he wishes to bring about or to make succeed." In *State v. Wakefield*, 267 Kan. 116, 121, 977 P.2d 941 (1999), the court

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

Where the evidence permits the jury to find defendant guilty either as an active principal in commission of the crime or as an aider and abettor, it is not error to give this instruction. *State v. Gleason*, 277 Kan. 624, 88 P.3d 218, 227 (2004). In *State v. Percival*, 32 Kan. App. 2d 82, 95, 79 P.3d 211 (2003), the prosecution offered evidence that the defendant participated in robbery, but the jury could also have found from defendant's evidence that defendant drove companion to site, waited in car and assisted in getaway.

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).

When a charge of felony murder is based upon the defendant aiding and abetting the commission of an underlying felony that is inherently dangerous to human life, PIK3d 54.05 is the appropriate instruction on aiding and abetting and PIK3d 54.06 is not necessary because the foreseeability requirement is established as a matter of law. *State v. Gleason*, 277 Kan. 624, 88 P.3d 218, 228-230 (2004). *Gleason* repudiates language in recent cases that death must be foreseeable from the commission of the underlying inherently dangerous felony to support conviction of felony murder.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

Comment

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

When a charge of felony murder is based upon the defendant aiding and abetting the commission of an underlying felony that is inherently dangerous to human life, PIK3d 54.05 is the appropriate instruction on aiding and abetting and PIK3d 54.06 is not necessary because the foreseeability requirement is established as a matter of law. *State v. Gleason*, 277 Kan. 624, 88 P.3d 218, 228-230 (2004). *Gleason* repudiates language in recent cases that death must be foreseeable from the commission of the underlying inherently dangerous felony to support conviction of felony murder.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes On Use

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

Comment

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

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.*

State v. Kessler, 276 Kan. 202, 73 P.3d 761 (2003), found no error in the failure to instruct on voluntary intoxication in a prosecution for aggravated indecent liberties, even though the State offered evidence that defendant was a heavy drinker who once had urinated upon his son while defendant was sleeping and lost control of his bladder. Defendant did not testify and put forth no evidence to suggest he was intoxicated at the time of the alleged acts or that his mental faculties were impaired on the nights in question.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

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

Notes on Use

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

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

Comment

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

In *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), the Court stated that where criminal discharge of a firearm into an occupied vehicle is the underlying felony for a charge of felony murder, it is a forcible felony and precludes the use of self defense under K.S.A. 21-3214(1).

PATTERN INSTRUCTIONS FOR KANSAS 3d

54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

Conviction of conspiracy requires an overt act in furtherance of the agreement. In contrast, conviction of attempt requires an overt act beyond mere preparation. See *State v. McAdam*, 277 Kan. 136, 139, 83 P.3d 161 (2004).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

recognized as a crime in Kansas, as it would require 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. 65-4159 because the district court seemingly convicted the defendant of both attempted manufacture and actual manufacture of methamphetamine. Although K.S.A. 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING
OFFENSE - NO DEFENSE**

The Committee recommends that there be no separate instruction given.

Notes on Use

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

Comment

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

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

evidence, and the whole of the evidence introduced at the trial taken together shows that a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. (*State v. Winner*, 17 Kan. 298.)” (Syl.4) *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

In *State v. Campbell*, 217 Kan. 756, 770, 539 P.2d 329 (1975), the Court stated that a specific intent is essential to the crime of conspiracy. The Court divided the concept of intent into two elements: (1) the intent to agree or conspire, and (2) the intent to commit the offense. Quoting with approval *Wharton's Criminal Law and Procedure* § 85, the Court recognized the obvious difficulty of proving the dual intent and concluded generally that no distinction should be made between the two specific intents. The Court embraced K.S.A. 21-3201 as satisfying the intent requirement in conspiracy cases. See also, *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

Conspiracy is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime; whereas, to aid and abet requires an actual participation in the act constituting the offense. See *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996), *cert. denied* 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998); *State v. Campbell*, 217 Kan. at 769; *State v. Rider, Edens & Lemons*, 229 Kan. 394, 625 P.2d 425 (1981).

Where there is one agreement to commit multiple crimes, a defendant may be convicted of only one count of conspiracy. *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

Conspiracy to commit a crime and commission of the substantive crime are separate and distinct offenses. Thus, conspiracy to commit a crime is not a lesser included offense of the substantive crime. See *State v. Burnett*, 221 Kan. 40, 45, 558 P.2d 1087 (1976).

A defendant's convictions for contributing to a child's misconduct and conspiring with the child to sell marijuana were not multiplicitous where the conspiracy was the illegal act generating the charge of contributing to a child's misconduct. *State v. Buhr*, 25 Kan. App. 2d 529, 966 P.2d 690, *rev. denied* 266 Kan. 1111 (December 22, 1998).

Conspiracy is not a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

It is not required that a co-conspirator have a financial stake in the success of a conspiracy. It is only necessary that he be shown not to be indifferent to the outcome of the conspiracy. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Conspiracy is not a lesser included offense of murder. See *State v. Adams*, 223 Kan. 254, 573 P.2d 604 (1977).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Conviction of conspiracy requires an overt act in furtherance of the agreement. In contrast, conviction of attempt requires an overt act beyond mere preparation. See *State v. McAdam*, 277 Kan. 136, 139, 83 P.3d 161 (2004).

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

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).

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

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from certain acts of the persons accused that were done in pursuance of the unlawful purpose. See *State v. Small*, 5 Kan. App. 2d at 762-763; *State v. Hernandez*, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied* 263 Kan. 888 (November 14, 1997).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

55.06 CONSPIRACY - ACT IN FURTHERANCE DEFINED

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

Notes on Use

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

Comment

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978). 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. 1118 (2002). K.S.A. 2003 Supp. 22-3201(b) requires the State to set out the essential facts of the crime. K.S.A. 21-3302(a) requires specific allegation of an overt act in furtherance of the conspiracy. The State must allege more than simply an "overt act in furtherance of the conspiracy." See *State v. Shirley*, 277 Kan. 659, 89 P.3d 649 (2004).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

56.00 CAPITAL MURDER - PRE-VOIR DIRE INSTRUCTION

NOTICE

On December 17, 2004, the Kansas Supreme Court ruled 4-3 that K.S.A. 21-4624(e), the weighing equation in the Kansas death penalty statute, is unconstitutional because of its provision that the death penalty is to be imposed when juries weigh aggravating and mitigating factors and find them equal. *State v. Marsh*, No. 81,135, opinion filed December 17, 2004.

A. (For crimes committed before July 1, 2004)

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

factors provided for by statute may be considered in deciding whether to impose the death penalty.

OR

B. (For crimes committed after June 30, 2004)

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. [Each of you have received questionnaires concerning your respective views regarding capital punishment.] I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time that the defendant will be sentenced to imprisonment for life with no possibility of parole if a sentence of death is not imposed. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty.

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.00-A CAPITAL MURDER

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

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

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

OR

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

OR

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

OR

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

OR

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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).

Premeditated first-degree murder is a lesser included offense of capital murder. *State v. Martis*, 277 Kan. 267, 83 P.3d 1216 (2004).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.00-B CAPITAL MURDER - DEATH SENTENCE - SENTENCING PROCEEDING

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

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

Notes on Use

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

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

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

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

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

This advisory is applicable only for crimes committed prior to July 1, 2004. For crimes committed after June 30, 2004, see PIK 56.00-G.

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.

“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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

In making the determination whether aggravating circumstances exist that 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.00-G CAPITAL MURDER - DEATH SENTENCE -
REASONABLE DOUBT**

A. (For crimes committed before July 1, 2004)

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.

OR

B. (For crimes committed after June 30, 2004)

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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 to imprisonment for life with no possibility of parole.

Notes on Use

For authority, see K.S.A. 21-4624(e), as amended, and *State v. Kleypas*, 272 Kan. 894, 1018, 1063-4, 1078, 40 P.3d 139 (2001).

Comment

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, (1994), 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 in the instruction for crimes committed prior to July 1, 2004, is phrased in general terms because the trial judge will have several options in sentencing such a defendant.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. 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).

Premeditated first-degree murder is a lesser included offense of capital murder. *State v. Martis*, 277 Kan. 267, 83 P.3d 1216 (2004). For a thorough analysis on lesser included offenses, see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

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

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

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

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

Comment

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

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

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK Crim. 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

**56.03-A MURDER IN THE SECOND DEGREE-
UNINTENTIONAL**

- A. (The defendant is charged with the crime of murder in the second degree. The defendant pleads not guilty.)**
- B. (If you do not agree that the defendant is guilty of murder in the first degree, you should then consider the lesser included offense of murder in the second degree.)**

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

- 1. That the defendant killed _____ unintentionally but recklessly under circumstances showing extreme indifference to the value of human life; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

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

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

Comment

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK Crim. 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. 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); *State v. Hebert*, 277 Kan. 61, 82 P.3d 470 (2004).

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.05 VOLUNTARY MANSLAUGHTER

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

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

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

OR

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

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

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

Comment

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

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

"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).

Where there is evidence of mitigating circumstances of sudden quarrel or heat of passion justifying an instruction on voluntary manslaughter in a case where voluntary manslaughter is a lesser included offense, the failure to instruct the jury to consider such circumstances, consistent with PIK Crim. 3d 56.05B, in its determination of whether the defendant is guilty of second-degree murder, is always error and in most cases presents a case of clear error. *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.06 INVOLUNTARY MANSLAUGHTER

- A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)**
- B. (If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)**

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

1. That the defendant unintentionally killed _____;
2. That it was done:
 - (a) recklessly;
or
 - (b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) _____;
or
 - (c) during the commission of a lawful act in an unlawful manner; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

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

or

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

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

or

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

or

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

or

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

or

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

and

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

Notes on Use

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

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

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

In a sentencing case, the Supreme Court used this instruction in its analysis. *State v. Perez-Moran*, 276 Kan. 830, 80 P.3d 361 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

56.18 AGGRAVATED BATTERY

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

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

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

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

Notes on Use

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

Comment

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

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

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

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

A “through and through” bullet wound is “great bodily harm” as a matter of law and can only be a severity level 4 (intentional) or a severity level 5 (reckless) aggravated battery. Therefore, severity level 7 and 8 aggravated batteries cannot be lesser included crimes. *State v. Valentine*, 260 Kan. 431, 921 P.2d 770 (1996) and *State v. Brice*, 276 Kan. 758, 80 P.3d 1113 (2003). But it is reversible error to instruct a jury that a “through and through” bullet wound is great bodily harm because it invades the province of the jury. *Brice* at Syl. ¶2.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. Phunkett, 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.

In *State v. Washington*, 226 Kan. 768, 602 P.2d 261 (1979), the Court held that a prior consistent out-of-court statement made by the victim to another person shortly after the offense was admissible at trial to corroborate the trial testimony of the victim.

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 aggravated 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 [(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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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. Wonsler*, 217 Kan. 406, 537 P.2d 197 (1975); and *State v. Kilpatrick*, 2 Kan. App. 2d 349, 578 P.2d 1147 (1978).

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."

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 includes 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).

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).

For further comment regarding the admission of child hearsay testimony, see PIK 3d 52.21.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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

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

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

OR

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

or

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

or

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

2. That at the time of the act _____ was a child 14 or more years of age but less than 16 years of age; and
3. That _____ did not consent to such fondling or touching; and

OR

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

or

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

or

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

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

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

Notes on Use

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

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

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

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

Comment

An instruction similar 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

In *State v. Kessler*, 276 Kan. 202, 73 P.3d 761 (2003), the court decided that convictions for two counts of aggravated indecent liberties with a child were not multiplicitous since they were committed separately at different times and places.

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).

For further comment regarding the admission of child hearsay testimony, see PIK 3d 52.21.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Notes on Use

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

- (a) sexual intercourse with a child;
- (b) fondling or touching a child in a lewd manner;
- (c) submitting to lewd fondling or touching by a child.

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

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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.07 CRIMINAL SODOMY

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

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

- 1. That the defendant engaged in sodomy with 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.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.09 ADULTERY

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

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

1. That the defendant (had sexual intercourse) (engaged in sodomy) with _____;
2. That the defendant was then married to a person other than _____; and
or
That the defendant was not then married and knew that _____ was married; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3507. Adultery is a class C misdemeanor. If the charge is based on sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the charge is based on sodomy, the definition of sodomy, PIK 3d 57.18, Sex Offenses - Definitions, should be given.

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.10 LEWD AND LASCIVIOUS BEHAVIOR

The defendant is charged with the crime of lewd and lascivious behavior. The defendant pleads not guilty.

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

**1. That the defendant publicly engaged in an otherwise lawful act of (sexual intercourse) (sodomy) with knowledge or reasonable anticipation that the participants were being viewed by others; and
or**

That the defendant publicly exposed (his)(her) sex organ or exposed (his)(her) sex organ in the presence of a person not (his)(her) spouse and who had not consented thereto, with the intent to arouse or to gratify the sexual desires of the defendant or another; and

[2.] That the defendant committed the act in the presence of _____, a person under 16 years of age at the time the act was committed; and

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

Notes on Use

For authority, see K.S.A. 21-3508. Lewd and lascivious behavior if committed in the presence of a person 16 years or more of age is a class B, nonperson misdemeanor. Lewd and lascivious behavior if committed in the presence of a person under 16 years of age is a severity level 9, person felony. If the act under Element No. 1 is sexual intercourse, PIK 3d 57.02, Sexual Intercourse - Definition, should be given. If the act under Element No. 1 is sodomy, PIK 3d 57.18(d), Sex Offenses - Definitions, should be given.

Comment

Lewd and lascivious behavior consists of elements separate and distinct from the offense of aggravated sodomy and is neither a lesser degree of aggravated sodomy, nor a crime necessarily proved if aggravated sodomy is proved. *State v.*

PATTERN INSTRUCTIONS FOR KANSAS 3d

Crawford, 223 Kan. 127, 573 P.2d 982 (1977); *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 307, 624 P.2d 964 (1981).

The crime of lewd and lascivious behavior was enlarged in 1983 to include the exposure of the sex organ in a public place.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.11 ENTICEMENT OF A CHILD

The statute upon which this instruction was based (K.S.A. 21-3509) was repealed in 1992. L. 1992, ch. 298. See PIK 3d 57.12, Indecent Solicitation of a Child.

PATTERN INSTRUCTIONS FOR KANSAS 3d

- computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk, or any play or other live presentation.**
- d. **“Nude” means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.**

Notes on Use

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

Comment

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. In *State v. Coburn*, 32 Kan. App. 2d 657, 87 P.3d 348 (2004), the Court held that the phrase “exhibition in the nude” means more than mere nudity and encompasses a child’s awareness so that the depiction is posed, displayed, or presented for public view.

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 two 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 58.00

CRIMES AFFECTING FAMILY
RELATIONSHIPS AND CHILDREN

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.01 BIGAMY

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

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

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

OR

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

OR

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

OR

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

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

Notes on Use

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD

If the sole reason for the charge of endangering a child is that defendant relied upon or furnished treatment by spiritual means through prayer in lieu of medical treatment or remedial care of the child, it is a defense to the charge of endangering a child that the defendant in good faith selected and depended upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination.

Notes on Use

For authority, see K.S.A. 21-3608(b).

This instruction should only be given if the defendant is the parent or guardian of the child. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.10-B AGGRAVATED ENDANGERING A CHILD

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

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

1. (a) That the defendant intentionally and recklessly caused or permitted _____ to be placed in a situation in which _____'s life, body or health is injured or endangered;
or
(b) That the defendant permitted such child to be in an environment where a person is selling, offering for sale or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture or attempt to manufacture any methamphetamine;
or
(c) That the defendant permitted such child to be in an environment where drug paraphernalia or volatile, toxic or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture any methamphetamine.
2. That _____ was then a child under the age of 18 years; and
3. That this act occurred on or about the ___ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see 2004 Session Laws of Kansas, Chapter 125, New Section 4. Substitute for House Bill No. 2777. Effective May 20, 2004. To be codified at K.S.A. 21-3608a. A violation of this statute is a severity level 9 person felony.

Reference should be made to how the terms "methamphetamine", "manufacture" and "drug paraphernalia" are defined by statute.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.11 ABUSE OF A CHILD

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

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

- 1. That the defendant intentionally (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) (shook _____, which resulted in great bodily harm to) _____;**
- 2. That _____ was a child under the age of 18 years; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3609. Abuse of a child is a severity level 5, person felony.

Comment

The above instruction was deemed to be sufficient in *State v. Carr*, 265 Kan. 608, 617, 963 P.2d 421 (1998).

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App. 2d 726, 602 P.2d 99 (1979).

PATTERN INSTRUCTIONS FOR KANSAS 3d

58.12-E UNLAWFULLY HOSTING MINORS CONSUMING ALCOHOL OR CEREAL MALT BEVERAGES

The defendant is charged with the crime of unlawfully hosting minors consuming alcohol. The defendant pleads not guilty.

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

1. That the defendant ([owned] [occupied] [procured]) ([a residence] [a building] [a structure] [a room] [any land]);
2. That the defendant intentionally permitted the (residence) (building) (structure) (room) (land) to be used in a manner that resulted in the possession or consumption of alcoholic liquor or cereal malt beverages there by persons under the age of 18; and
3. That this occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 2003 Supp. 21-3610. Unlawfully hosting minors consuming alcohol or cereal malt beverages is a class B, person misdemeanor with a minimum fine of \$200.

For a definition of “cereal malt beverages” see K.S.A. 41-2701 and amendments thereto.

For a definition of “alcoholic liquor” see K.S.A. 41-102 and amendments thereto.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Casting An Object Unto A Street Or Road - Damage	
To Vehicle, Resulting In Bodily Injury	59.52
Casting An Object Onto A Street Or Road - Bodily Injury . .	59.53
Casting An Object Onto A Street Or Road - Vehicle	
Damage	59.54
Casting An Object Onto A Street Or Road - No Damage . . .	59.55
Sale Of Recut Tires	59.56
Theft Of Cable Television Services	59.57
Piracy Of Recordings	59.58
Dealing In Pirated Recordings	59.58-A
Piracy of Recordings - Defenses	59.59
Non-Disclosure Of Source Of Recordings	59.60
Defrauding An Innkeeper	59.61
Grain Embezzlement	59.62
Making False Public Warehouse Records And Statements . .	59.63
Making False Public Warehouse Reports	59.63-A
Adding Dockage Or Foreign Material To Grain	59.63-B
Computer Crime	59.64
Computer Crime - Defense	59.64-A
Computer Trespass	59.64-B
Violation Of The Kansas Odometer Act - Tampering, Etc. . .	59.65-A
Violation Of The Kansas Odometer Act - Conspiring	59.65-B
Violation Of The Kansas Odometer Act - Operating	
A Vehicle	59.65-C
Violation Of The Kansas Odometer Act - Unlawful Device .	59.65-D
Violation Of The Kansas Odometer Act - Unlawful Sale . . .	59.65-E
Violation Of The Kansas Odometer Act - Unlawful	
Service, Repair Or Replacement	59.65-F
Promoting a Pyramid Promotional Scheme	59.66
Manufacture, Sale or Distribution of a Theft Detection	
Shielding Device	59.67
Possession of a Theft Detection Shielding Device	59.67-A
Removal of a Theft Detection Device	59.67-B
Counterfeiting Merchandise or Services	59.68
RESERVED FOR FUTURE USE	59.69
Value In Issue	59.70
Counterfeiting Merchandise or Services - Value or	
Units in Issue	59.70-A

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01 THEFT

The defendant is charged with the crime of theft of property of the value of (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least [\$500] [\$1,000] but less than \$25,000) (less than [\$500] [\$1,000]). The defendant pleads not guilty.

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

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

OR

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

OR

That the defendant obtained by threat control over property;

OR

That the defendant obtained control over property knowing the property to have been stolen by another;

3. That the defendant intended to deprive _____ permanently of the use or benefit of the property;
4. That the value of the property was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least [\$500] [\$1,000] but less than \$25,000) (less than [\$500] [\$1,000]); and
5. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

For authority, see K.S.A. 2004 Supp. 21-3701. Effective July 1, 2004, theft of property of the value of \$100,00 or more is a severity level 5, nonperson felony. Theft of property of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of property of the value of at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony. Theft of property of the value of less than \$1,000 is a class A, nonperson misdemeanor, except that it is a severity level 9, nonperson felony if committed by a person who has within five years immediately preceding commission of the crime, been convicted of theft two or more times.

In a felony theft prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

For a definition of "deprive permanently", see PIK 3d Chapter 53.00, Definitions and Explanation of Terms.

In cases where the State resorts to the statutory presumption of K.S.A. 21-3702 to establish intent to permanently deprive, an instruction on the meaning of *prima facie* is required. See PIK 3d 54.01-B, Presumption of Intent to Deprive, and *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977).

In situations where there is a question in the mind of the prosecutor as to the type of theft to charge under K.S.A. 21-3701, it is permissible to charge in the alternative. *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980).

When instructing on the lesser included offense of criminal deprivation of property (PIK 3d 59.04), see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

Comment

PIK 59.01 is approved in *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976).

In a prosecution for felony theft where value is in issue, an instruction with respect to the element of value and a finding as to value is required. *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Nesmith*, 220 Kan. 146, 551 P.2d 896 (1976); *State v. Green* 222 Kan. 729, 567 P.2d 893 (1977).

The Committee believes that no instruction should be given relating to the circumstances of possession of goods proven to have been recently stolen. The statute defining the crime of theft as compared with what was formerly larceny does not require the elements of taking and carrying away. These were elements which the traditional instruction permitted to be inferred against the possessor by the fact of possession.

PATTERN INSTRUCTIONS FOR KANSAS 3d

There is doubt that the principle was ever proper as an instruction. The circumstance of possession of goods recently stolen is a rule of evidence, not a rule of law. Its only application should have been in determining whether as a matter of law there was sufficient evidence to justify submitting the case to the jury. Comment noted and approved in *State v. Crawford*, 223 Kan. 127, 573 P.2d 982 (1977).

To convict a defendant of theft under K.S.A. 21-3701a(4), the State has the burden of proving that the defendant, at the time he received property, had a belief or reasonable suspicion from all the circumstances known to him that the property was stolen, and that the act was done with intent to deprive the owner permanently of the possession, use, or benefit of his property. Although PIK 59.01 was approved, additional instruction was required to fully inform the jury of the elements of the offense. *State v. Bandt*, 219 Kan. 816, 549 P.2d 936 (1976). PIK 3d 59.01-A should be used with PIK 3d 59.01 in possession of stolen property cases.

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires the State to prove in a theft-by-deception prosecution, pursuant to K.S.A. 21-3701a(2), that the victim was deceived by reliance in whole or in part upon the false statement. See also, *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

More recent cases relating to the deception and the reliance necessary for a K.S.A. 21-3701a(2) violation are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980), where concealment of merchandise in a toy box was deceptive because the cashier was unaware of the concealed merchandise, and *State v. Rios*, 246 Kan. 517, 792 P.2d 1065 (1990).

In *State v. Keeler*, 238 Kan. 356 Syl. ¶ 8, 710 P.2d 1279 (1985), the Court stated: "The crime of unlawful deprivation of property under K.S.A. 21-3705 is a lesser included offense of the crime of theft under K.S.A. 1984 Supp. 21-3701. The holding to the contrary in *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980), is overruled and similar language in *State v. Long*, 234 Kan. 580, 588, 675 P.2d 832 (1984), is disapproved." See also, *State v. Wickliffe*, 16 Kan. App. 2d 424, 826 P.2d 522 (1992), an instruction on unlawful deprivation should be given when there is little or no evidence to indicate the intent of the defendant when the property was taken.

In *State v. Ringi*, 238 Kan. 523 Syl. ¶ 2, 712 P.2d 1223 (1986), the Court held: "The charge of theft by deception under K.S.A. 1984 Supp. 21-3701a(2) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3707." In that case, a defendant could be charged with both offenses when they occurred on different days.

In *State v. Hanks*, 10 Kan. App. 2d 666, 708 P.2d 991 (1985), the Court rejected the defendant's arguments that: (1) proof of two prior theft convictions is an element of a class E felony theft which should have been included in the jury instructions, and (2) that "theft" is a lesser included offense of "theft after having been convicted of theft two or more times within the preceding five years."

PATTERN INSTRUCTIONS FOR KANSAS 3d

In *State v. Micheaux*, 242 Kan. 192, 747 P.2d 784 (1987), the Court, in overruling *State v. Bryan*, 12 Kan. App. 2d 206, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987), held that the crimes of welfare fraud and theft are independent crimes because welfare fraud includes an *attempt* to obtain welfare assistance in addition to the actual obtaining of welfare assistance, and because it covers the obtaining of *services* and *institutional care* in addition to property. Also, the intent to deprive the owner permanently of the possession, use, or benefit of the property is not an element of welfare fraud.

The asportation (carrying away) element of common-law larceny is included within the term "obtain or exert control" by statutory definition contained in K.S.A. 21-3110(12) and does not need to be separately set forth in a theft charge under K.S.A. 21-3701a(1) alleging a defendant obtained or exerted unauthorized control over the property. *State v. Freitag*, 247 Kan. 499, 802 P.2d 502 (1990).

Neither theft nor conspiracy to commit theft were intended by the Legislature to be a continuing offense. *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991).

Sales tax is not part of the "value" of unsold retail merchandise stolen from a store. *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814, *rev. denied* 241 Kan. 839 (1987).

An information charging the defendant with felonious theft of 8,434 gallons of regular gasoline in violation of K.S.A. 21-3701, a class E felony, and which did not allege that the defendant had been convicted of theft two or more times in the last five years, when read in its entirety, construed according to common sense, and interpreted to include facts necessarily implied, sufficiently informed the defendant that the value of the gasoline taken was \$150 or more even though not specifically alleged. *State v. Crichton*, 13 Kan. App. 2d 213, 766 P.2d 832, *rev. denied* 244 Kan. 739 (1988).

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

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.01-A THEFT - KNOWLEDGE PROPERTY STOLEN

Knowledge that property has been stolen by another must exist at the time control first occurs and may be proven by a showing that the defendant either knew or had a reasonable suspicion from all the circumstances known to the defendant that the property was stolen.

Notes on Use

The instruction should be used with PIK 3d 59.01, Theft, in a prosecution for violation of K.S.A. 21-3701a(4), receiving stolen property.

State v. Bandt, 219 Kan. 816, 549 P.2d 936 (1976), requires that knowledge of the stolen character of the property exists at the time control first occurs where defendant is charged under K.S.A. 21-3701a(4).

Comment

Stolen property, once recovered either by the owner or law enforcement officers, is no longer stolen property as contemplated in K.S.A. 21-3701a(4). Therefore, one cannot be convicted of theft by obtaining control over stolen property when actual physical possession of the stolen property has been recovered by the owner or by law enforcement officers as agents for the owner, before delivery of the property to the accused. *State v. Sterling*, 230 Kan. 790, 640 P.2d 1264 (1982).

For a discussion of the definition of "obtain" found in K.S.A. 21-3110(11) which relates to K.S.A. 21-3701a(4), and a definition of "obtains or exerts control" as found in K.S.A. 21-3110(12) which relates to K.S.A. 21-3701a(1), see *State v. Myers*, 6 Kan. App. 2d 906, 908, 636 P.2d 213 (1981).

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.02 THEFT OF LOST OR MISLAID PROPERTY

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

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

1. That _____ was the lawful owner of the property;
2. That the property was lost or mislaid;
3. That the defendant came into possession of the property;
4. That the defendant (knew) (learned) that _____ was the lawful owner of the property;
5. That the defendant failed to take reasonable measures to restore the property to _____;
6. That the defendant intended to deprive _____ permanently of the use or benefit of the property; and
7. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3703. Theft of lost or mislaid property is a class A, nonperson misdemeanor.

For a definition of "deprive permanently," see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

Comment

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), the trial court refused to instruct the jury on the crime of theft of lost or mislaid property finding that it was not a lesser included crime under K.S.A. 21-3107(2)(d). The Supreme Court reversed, holding that it was a lesser degree of the same crime. (K.S.A. 21-3107(2)(a)). It held that theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are both forms of the same crime of larceny.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.03 THEFT OF SERVICES

The defendant is charged with the crime of theft of services of the value of (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least [\$500] [\$1,000] but less than \$25,000) (less than [\$500] [\$1,000]). The defendant pleads not guilty.

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

1. That the defendant intentionally obtained services in the form of _____ from _____;
2. That the defendant obtained these services by (deception by means of a false statement or representation which deceived _____, who relied in whole or in part upon the false representation or statement of the defendant) (threat) (coercion) (stealth) (tampering by [describe the form of tampering]) (use of a false token or device);
3. That the value of the services obtained was (\$100,000 or more) (at least \$25,000 but less than \$100,000) (at least [\$500] [\$1,000] but less than \$25,000) (less than [\$500] [\$1,000]); and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 2004 Supp. 21-3704. Effective July 1, 2004, theft of services of the value of \$100,000 or more is a severity level 5, nonperson felony. Theft of services of the value of \$25,000 but less than \$100,000 is a severity level 7, nonperson felony. Theft of services of the value of at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony. Theft of services of the value of less than \$1,000 is a class A, nonperson misdemeanor.

PATTERN INSTRUCTIONS FOR KANSAS 3d

In a felony theft of services prosecution, it may be necessary to provide the jury with the alternative of finding a lesser felony or misdemeanor theft of services if value is in issue. PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

Forms of tampering are described in K.S.A. 21-3704(c).

Services is defined in K.S.A. 21-3704(b).

Comment

State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978), requires proof of reliance by the victim upon the false representation or statement of the defendant.

State v. Saylor, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Hamilton*, 6 Kan. App. 2d 646, 631 P.2d 1255 (1981), are additional cases relating to the requirements of "deception" and "reliance" in theft cases.

PATTERN INSTRUCTIONS FOR KANSAS 3d

59.04 CRIMINAL DEPRIVATION OF PROPERTY

The defendant is charged with criminal deprivation of property. The defendant pleads not guilty.

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

- 1. That _____ was the owner of the property in question;**
- 2. That the defendant (obtained) (exerted) unauthorized control over the property without the owner's consent;**
- 3. That the defendant intended to temporarily deprive the owner of the use or benefit of such owner's property; and**
- 4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3705. Criminal deprivation of property other than a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A, nonperson misdemeanor. Upon a second or subsequent conviction, the sentence shall be not less than 30 days imprisonment and not less than a \$100 fine, except where such sentence and fine would result in a manifest injustice.

Criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A nonperson misdemeanor. Upon a first conviction of this subsection, a person shall be sentenced to not less than 30 days nor more than one year's imprisonment and fined not less than \$100. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 60 days nor more than one year's imprisonment and fined not less than \$200. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice.

For definition of "temporarily deprive," see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

When instructing on this crime as a lesser included offense of theft, see PIK 3d 68.09 for form and PIK 3d 68.10 for verdict form.

PATTERN INSTRUCTIONS FOR KANSAS 3d

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

	PIK Number
Criminal Use Of Weapons - Felony	64.01
Criminal Use Of Weapons - Misdemeanor	64.02
Criminal Discharge Of A Firearm - Misdemeanor	64.02-A
Criminal Discharge Of A Firearm - Felony	64.02-A-
Criminal Discharge Of A Firearm - Affirmative Defense	64.02-B
Aggravated Weapons Violation	64.03
Criminal Use Of Weapons - Affirmative Defense	64.04
Criminal Disposal Of Firearms	64.05
Criminal Possession Of A Firearm - Felony	64.06
Criminal Possession Of A Firearm - Misdemeanor	64.07
Possession Of A Firearm (In)(On The Grounds Of)	
A State Building Or In A County Courthouse	64.07-A
Criminal Possession Of A Firearm By A Juvenile	64.07-B
Criminal Possession Of A Firearm By A Juvenile -	
Affirmative Defenses	64.07-C
Defacing Identification Marks Of A Firearm	64.08
Failure To Register Sale Of Explosives	64.09
Failure To Register Receipt Of Explosives	64.10
Explosive - Definition	64.10-A
Criminal Disposal Of Explosives	64.11
Criminal Possession Of Explosives	64.11-A
Criminal Possession Of Explosives - Defense	64.11-B
Carrying Concealed Explosives	64.12
Refusal To Yield A Telephone Party Line	64.13
Creating A Hazard	64.14
Unlawful Failure To Report A Wound	64.15
Unlawfully Obtaining Prescription-Only Drug	64.16
Unlawfully Obtaining Prescription-Only Drug	
For Resale	64.17
Selling Beverage Containers With Detachable Tabs	64.18
Failure To Register As An Offender	64.19

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.01 CRIMINAL USE OF WEAPONS - FELONY

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

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

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

or

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

or

**That the defendant knowingly possessed a device or
attachment of any kind (designed) (used) (intended
for use) in 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

K.S.A. 21-4201(a)(8) does not apply to a governmental laboratory or to solid plastic bullets. The provisions of K.S.A. 21-4201(b) provides that the offense contained in K.S.A. 21-4201(a)(7) does not apply to law enforcement officers or other designated persons.

In *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987), the Court held evidence that the defendant possessed all the pieces of a disassembled shotgun is sufficient to support a conviction. PIK 2d 64.01 is cited with approval.

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02 CRIMINAL USE OF WEAPONS - MISDEMEANOR

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

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

1. That the defendant knowingly (sold) (manufactured) (purchased) (possessed) (carried) a (bludgeon) (sandclub) (metal knuckles) (throwing star) (switchblade knife); and

or

That the defendant knowingly (carried concealed on defendant's person) (possessed with the intention to use the same unlawfully against another) a (dagger) (dirk) (billy) (blackjack) (slung shot) (dangerous knife) (straight-edged razor) (stiletto) (any dangerous or deadly weapon or instrument); and

or

That the defendant knowingly carried (on defendant's person) (in a [land] [water] [air] vehicle) a (tear gas bomb) (smoke bomb) (projector or object containing a noxious [liquid] [gas] [substance]) with the intent to use the same unlawfully; and

or

That the defendant knowingly carried a (pistol) (revolver) (other firearm) concealed on defendant's person when not on defendant's own land or abode or fixed place of business; and

or

That the defendant knowingly set a spring gun; and

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

Notes on Use

For authority, see K.S.A. 21-4201(a)(1) through (5) and (a)(9). The instruction presents several alternative situations and only the appropriate one should be used.

PATTERN INSTRUCTIONS FOR KANSAS 3d

If the weapon is a switchblade knife, the definition given in subsection (a)(1) of the statute should be inserted after the numbered paragraphs of the instruction.

Likewise, under subsection (a)(2), an ordinary pocket knife with no blade more than 4 inches in length shall not be construed to be a dangerous knife, weapon or instrument. If applicable, this exclusionary definition should be included after the numbered paragraphs of the instruction.

It should also be noted under this statute, possession of a shotgun with a barrel less than 18 inches in length is a felony. See PIK 3d 64.01, Criminal Use of Weapons - Felony.

See also, PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defenses, if an affirmative defense that the defendant was acting within the scope of authority is applicable.

Provisions concerning pipe bombs, etc., formerly included in K.S.A. 21-4201 and this instruction are now included in K.S.A. 21-3731 and PIK 3d 59.38 as a result of 1999 Senate Bill 149.

Comment

In *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975), it was held that a municipal ordinance which prohibited the use of certain weapons was not in conflict with the state statute (21-4201), even though the municipal ordinance was more restrictive.

Under K.S.A. 21-4201(a)(2), the intentional carrying of a concealed weapon upon the person of the accused constitutes in itself a complete criminal offense, irrespective of the purpose or motive of the accused, unless the accused occupies an exempt status expressly recognized in the statute. *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976). In *Lassley*, the Court also held that where the defendant is charged with carrying a concealed weapon, under 21-4201(a)(2), a separate instruction defining general criminal intent is not necessary if an instruction on the elements of the crime requires the State to prove that the proscribed act was done willfully or knowingly.

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), held that the crime of carrying a concealed weapon under 21-4201(a)(4) is not a lesser included offense of unlawful possession of a firearm under 21-4204(a)(2). PIK 64.02 is cited.

In *State v. Hargis*, 5 Kan. App. 2d 608, 609, 611, 620 P.2d 1181 (1980), the Court held that an individual engaging in an unofficial narcotics investigation was not exempted as a law enforcement officer because of the individual's commission as a special deputy or school security guard.

In *City of Junction City v. Mevis*, 226 Kan. 526, 530, 601 P.2d 1145 (1979), the Court held that a city ordinance prohibiting anyone from carrying firearms within the city limits was unconstitutionally broad.

PATTERN INSTRUCTIONS FOR KANSAS 3d

State v. Hunt, 8 Kan. App. 2d 162, 164, 651 P.2d 967 (1982), held that a scalpel is a dangerous weapon within the meaning of K.S.A. 21-4201(a)(2).

In *State v. Doile*, 7 Kan. App. 2d 722, 648 P.2d 262 (1982), the constitutionality of subsection (a)(4) was upheld as not an unreasonable exercise of police power or overbroad.

The constitutionality of K.S.A. 21-4201(a)(1) was upheld in *State v. Neighbors*, 21 Kan. App. 2d 824, 908 P.2d 649 (1995), wherein the court found the statute to be neither vague nor overbroad.

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02-A CRIMINAL DISCHARGE OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

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

1. That the defendant intentionally discharged a firearm;
2. That the act occurred upon (land) (a nonnavigable body of water) of another;

or

That the act occurred (upon) (from) any (public road) (public road right-of-way) (railroad right-of-way) that adjoins land of another;

3. That the defendant did not have the permission of the owner or person in possession of such land to discharge a firearm; and
4. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

Authority for this instruction is K.S.A. 21-4217, a class C misdemeanor.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.02-A-1 CRIMINAL DISCHARGE OF A FIREARM - FELONY

The defendant is charged with criminal discharge of a firearm. The defendant pleads not guilty.

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

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an unoccupied dwelling; and

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

OR

1. That the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied (dwelling) (building) (structure) (motor vehicle) (aircraft) (watercraft) (train) (locomotive) (railroad car) (caboose) (railmounted work equipment) (rolling stock) (designate other means of conveyance of person or property);

2. That the act resulted in (bodily harm)(great bodily harm) to a person; and

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

Notes on Use

For authority, see K.S.A. 21-4219. The provisions of K.S.A. 21-4219 were enacted to address the so-called “drive by shootings” and presumably fill a perceived need not provided under K.S.A. 21-3410 and 21-3414.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Criminal discharge of a firearm at an unoccupied dwelling is a severity level 8, person felony. Criminal discharge of a firearm at an occupied building or vehicle is a severity level 7, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in bodily harm to a person during the commission of the act is a severity level 5, person felony. Criminal discharge of a firearm at an occupied building or vehicle which results in great bodily harm to a person during the commission of the act is a severity level 3, person felony.

See PIK 3d 64.04, Criminal Use of Weapons - Affirmative Defense, if the evidence supports the giving of an instruction that the defendant was acting within the scope of authority.

See PIK 3d 56.04, Homicide Definitions, for a definition of maliciously.

Comment

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

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

Criminal discharge of a firearm at an occupied dwelling is an inherently dangerous felony and may serve as the underlying felony for a charge of felony murder. *State v. Lowe*, 276 Kan. 957, 80 P.3d 1156 (2003).

In *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), the Court stated that where criminal discharge of a firearm into an occupied vehicle is the underlying felony for a charge of felony murder, it is a forcible felony and precludes the use of self defense under K.S.A. 21-3214(1).

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.02-B CRIMINAL DISCHARGE OF A FIREARM -
AFFIRMATIVE DEFENSE**

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

Notes on Use

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.03 AGGRAVATED WEAPONS VIOLATION

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

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

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

Notes on Use

For authority, see K.S.A. 21-4202. This statute has been amended to include convictions from other jurisdictions which are substantially the same as a Kansas person felony. Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201.

If the prior conviction was a nonperson felony, the first alternative in element 2 should be used; if the prior conviction was a person felony, the second alternative should be used.

Comment

In *State v. Lassley*, 218 Kan. 758, 545 P.2d 383 (1976), the Court approved PIK 64.03 as a correct statement of the elements of the offense. The conviction of a felony upon a plea of *nolo contendere* within five years prior to the unlawful use of a weapon may be used as a prior conviction under K.S.A. 21-4202. *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976).

State v. Hoskins, 222 Kan. 436, 565 P.2d 608 (1977), holds that the crime of aggravated weapons violation under K.S.A. 21-4202 is not a lesser included offense

PATTERN INSTRUCTIONS FOR KANSAS 3d

of unlawful possession of a firearm under K.S.A. 21-4204(a)(2).

Unlawful use of a weapon is a lesser included offense of aggravated weapons violation. *State v. Sanders*, 258 Kan. 409, 904 P.2d 951 (1995).

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

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

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

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

Notes on Use

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.05 CRIMINAL DISPOSAL OF FIREARMS

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

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

- A. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm with a barrel less than 12 inches long to _____;
2. That _____ was a person under 18 years of age; and

OR

- B. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;
2. That the defendant knew _____ was both addicted to and an unlawful user of _____, a controlled substance; and

OR

- C. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;
2. That the defendant knew _____ had, within the preceding five years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and

OR

- D. 1. That the defendant knowingly (sold) (gave) (transferred) a firearm to _____;
2. That the defendant knew _____ had, within the preceding 10 years, been (convicted of _____, a felony) (released from imprisonment for _____, a felony, and had not had the conviction of the crime [expunged] [pardoned]); and

OR

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant knew _____ had been convicted of a felony and had been found to be in possession of a firearm at the time of the commission of the offense; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4203. Criminal disposal of firearms is a class A, nonperson misdemeanor. The appropriate alternative situation should be used.

Alternative C concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within five years of the act charged. For the purposes of this alternative, the specified felony conviction is defined as any felony except a felony as defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a or 65-4127b; or K.S.A. 65-4160 through 65-4165, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony. It is important to note that there is no longer any barrel length specification.

Alternative D concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within 10 years of the act. The specified felony conviction for this alternative is any felony defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 65-4127a, 65-4127b; or K.S.A. 65-4160 through 65-4164, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

Alternative C has the proviso that the transferee "was found not to have been in possession of a firearm at the time of the commission of the offense." The specified crimes for alternative D have the proviso that the transferee "was not found to have been in the possession of a firearm at the time of the commission of the offense." The Committee believed it improbable that a court would make those specific findings unless by implication as to alternative D by the fact of conviction of a crime that did not involve the use of a firearm as an element of the charge. It would be hard to imagine a situation in which a court made the specific finding that one was not in possession of a firearm at the time of the commission of the crime. Similarly, in alternative E it presumed that the finding of possession of a firearm at the time of the commission of the offense would be derived from the elements of the charge.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Note that while K.S.A. 21-4203 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicates that they were repealed in 1993. However, the Revisor's notes under the repealed statutes indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164 which are also referred to in K.S.A. 21-4203.

Alternative	Status of Transferee	Barrel Length	Prior Crime	Prior Crime Time Limit
A.	Less than 18 Years	Less than 12"	N/A	N/A
B.	Addict and User	N/A	N/A	N/A
C.	Felon	N/A	Specified felony without firearm	Five years
D.	Felon	N/A	Specified felony without firearm	Ten years
E.	Felon	N/A	Any felony with firearm	No time limit

Comment

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

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

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

- A. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant had been (convicted of _____, [a person felony] [a violation of the Uniform Controlled Substances Act]) (adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]);
3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (person felony) (violation of the Uniform Controlled Substances Act) (act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]); and

OR

- B. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

- C. 1. That the defendant knowingly had possession of a firearm;

PATTERN INSTRUCTIONS FOR KANSAS 3d

2. That the defendant within 10 years preceding such possession had been (convicted of _____, a felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony); and

OR

- D. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant within 10 years preceding such possession had been (convicted of _____, a nonperson felony) (adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a nonperson felony);
3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (nonperson felony) (act which if done by an adult would constitute the commission of a nonperson felony); and

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

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(2), Alternative B is K.S.A. 21-4204(a)(3), Alternative C is K.S.A. 21-4204(a)(4)(A), and Alternative D is K.S.A. 21-4204(a)(4)(B). Each crime is a severity level 8, nonperson felony.

Alternatives A and D are to be used when the defendant was found to have been in possession of a firearm at the time of the commission of the prior felony. The Committee believes that while such a prior finding may not have been specifically made by the court it may be implied from the elements of the charge upon which the defendant was convicted. Alternatives B and C, however, have the negative statutory requirement that the defendant was found not to have been in possession of a firearm at the time of the commission of the offense. The negative requirements of alternatives B and C are not required to be proved by the

PATTERN INSTRUCTIONS FOR KANSAS 3d

prosecution and have not been included as part of the elements of those alternatives. See *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, rev. denied 265 Kan. 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.

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

Comment

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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.

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.07 CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR

The defendant is charged with criminal possession of a firearm. The defendant pleads not guilty.

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

- A. 1. That the defendant was both addicted to and an unlawful user of _____, a controlled substance;
2. That the defendant knowingly had possession of a firearm; and

OR

- B. 1. That the defendant knowingly had possession of a firearm and was not a law enforcement officer;
2. That the defendant was [in or on school (property) (grounds) upon which was located a (building) (structure) used by (a unified school district) (an accredited nonpublic school) for student (instruction) (attendance) (extracurricular activities) for pupils enrolled in (kindergarten) (any of the grades 1 through 12)] [at a regularly scheduled school sponsored activity or event]; and

OR

- C. 1. That the defendant knowingly had possession of a firearm;
2. That the defendant refused to (surrender) (immediately remove) the firearm (from school [property] [grounds]) (at a regularly scheduled school sponsored activity or event) when (requested) (directed) by a (duly authorized school employee) (law enforcement officer); and
3. That this act occurred on or about the ____ day of _____, _____ in _____ County, Kansas.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(1). Authority for Alternative B is K.S.A. 21-4204(a)(5). A violation of Alternative A or B is a class B, nonperson select misdemeanor. Authority for Alternative C is K.S.A. 21-4204(a)(6), a class A, nonperson misdemeanor.

Felony criminal possession of a firearm is proscribed under subsections (a)(2), (3) and (4) of K.S.A. 21-4204 and it is the subject of PIK 3d 64.06, Criminal Possession of a Firearm - Felony. See Comment to PIK 3d 64.06.

As commonly defined, a person is addicted when he or she has a compulsive need for a habit forming drug and has lost the power of self control with reference to this addiction. *Black's Law Dictionary 37* (6th Ed. 1990).

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07-A POSSESSION OF A FIREARM (IN) (ON THE GROUNDS OF) A STATE BUILDING OR IN A COUNTY COURTHOUSE

The defendant is charged with the crime of possession of a firearm ([in] [on the grounds of] a state building) (in a county courthouse). The defendant pleads not guilty.

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

1. That the defendant knowingly had possession of a firearm;
2. That the defendant was ([in] [on the grounds of] the [set forth the name and address of the statutorily named building]) (within the governor's residence) ([on the grounds of] [in a building on the grounds of] the governor's residence) (within [describe building], a [state-owned] [state-leased] building, so designated by the secretary of administration by rules and regulations and with conspicuously placed signs that clearly stated that firearms were prohibited within the building) (within the courthouse of _____ County, Kansas); and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4218. Possession of a firearm on the grounds of or in state buildings or county courthouses is a class B nonperson select misdemeanor.

Subsection (a) of K.S.A. 21-4218 provides that possession of a firearm on the grounds of or in such state buildings does not apply to certain law enforcement officers, or to any person summoned by any such officer to assist in making arrests or preserving the peace while actually engaged in assisting such officer, or to members of military of this state or the United States, when such officers are performing and carrying out official duties. Subsection (a) further provides that the firearms are prohibited in county courthouses, unless by resolution, the

PATTERN INSTRUCTIONS FOR KANSAS 3d

county commissioners authorize the possession of a firearm in the courthouse.

Subsection (b) of K.S.A. 21-4218 provides that it is not a violation of the statute for the governor, the governor's immediate family, or specifically authorized guests of the governor to possess a firearm on the grounds of or in any building on the grounds of the governor's residence.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07-B CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE

The defendant is charged with criminal possession of a firearm by a juvenile. The defendant pleads not guilty.

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

1. That the defendant knowingly possessed a firearm with a barrel less than 12 inches long;
2. That at the time of the act the defendant was less than 18 years of age; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4204a. Criminal possession of a firearm by a juvenile is a class A, nonperson misdemeanor.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.07-C CRIMINAL POSSESSION OF A FIREARM BY A JUVENILE - AFFIRMATIVE DEFENSES

It is a defense to the charge of criminal possession of a firearm by a juvenile that at the time of the commission of the act the defendant was _____.

Notes on Use

For authority, including the specific affirmative defenses, see K.S.A. 21-4204a. Insert in the blank space the applicable defense as specified by statute. If this instruction is given, PIK 3d 52.08, Affirmative Defenses-Burden of Proof, should be given.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

The defendant is charged with the crime of defacing identification marks of a firearm. The defendant pleads not guilty.

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

- 1. That the defendant intentionally (changed) (altered) (removed) (obliterated) the (name of the maker) (model) (manufacturer's number) (mark of identification) of a firearm; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4205. Defacing identification marks of a firearm is a class B nonperson misdemeanor.

Comment

It should be noted that under K.S.A. 21-4205(b) possession of any firearm upon which an identification mark shall have been intentionally altered is *prima facie* evidence that the possessor altered the same. This section does not create a presumption but only a rule to be applied in determining the sufficiency of the evidence; hence, an instruction covering this is not required.

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES

The defendant is charged with the crime of failure to register sale of explosives. The defendant pleads not guilty.

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

- 1. That the defendant was the seller of an explosive or detonating substance;**
- 2. That the defendant failed to register the sale or disposition of such explosive; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

The register of sales must contain the dates of the sale or other disposition; the name, address, age, and occupation of the person to whom the explosive is sold or delivered; the kind and amount of explosive delivered; the place at which it is to be used; and for what purpose it is to be used.

Notes on Use

For authority, see K.S.A. 21-4207. Failure to register sale of explosives is a class B, nonperson misdemeanor.

See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.10 FAILURE TO REGISTER RECEIPT OF EXPLOSIVES

The defendant is charged with the crime of failure to register receipt of explosives. The defendant pleads not guilty.

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

1. That a quantity of explosives or detonating substance was delivered to the defendant;
2. That the defendant failed to sign (his)(her) name in the register of sales of explosives on the page where the record of such delivery is entered; and
3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4208. Failure to register receipt of explosives is a class C misdemeanor.

For form of register of sales, see K.S.A. 21-4207 and PIK 3d 64.09, Failure to Register Sale of Explosives. See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.10-A EXPLOSIVE - DEFINITION

The term "explosive" is defined as any chemical compound, mixture, or device, of which the primary purpose is to function by explosion, and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

Notes on Use

For authority, see K.S.A. 21-4209b.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

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

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

1. That the defendant knowingly ([sold] [gave] [transferred]) ([an explosive substance] [a detonating substance]) to _____;
2. That _____ was a person under 21 years of age; and

or

That the defendant knew _____ was (a person who was both addicted to and an unlawful user of a controlled substance, _____) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been released from imprisonment for a felony); and

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

Notes on Use

For authority, see K.S.A. 21-4209. Criminal disposal of explosives is a severity level 10, person felony. The applicable bracketed reference in each parentheses mentioned in element nos. 1 and 2 should be selected. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor. See K.S.A. 21-3202.

See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

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

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.11-A CRIMINAL POSSESSION OF EXPLOSIVES

The defendant is charged with criminal possession of explosives. The defendant pleads not guilty.

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

- 1. That the defendant knowingly had possession of any explosive or detonating substance;**
- 2. That the defendant within five years preceding such possession had been (convicted of _____, a felony) (released from imprisonment for _____, a felony); and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4209a. Criminal possession of explosives is a severity level 7, person felony.

See also, PIK 3d 59.38, Criminal Use of Explosives.

Comment

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

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

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

**64.11-B CRIMINAL POSSESSION OF EXPLOSIVES -
DEFENSE**

K.S.A. 21-4209a(b) was amended by L. 1992, ch. 298, § 72 by repealing the defense of possession of explosives in the course of a person's lawful employment.

64.12 CARRYING CONCEALED EXPLOSIVES

The defendant is charged with the crime of carrying concealed explosives. The defendant pleads not guilty.

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

- 1. That the defendant knowingly carried (an explosive substance) (a detonating substance) on (his)(her) person in a wholly or partly concealed manner; and**
- 2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4210. Carrying concealed explosives is a class C misdemeanor.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.13 REFUSAL TO YIELD A TELEPHONE PARTY LINE

The defendant is charged with the crime of refusal to yield a telephone party line. The defendant pleads not guilty.

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

1. That the defendant willfully refused to surrender immediately the use of a party line when informed that the line was needed for (an emergency call to a [fire department] [police department]) (medical aid or ambulance); and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Party line means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

Emergency means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential.

Notes on Use

For authority, see K.S.A. 21-4211. Refusal to yield a telephone party line is a class C misdemeanor.

Harassment by telephone is covered by PIK 3d 63.14, Harassment by Telephone.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.14 CREATING A HAZARD

The defendant is charged with the crime of creating a hazard. The defendant pleads not guilty.

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

1. That the defendant (stored) (abandoned) in a place accessible to children a container having a compartment of more than 1½ cubic feet capacity and a (door) (lid) which (locks) (fastens) automatically when closed and which cannot be easily opened from the inside, and did fail to remove the (door) (lock) (lid) (fastening device) on such container; and

or

That the defendant (was the owner) (had possession) of property upon which a (cistern) (well) (cesspool) was located, and knowingly failed to cover the same with protective covering of sufficient strength and quality to exclude human beings and domestic animals therefrom; and

or

That the defendant ([exposed] [abandoned] [left]) ([an explosive substance] [a dangerous substance]) in a place accessible to children; and

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

Notes on Use

For authority, see K.S.A. 21-4212. Creating a hazard is a class B nonperson misdemeanor.

The appropriate alternative situation should be used. For a similar offense, see maintaining a public nuisance covered by K.S.A. 21-4106 and PIK 3d 63.06, Maintaining a Public Nuisance.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

64.15 UNLAWFUL FAILURE TO REPORT A WOUND

The defendant is charged with the crime of unlawful failure to report a wound. The defendant pleads not guilty.

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

1. That the defendant treated _____ for a (bullet wound) (gunshot wound) (powder burn) caused by the discharge of a firearm;
or
That the defendant treated _____ for a wound likely to result in death and apparently inflicted by a (knife) (ice pick) (sharp or pointed instrument);
2. That the defendant failed to report the treatment of the wound to the office of the chief of police of _____ or to the office of the sheriff of _____ County, Kansas; and
3. That this act or omission occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-4213. Unlawful failure to report a wound is a class C misdemeanor. The appropriate alternative situation should be used.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.16 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means. The defendant pleads not guilty.

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

1. That the defendant intentionally made, altered or signed a prescription order and the defendant was not a practitioner or mid-level practitioner at the time of the commission of the act;

or

That the defendant delivered a prescription order, knowing it to have been made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant possessed a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant possessed a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner or mid-level practitioner;

or

That the defendant provided false information to a practitioner or mid-level practitioner for the purpose of obtaining a prescription-only drug; and

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

As used in this instruction, practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

As used in this instruction, mid-level practitioner means an advanced registered nurse practitioner issued a certificate of qualification who has authority to prescribe drugs pursuant to a written protocol with a responsible physician or a registered physician's assistant who also has authority to prescribe drugs pursuant to a written protocol with a responsible physician.

As used in this instruction, prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."

As used in this instruction, prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order. A pharmacist means any natural person registered to practice pharmacy.

Notes on Use

For authority, see K.S.A. 21-4214. Obtaining a prescription-only drug by fraudulent means is a class A, nonperson misdemeanor for the first offense and a severity level 9, nonperson felony for a second or subsequent offense.

A mid-level practitioner is defined in K.S.A. 65-1626 as amended by 1999 House Bill 2168. The authority for a mid-level practitioner to prescribe prescription-only drugs is found in K.S.A. 65-1130, 65-2896a, and 65-2896e. The certification requirement for a mid-level practitioner is found in K.S.A. 65-1131.

K.S.A. 21-4214 specifically provides that if a prosecution for unlawfully obtaining prescription-only drugs may be brought under the provisions of K.S.A.

PATTERN INSTRUCTIONS FOR KANSAS 3d

65-4127a, 65-4127b, or 65-4160 through 65-4164 prosecutions may not be brought under this section.

Note that while K.S.A. 21-4214 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicate that they were repealed in 1993. However, the Revisor's notes under the repealed statutes indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164 which are also referred to in K.S.A. 21-4203.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.17 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG FOR RESALE

The defendant is charged with the crime of obtaining a prescription-only drug by fraudulent means for resale. The defendant pleads not guilty.

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

1. That the defendant intentionally obtained a prescription-only drug by (making) (altering) (signing) a prescription order at a time when defendant was not a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by delivering a prescription order, knowing it to have been (made) (altered) (signed) by a person other than a practitioner;

or

That the defendant intentionally obtained a prescription-only drug by providing false information to a practitioner;

2. That the defendant (intentionally sold the prescription-only drug so obtained) (intentionally offered for sale the prescription-only drug so obtained) (intentionally possessed with intent to sell the prescription-only drug so obtained); and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Pharmacist means any natural person registered to practice pharmacy.

Practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Prescription-only drug means any drug required by the federal or state food, drug and cosmetic act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription."

Prescription order means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. Prescription order does not mean a drug dispensed pursuant to such an order.

Notes on Use

For authority, see K.S.A. 21-4215. Obtaining a prescription-only drug by fraudulent means for resale is a severity level 6, nonperson felony. The appropriate alternative situation should be used.

The provisions of this section are not applicable to prosecutions involving prescription-only drugs which could be brought under the Uniform Controlled Substances Act and to which the provisions of K.S.A. 65-4127a, 65-4127b, or 65-4160 through 65-4164 and amendments thereto, would be applicable. See PIK 3d 67.13-67.16.

Note that while K.S.A. 21-4215 refers to K.S.A. 65-4127a and 65-4127b, the history of the referenced statutes indicate that they were repealed in 1993. However, the Revisor's notes under the repealed statutes indicate that the provisions of K.S.A. 65-4127a are contained in K.S.A. 65-4160 and 65-4161 and the provisions of K.S.A. 65-4127b are contained in K.S.A. 65-4162, 65-4163 and 65-4164, which are also referred to in K.S.A. 21-4203.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are "all enacted for the protection of human life or safety" and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

64.18 SELLING BEVERAGE CONTAINERS WITH DETACHABLE TABS

The defendant is charged with the crime of selling beverage containers with detachable tabs. The defendant pleads not guilty.

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

1. That the defendant intentionally sold or offered for sale at retail in this State a metal beverage container designed and constructed so that a part of the container was detachable in opening the container; and
2. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

Beverage container means any sealed can containing beer, cereal malt beverages, mineral waters, soda water, and similar soft drinks intended for human consumption.

Notes on Use

For authority, see K.S.A. 21-4216. Selling beverage containers with detachable tabs is a class C misdemeanor.

Comment

The crimes contained in Article 42, Chapter 21, Kansas Criminal Code, are “all enacted for the protection of human life or safety” and may serve as the underlying crime in a charge of involuntary manslaughter. *State v. Owens*, 272 Kan. 682, 689, 35 P.3d 791 (2001). See also, K.S.A. 21-3404(b) and PIK 56.06.

PATTERN INSTRUCTIONS FOR KANSAS 3d

64.19 FAILURE TO REGISTER AS AN OFFENDER

The defendant is charged with the crime of failure to register as an offender. The defendant pleads not guilty.

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

1. That the defendant had been (convicted of _____)(adjudicated as a juvenile offender because of the commission of _____);
2. That the defendant failed to (insert here the appropriate violation as set out in K.S.A. 22-4904 through K.S.A. 22-4907); and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 22-4901 et seq. and amendments thereto. K.S.A. 22-4902 lists the offenses subject to registration pursuant to the Kansas Offender Registration Act. Failure to register is a severity level 10, nonperson felony.

Comment

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

The Kansas Sex Offender Registration Act was renamed the Kansas Offender Registration Act in 1997. At that time the Act was expanded to include registration requirements for those who commit certain violent and other types of offenses.

In *State v. Snelling*, 266 Kan. 986, 975 P.2d 259 (1999), the Court held that the registration and notification provisions of the Kansas Offender Registration Act do not constitute cruel and unusual punishment.

In *State v. Wilkinson*, 269 Kan. 603, 9 P.3d 1 (2000), the Court held that the only procedural due process the defendant was entitled to was the process required to convict of the underlying offense. The registration requirement triggered by the conviction was accordingly found to not violate procedural due process under the United States or Kansas Constitutions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

An order requiring registration for an offense committed prior to the enactment of the Kansas Sex Offender Registration Act did not constitute an ex post facto violation. *State v. Hemby*, 264 Kan. 542, 957 P.2d 428 (1998). In accord, see *State v. Armbrust*, 274 Kan. 1089, 59 P.3d 1000 (2002), where the Court recognized that the conduct punished by the application of the Kansas Offender Registration Act was not the violent offense which triggered the registration requirements, but the failure to properly register under the Act.

The conviction that creates the registration requirement is an element of the offense of Failure to Register As An Offender and cannot be counted in determining the criminal history score. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

PATTERN INSTRUCTIONS FOR KANSAS 3d

(THIS PAGE BLANK)

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.01 - 67.12

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS - POSSESSION

The defendant is charged with the crime of unlawfully (possessing) (controlling) insert name of narcotic drug or stimulant. The defendant pleads not guilty.

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

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

Notes on Use

For authority, see K.S.A. 65-4160. The statute specifically relates to "any opiates, opium, or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto." Such stimulants include amphetamine, methamphetamine and their immediate precursors. There will be occasions when a court should include the definition of the specific drug(s) involved, either in the same or additional instructions.

A conviction under K.S.A. 65-4160 is a drug severity level 4 felony. The penalty enhancement feature of this statute was deleted effective November 1, 2003.

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

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

Comment

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.13-A CONTROLLED SUBSTANCES - SALE DEFINED

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. Sale under the Act means selling for money, and also includes barter, exchange, or gift, or an offer to do any of these things. It is not necessary that the prohibited substance be the property of the defendant or in his or her physical possession.

Notes on Use

For authority, see *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Maxwell*, 10 Kan. App. 2d 62, 691 P.2d 1316 (1984); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974). In *State v. Evans*, 219 Kan. 515, 548 P.2d 772 (1976), the court disapproved of the use of the definition of "sale" normally given it in the context of commercial law.

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.13-B NARCOTIC DRUGS AND CERTAIN STIMULANTS - SALE, ETC.

The defendant is charged with the crime of unlawfully (selling) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) insert name of narcotic drug or stimulant. The defendant pleads not guilty.

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

1. That the defendant (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) insert name of narcotic drug or stimulant;
 2. That the defendant did so intentionally;
 3. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;
 4. That the defendant was 18 years of age or over;] and
- [3.] or [5.] That this act occurred on or about the ___ day of _____, _____, in _____ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any grades 1 through 12.]

Notes on Use

For authority, see 2004 Supp. K.S.A. 65-4161. Effective May 20, 2004, "compounding" is no longer a prohibited act under this statute.

The statute specifically relates to "any opiates, opium, or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3), or (f)(1) of K.S.A. 65-4107 and amendments thereto." Such stimulants are amphetamine, methamphetamine and their immediate precursors. There will be occasions when a court should include the definition of the specific drug(s) or stimulant(s) involved, either in the same or in additional instructions.

A first conviction under K.S.A. 65-4161 is a drug severity level 3 felony, conviction for a second offense is a drug severity level 2 felony, and conviction for a third or subsequent offense is a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Upon conviction of a first offense, the defendant is guilty of a drug severity level 2 felony if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

K.S.A. 65-4101 defines the terms "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), and "person" in paragraph (s).

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. See PIK 3d 67.13-A.

Comment

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

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

K.S.A. 65-4161 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *pet. rev. den.* 257 Kan. 1095 (1995); *State v. Penny*, 22 Kan. App. 2d 212, 914 P.2d 962 (1996).

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

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

The Kansas schoolyard statute, K.S.A. 65-4161(d), does not apply to a suspect who by happenstance passes through a protected school zone in a vehicle and is subsequently apprehended outside the school zone. *State v. Barnes*, 275 Kan. 364, 64 P.3d 405 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**67.13-C NARCOTIC DRUGS AND CERTAIN STIMULANTS -
POSSESSION OR OFFER TO SELL WITH INTENT TO
SELL**

The defendant is charged with the crime of unlawfully (possessing) (offering to sell) [insert name of narcotic drug or stimulant] with intent to (sell) (deliver) (distribute). The defendant pleads not guilty.

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

1. That the defendant (possessed) (offered to sell) [insert name of narcotic drug or stimulant];
2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;
- [3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
4. That the defendant was 18 years of age or over;] and [3.] or [5.] That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 65-4161. The statute specifically relates to "any opiates, opium, or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3), or (f)(1) of K.S.A. 65-4107 and amendments thereto." Such stimulants are amphetamine, methamphetamine and their immediate precursors. There will be occasions when a court should include the definition of the specific drug(s) or stimulant(s) involved, either in the same or in additional instructions.

A first conviction under K.S.A. 65-4161 is a drug severity level 3 felony, conviction for a second offense is a drug severity level 2 felony, and conviction for a third or subsequent offense is a drug severity level 1 felony. Prior convictions for substantially similar offenses from other jurisdictions may be used to increase an offender's punishment.

PATTERN INSTRUCTIONS FOR KANSAS 3d

Upon conviction of a first offense, the defendant is guilty of a drug severity level 2 felony if the defendant was 18 years of age or over and the substances involved were possessed with intent to sell, deliver or distribute or offered for sale in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

K.S.A. 65-4101 defines the terms "deliver" or "delivery" in paragraph (g) and "distribute" in paragraph (j).

A sale under the Uniform Controlled Substances Act has a broader meaning than "sale" usually has. See PIK 3d 67.13-A.

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

Comment

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App. 2d 364, 657 P.2d 1136 (1983).

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

K.S.A. 65-4161 qualifies the acts specified as unlawful with the premise, "Except as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which narcotic drugs, as well as other controlled substances (which term is defined in K.S.A. 65-4101(e)), may be manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

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

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *rev. den.* 257 Kan. 1095 (1995); *State v. Penny*, 22 Kan. App. 2d 212, 914 P.2d 962 (1996).

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

The Kansas schoolyard statute, K.S.A. 65-4161(d), does not apply to a suspect who by happenstance passes through a protected school zone in a vehicle and is subsequently apprehended outside the school zone. *State v. Barnes*, 275 Kan. 364, 64 P.3d 405 (2003).

PATTERN INSTRUCTIONS FOR KANSAS 3d

**67.13-D POSSESSION OF A CONTROLLED SUBSTANCE
DEFINED**

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

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

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

1. defendant's previous participation in the sale of a controlled substance;
2. defendant's use of controlled substances;
3. defendant's proximity to the area where the controlled substance was found;
4. the fact that the controlled substance was found in plain view;
5. incriminating statements of the defendant;
6. suspicious behavior of the defendant; and

PATTERN INSTRUCTIONS FOR KANSAS 3d

hallucinogenic drugs. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

Generally, a violation of K.S.A. 65-4163 is a drug severity level 3 felony. Pursuant to K.S.A. 65-4163(b), if the defendant was 18 years of age or over and the substances involved were possessed or offered for sale with intent to sell within 1,000 feet of school property upon which was located a school structure, the violation is a drug severity level 2 felony. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

The Committee notes that possession with intent to deliver or distribute is not included in the more serious offense of K.S.A. 65-4163(b).

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

Comment

Possession of a drug prohibited by K.S.A. 65-4163 is a lesser included offense of possession with intent to sell and when the evidence warrants it, PIK 3d 67.16 should be given. The accused cannot be convicted of both possession and possession with intent to sell when the sale is of the possessed, controlled substance. K.S.A. 21-3107; *State v. Hagan*, 3 Kan. App. 2d 558, 598 P.2d 550 (1979). Possession with intent to sell would appear to be a lesser included offense of possession with intent to sell within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

The Committee notes that the only substance incorporated under K.S.A. 65-4163 that is defined in the "definitions" section of the Uniform Act is "marijuana." See K.S.A. 65-4101(o), where marijuana is defined in terms of the plant *cannabis*.

K.S.A. 65-4163 qualifies the acts specified as unlawful with the premise, "[e]xcept as authorized by the uniform controlled substances act." The Uniform Controlled Substances Act contains a number of provisions under which controlled substances (defined in K.S.A. 65-4101(e)) may be lawfully manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

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

A definition of "intent to sell" is not necessary, as the phrase "was not used in any technical sense nor in any way different from its ordinary use in common parlance." *State v. Guillen*, 218 Kan. 272, Syl. ¶ 1, 543 P.2d 934 (1975).

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App.

PATTERN INSTRUCTIONS FOR KANSAS 3d

2d 364, 657 P.2d 1136 (1983). Possession with intent to sell requires proof of possession and an intent to sell. *State v. Heiskell*, 21 Kan. App. 2d 105, 896 P.2d 1106 (1995) (citing PIK 67.14).

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

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *rev. den.* 257 Kan. 1095 (1995).

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.15 STIMULANTS, DEPRESSANTS, AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - SALE, ETC.

The defendant is charged with the crime of unlawfully (selling) (cultivating) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid]. The defendant pleads not guilty.

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

1. That the defendant (sold) (cultivated) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];
 2. That the defendant did so intentionally;
 3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;
 4. That the defendant was 18 years of age or over;] and
- [3.] or [5.] That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.

[School means a structure used by a unified school district or an accredited nonpublic school for student instruction, attendance or extracurricular activities of pupils enrolled in kindergarten or any of grades 1 through 12.]

Notes on Use

For authority, see K.S.A. 2004 Supp. 65-4163. Effective May 20, 2004, "compounding" is no longer a prohibited act under this statute.

K.S.A. 65-4163 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are involved. For example, it refers to K.S.A. 65-4105(d), 65-4107(g) and 65-4109(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana, mescaline, and peyote, among many others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not

PATTERN INSTRUCTIONS FOR KANSAS 3d

fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

Generally, a violation of K.S.A. 65-4163 is a drug severity level 3 felony. If the defendant was 18 or more years of age and the substances involved were sold within 1,000 feet of school property upon which was located a school structure, the violation is a drug severity level 2 felony. K.S.A. 65-4163(b). If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

See Notes on Use to PIK 3d 67.13-B, Narcotic Drugs and Certain Stimulants- Sale, Etc.

K.S.A. 65-4101 defines the term "administer" in paragraph (a), "deliver" or "delivery" in paragraph (g), "dispense" in paragraph (h), "distribute" in paragraph (j), "person" in paragraph (s) and "cultivate" in paragraph (aa). When appropriate, definitions should be given.

Comment

See Comment to PIK 3d 67.14, Stimulants, Depressants and Hallucinogenic Drugs or Anabolic Steroids - Possession or Offer to Sell with Intent to Sell.

Delivery is not a lesser included offense of sale. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976).

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

Sale is a lesser included offense of sale within 1,000 feet of a school. *State v. Josenberger*, 17 Kan. App. 2d 167, 836 P.2d 11 (1992).

A defendant's knowledge of the proximity of a school is not an essential element of the crime of selling cocaine within 1,000 feet of a school. *State v. Swafford*, 20 Kan. App. 2d 563, 890 P.2d 368, *rev. den.* 257 Kan. 1095 (1995).

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

67.21 UNLAWFULLY MANUFACTURING A CONTROLLED SUBSTANCE (AFTER JULY 1, 1999)

The defendant is charged with the crime of unlawfully manufacturing a controlled substance. The defendant pleads not guilty.

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

- 1. That the defendant manufactured a controlled substance known as include here a controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113;**
- 2. That the defendant did so intentionally; and**
- 3. That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4159. This instruction is for use where conduct occurred on or after July 1, 1999. Where conduct occurred prior to July 1, 1999, use PIK 3d 67.21-A.

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

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 65-4101(e).

For purposes of clarity, the Court should refer to the substance involved in the case as a "controlled substance" and insert the name of the specific drug in the appropriate blank.

There will be cases when a court should include the definitions, either in the same or similar instructions.

A violation of K.S.A. 65-4159(b) is a drug severity level 1 felony. The general misdemeanor penalty provision of K.S.A. 65-4127c has no application to a violation of K.S.A. 65-4159. *State v. Layton*, 276 Kan. 777, 80 P.3d 65 (2003).

However, since the manufacturing of methamphetamine under K.S.A. 65-4159(a) and the compounding of methamphetamine under K.S.A. 65-4161(a) were identical offenses prior to May 20, 2004, a defendant charged and convicted of manufacturing methamphetamine under K.S.A. 65-4159(a) could only be sentenced with the lesser penalties prescribed by K.S.A. 65-4161. *State v. McAdam*, 277 Kan. 136, 145, 83 P.3d 578 (2004). As of May 20, 2004, compounding was deleted from K.S.A. 65-4161(a).

PATTERN INSTRUCTIONS FOR KANSAS 3d

In addition, a new statute, K.S.A. 65-4159a, reiterates that violations of K.S.A. 65-4159 occurring prior to May 20, 2004 shall be sentenced as drug severity level 1 crimes and not sentenced under the lesser penalties of K.S.A. 65-4161 or K.S.A. 65-4163.

In the case of *State v. Barnes*, 278 Kan. 121, 128-130, 92 P.3d 578 (2004), the Kansas Supreme Court concluded that new K.S.A. 65-4159a was ineffective, based upon the Ex Post Facto Clause of the United States Constitution.

Comment

The use of the term “manufacture” in K.S.A. 1998 Supp. 65-4101(n) is distinguished from the use of same term in K.S.A. 1998 Supp. 65-4159 in *State v. Bowen*, 27 Kan. App. 2d 122, 999 P.2d 286 (2000). However, in *State v. Gunn*, 29 Kan. App. 2d 337, 26 P.3d 710 (2001), the Court addressed the issue of manufacturing for “own use” as a possible exception under K.S.A. 65-4101(n), rather than distinguishing it as the *Bowen* court did, and held that the defendant failed to present sufficient evidence to bring her within the exception.

The crime of possessing ephedrine with the intent to manufacture a controlled substance and the crime of manufacturing a controlled substance are not multiplicitous. Nor is possession of ephedrine a lesser included crime of manufacturing methamphetamine. *State v. Campbell*, 31 Kan. App. 2d 1123, 1132, 78 P.3d 1178 (2003).

In *State v. Martens*, 274 Kan. 459, 54 P.3d 960 (2002), the Kansas Supreme Court modified *State v. Martens*, 273 Kan. 179, 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).

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.10 LESSER INCLUDED OFFENSES - VERDICT FORMS

We, the jury, find the defendant guilty of (principal offense charged).

Presiding Juror

We, the jury, find the defendant guilty of (lesser included offense).

Presiding Juror

We, the jury, find the defendant not guilty.

Presiding Juror

Notes on Use

A verdict form should be completed for each criminal offense charged. A verdict form should also include any lesser included offenses under the crime charged and a verdict of not guilty.

Comment

The submission of a verdict form of guilty and not guilty for the main charge and each lesser included offense is misleading to the jury and error. *State v. Schaefer*, 190 Kan. 479, 375 P.2d 638 (1962).

The trial court's use of only one all-inclusive verdict form with guilty or not guilty alternatives listed for the charged crime and each lesser included offense is criticized in *State v. Franklin*, 264 Kan. 496, 505, 958 P.2d 611 (1998). The Supreme Court stated that PIK 68.10 should be followed where lesser included offense instructions are present.

PATTERN INSTRUCTIONS FOR KANSAS 3d

68.11 VERDICT FORM - VALUE IN ISSUE

We, the jury, find the defendant guilty of _____ and find the (value of) (damage to) (amount of) the [(property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s])] [(which the defendant [obtained] [damaged] [impaired] [gave])] [(over which the defendant [obtained] [exerted] unauthorized control)] to be:

_____ dollars (\$ _____) or more

At least _____ dollars (\$ _____),
but less than _____ dollars (\$ _____)

Less than _____ dollars (\$ _____)

(Place an X in the appropriate square.)

Presiding Juror

Notes on Use

Complete the form by selecting the applicable bracketed and parenthetical expression and specify in the blanks the particular crime charged and the amounts involved. PIK 3d 68.03, Not Guilty Verdict - General Form, must be used with this form.

See Comment to and Notes on Use to PIK 3d 59.70, Value in Issue.

Comment

In *State v. Alexander*, 12 Kan. App. 2d 1, 732 P.2d 814 (1987), the Court held that the trial court erred by allowing the jury to consider sales tax in its determination of the value of the merchandise stolen from a retail store.

The value to be used in determining whether theft is a felony or misdemeanor is the fair market value of the property taken. *State v. Robinson*, 4 Kan. App. 2d 428, 608 P.2d 1014 (1980).

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 2.

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

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

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

(PIK 3d 56.01)

Instruction No. 3.

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

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

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

Your Presiding Juror should then 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:

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(PIK 3d 56.03)

Instruction No. 5.

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

If you decide the defendant intentionally killed John Green, but that it was done in the heat of passion, the defendant may be convicted of voluntary manslaughter only. (PIK 3d 56.05)

Instruction No. 6.

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

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

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

(PIK 3d 56.06)

Instruction No. 7.

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

Premeditation means to have thought 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

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

(PIK 3d 56.04)

Instruction No. 8.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless 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 each of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

Instruction No. 9.

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

VERDICT FORMS

We, the jury, find the defendant guilty of first degree murder.

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 3d 68.10)

69.02 THEFT WITH TWO PARTICIPANTS

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 5, 2004, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store, Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later, John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

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

PIK 3d 51.05, Rulings of the Court.

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Instruction 2.** **PIK 3d 59.01, Theft.**
- Instruction 3.** **PIK 3d 59.70, Value in Issue.**
- Instruction 4.** **PIK 3d 54.05, Responsibility for Crimes
of Another.**
- Instruction 5.** **PIK 3d 52.02, Burden of Proof,
Presumption of Innocence, Reasonable
Doubt.**
- Instruction 6.** **PIK 3d 54.01, Inference of Intent.**
- Instruction 7.** **PIK 3d 68.01, Concluding Instruction.**
- Verdict Forms.** **PIK 3d 68.11, Verdict of Guilty and
Finding of Value of Property.**
- PIK 3d 68.03, Not Guilty Verdict.**

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(PIK 3d 51.06)

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

(PIK 3d 52.09)

Instruction No. 2.

The defendant is charged with the crime of theft of property of the value of at least \$1,000 but less than \$25,000. The defendant pleads not guilty.

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

- 1. That Acme Department Store was the owner of the property;**
- 2. That the defendant exerted unauthorized control over the property;**
- 3. That the defendant intended to deprive Acme Department Store permanently of the use or benefit of the property;**
- 4. That the value of the property was at least \$1,000 but less than \$25,000; and**
- 5. That this act occurred on or about the 5th day of July, 2004, in Sedgwick County, Kansas.**

(PIK 3d 59.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 3.

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in an amount of at least \$1,000 but less than \$25,000.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 3d 59.70)

Instruction No. 4.

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

(PIK 3d 54.05)

Instruction No. 5.

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless 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 each of the claims made by the State, you should find the defendant guilty.

(PIK 3d 52.02)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 6.

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

(PIK 3d 54.01)

Instruction No. 7.

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

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

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____
(PIK 3d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

One thousand dollars (\$1,000) or more
Less than One thousand dollars (\$1,000)

(Place an X in the appropriate square.)

Presiding Juror

(PIK 3d 68.11)

OR

We, the jury find the defendant not guilty of

Presiding Juror

(PIK 3d 68.03)

PATTERN INSTRUCTIONS FOR KANSAS 3d

69.03 POSSESSION OF MARIJUANA WITH INTENT TO SELL - ENTRAPMENT AS AN AFFIRMATIVE DEFENSE

Summary of the Facts and Issues

On July 3, 1996, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted on October 4, 1996. A price was negotiated and a meeting was set up for October 5, 1996, to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

An Outline of Suggested Instructions in Sequence Follows:

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

PIK 3d 51.05, Rulings of the Court.

PATTERN INSTRUCTIONS FOR KANSAS 3d

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

Instruction 2. PIK 3d 67.14, Stimulants, Depressants and Hallucinogenic Drugs Or Anabolic Steroids - Possession With Intent to Sell.

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

Instruction 4. PIK 3d 54.14, Entrapment.

Instruction 5. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Instruction 6. PIK 3d 54.01, Inference of Intent.

Instruction 7. PIK 3d 68.01, Concluding Instruction.

**Verdict Forms. PIK 3d 68.02, Guilty Verdict - General Form.
PIK 3d 68.03, Not Guilty Verdict - General Form.**

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

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

(PIK 3d 51.02)

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(PIK 3d 51.05)

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

(PIK 3d 51.06)

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

(PIK 3d 52.09)

Instruction 2.

The defendant is charged with the crime of unlawfully possessing marijuana with intent to sell it. The defendant pleads not guilty.

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

1. That the defendant possessed marijuana;
2. That the defendant did so with the intent to sell it;
3. That this act occurred on or about the 5th day of October, 1996, in Sedgwick County, Kansas.

(PIK 3d 67.14)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction 3.

The defendant claims as a defense that he was entrapped. Evidence in support of this claim should be considered by you in determining whether the State has met its burden of proving 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 unless you are convinced

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 each 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

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

We, the jury, find the defendant guilty of possession of marijuana with intent to sell.

Presiding Juror

(PIK 3d 68.02)

OR

We, the jury, find the defendant not guilty of possession of marijuana with intent to sell.

Presiding Juror

_____, _____
(PIK 3d 68.03)

69.04 CAPITAL MURDER--GUILT AND PENALTY PHASES

NOTICE

On December 17, 2004, the Kansas Supreme Court ruled 4-3 that K.S.A. 21-4624(e), the weighing equation in the Kansas death penalty statute, is unconstitutional because of its provision that the death penalty is to be imposed when juries weigh aggravating and mitigating factors and find them equal. *State v. Marsh*, No. 81,135, opinion filed December 17, 2004.

Summary of the Facts and Issues

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

Brown testified that Jones, who was much larger than Brown, had attacked him and begun beating him for no apparent reason. Brown stated that he had suffered severe and systematic abuse at the hands of Jones, and that he

PATTERN INSTRUCTIONS FOR KANSAS 3d

armed himself with the sharpened spoon out of fear of further abuse by Jones. Brown stated that he killed Jones in self-defense. Psychologist Tracy Smith testified that Brown was suffering from post-traumatic stress disorder at the time of the killing. A doctor who examined Brown after the incident testified that Brown had cuts, bruises, and scars consistent with having been beaten.

Suggested Instruction to be Given Before Voir Dire:

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

Outline of Suggested Instructions in Sequence - Guilt Phase:

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

PIK 3d 51.05, Rulings of the Court.

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

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

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

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

Instruction 5. PIK 3d 56.05, Voluntary Manslaughter.

Instruction 6. PIK 3d 56.06, Involuntary Manslaughter.

Instruction 7. PIK 3d 56.04, Homicide Definitions.

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

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

Instruction 11. PIK 3d 54.01, Inference of Intent.

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

Instruction 13. PIK 3d 68.01, Concluding Instructions.

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

TEXT OF SUGGESTED INSTRUCTION TO BE GIVEN BEFORE VOIR DIRE

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. Each of you have received questionnaires concerning your respective views regarding capital punishment. I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to

PATTERN INSTRUCTIONS FOR KANSAS 3d

death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time concerning the sentence that will be imposed if a sentence of death is not imposed. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty.
(PIK 3d 56.00)

TEXT OF SUGGESTED INSTRUCTIONS - GUILT PHASE

Instruction No. 1.

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(PIK 3d 52.09)

Instruction No. 2.

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

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

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

(PIK 3d 56.00-A)

Instruction No. 3.

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

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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 in the heat of passion 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;**

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

(PIK 3d 56.06)

Instruction No. 7.

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

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

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

(PIK 3d 56.04)

Instruction No. 8.

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

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

(PIK 3d 54.17)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 9.

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

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

(PIK 3d 52.02)

Instruction No. 10.

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

(PIK 3d 52.08)

Instruction No. 11.

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

(PIK 3d 54.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 12.

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict. (PIK 3d 51.10-A)

Instruction No. 13.

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

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

Your agreement upon a verdict must be unanimous.

District Judge

_____, _____
(PIK 3d 68.01)

PATTERN INSTRUCTIONS FOR KANSAS 3d

VERDICT FORMS

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

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

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

Presiding Juror

OR

We, the jury, find the defendant not guilty.

Presiding Juror

(PIK 3d 68.10)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Outline of Suggested Instructions in Sequence - Penalty Phase:

- Instruction 1. PIK 3d 56.00-B, Capital Murder-Death Sentence-Sentencing Proceeding.**
- Instruction 2. PIK 3d 51.04, Consideration of Evidence, Revised.**
- Instruction 3. PIK 3d 51.05, Rulings of the Court.**
- Instruction 4. PIK 3d 51.06, Statements and Arguments of Counsel.**
- Instruction 5. PIK 3d 52.09, Credibility of Witnesses.**
- Instruction 6. PIK 3d 56.00-C, Capital Murder-Aggravating Circumstances.**
- Instruction 7. PIK 3d 56.00-D, Capital Murder-Mitigating Circumstances.**
- Instruction 8. PIK 3d 56.00-E, Capital Murder-Burden of Proof.**
- Instruction 9. PIK 3d 56.00-F, Capital Murder-Aggravating and Mitigating Circumstances-Theory of Comparison.**
- Instruction 10. PIK 3d 56.00-G, Capital Murder-Reasonable Doubt.**
- Instruction 11. PIK 3d 56.00-H, Capital Murder-Sentencing Recommendation.**
- Instruction 12. PIK 3d 68.01-A, Concluding Instruction-Capital Murder-Sentencing Proceeding.**

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

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

TEXT OF SUGGESTED INSTRUCTIONS - PENALTY PHASE

Instruction No. 1.

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

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

(PIK 3d 56.00-B)

Instruction No. 2.

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

(PIK 3d 51.04, Revised)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 3

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

(PIK 3d 51.05)

Instruction No. 4

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

(PIK 3d 51.06)

Instruction No. 5

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

(PIK 3d 52.09)

Instruction No. 6

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

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

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

PATTERN INSTRUCTIONS FOR KANSAS 3d

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

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

Instruction No. 7

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

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

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

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

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

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

(PIK 3d 56.00-D)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 8

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

(PIK 3d 56.00-E)

Instruction No. 9

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

(PIK 3d 56.00-F)

Instruction No. 10

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

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

(PIK 3d 56.00-G)

PATTERN INSTRUCTIONS FOR KANSAS 3d

Instruction No. 11

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

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

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

OR

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

(PIK 3d 56.00-H)

Instruction No. 12

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

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

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

District Judge

_____, _____
(PIK 3d 68.01-A)

VERDICT FORMS

SENTENCING VERDICT

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

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

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

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

Presiding Juror

_____, _____
(PIK 3d 68.14-B-1)

OR

SENTENCING VERDICT

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

Presiding Juror

_____, _____
(PIK 3d 68.17)

PIK CRIMINAL INDEX

- ABANDONMENT OF A CHILD,**
 - Aggravated, 58.05-A
 - Elements instruction, 58.05
- ABORTION,**
 - Criminal, 56.10
 - Justification, 56.11
- ABUSE OF A CHILD,**
 - Elements instruction, 58.11
- ACCESSORY, 54.05**
- ACCOMPLICE,**
 - Testimony, 52.18
 - Aiding and abetting, 54.05
- ACTS,**
 - Multiple, 68.09-B
- ADDING DOCKAGE OR FOREIGN MATERIAL TO GRAIN,**
 - Elements Instruction, 59.63-B
- ADJUSTING DEBTS, 66.02**
- ADMINISTRATION OF JUSTICE,**
 - Interference, 60.17
- ADMISSIONS,**
 - Guiding instruction, 52.05
- ADULTERATION OR CONTAMINATION OF FOOD OR DRINK,**
 - Criminal threat, 56.23-A
- ADULTERY,**
 - Elements instruction, 57.09
- AFFIRMATIVE DEFENSES,**
 - Bigamy, 58.01
 - Burden of proof, 52.08
 - Criminal discharge of a firearm, 64.02-B
 - Criminal use of weapons, 64.04
 - Driving while license is canceled, suspended or revoked, 70.10-A
 - Endangering a child, 58.10
 - Indecent liberties with a child, 57.05-B
 - Mistreatment of dependant adult, 56.38
 - Promoting obscenity, 65.05

PATTERN INSTRUCTIONS FOR KANSAS 3d

Promoting obscenity to a minor, 65.05-A
Transporting an Alcoholic Beverage in an Opened
Container, 70.03

AGGRAVATED ABANDONMENT OF A CHILD,

Elements instruction, 58.05-A

AGGRAVATED ARSON,

Elements instruction, 59.22

AGGRAVATED ASSAULT,

Elements instruction, 56.14

AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER

Elements instruction, 56.15

AGGRAVATED BATTERY,

Elements instruction, 56.18

**AGGRAVATED BATTERY AGAINST LAW ENFORCEMENT
OFFICER,**

Elements instruction, 56.19

AGGRAVATED BURGLARY,

Elements instruction, 59.18

AGGRAVATED CRIMINAL SODOMY,

Causing child under 14 to engage, 57.08-A

Child under 14, 57.08

Elements instruction, 57.08, 57.08-A, 57.08-B

No consent, 57.08-B

AGGRAVATED CRIMINAL THREAT,

Elements instruction, 56.23-B

AGGRAVATED ENDANGERING A CHILD,

Elements instruction, 58.10-B

AGGRAVATED ESCAPE FROM CUSTODY,

Elements instruction, 60.11

AGGRAVATED FAILURE TO APPEAR,

Elements instruction, 60.15

AGGRAVATED FALSE IMPERSONATION,

Elements instruction, 60.26

AGGRAVATED INCEST,

Elements instruction, 58.04

AGGRAVATED INDECENT LIBERTIES WITH A CHILD,

Elements instruction, 57.06

AGGRAVATED INDECENT SOLICITATION OF A CHILD,

Elements instruction, 57.13

PATTERN INSTRUCTIONS FOR KANSAS 3d

AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY,

- By hiree, 56.26-B
- By parents hiring another, 56.26-A
- Other circumstances, 56.26-C

AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM,
Elements instruction, 60.06-B

AGGRAVATED JUVENILE DELINQUENCY,
Elements instruction, 58.13

AGGRAVATED KIDNAPPING,
Elements instruction, 56.25

AGGRAVATED ROBBERY,
Elements instruction, 56.31

AGGRAVATED SEXUAL BATTERY,
Child under 16, 57.21
Dwelling, 57.22
Elements instruction, 57.20, 57.21, 57.22, 57.23, 57.24,
57.25
Force or Fear, 57.20
Mental deficiency of victim, 57.24
Victim unconscious or physically powerless, 57.23

AGGRAVATED SODOMY,
Elements instruction, 57.08

AGGRAVATED TAMPERING WITH A TRAFFIC SIGNAL,
Elements instruction, 59.31

AGGRAVATED VEHICULAR HOMICIDE,
Elements instruction, 56.07-A

AGGRAVATED WEAPONS VIOLATION,
Elements instruction, 64.03

AIDING AND ABETTING, 54.05

AIDING A FELON OR PERSON CHARGED AS A FELON,
Elements instruction, 60.13

AIDING A PERSON CONVICTED OR CHARGED WITH A MISDEMEANOR,
Elements instruction, 60.14

AIDING ESCAPE,
Elements instruction, 60.12

AIRCRAFT,
Operating under influence, 70.06, 70.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

AIRCRAFT IDENTIFICATION,

Fraudulent Acts, 60.35

AIRCRAFT PIRACY,

Instruction, 56.35

AIRCRAFT REGISTRATION,

Failure to register, 60.32

Fraudulent, 60.33

ALCOHOLIC BEVERAGES,

Furnishing to a minor for illicit purposes, 58.12-B

Hosting minors consuming, 58.12-E

Transporting in an opened container, 70.03

ALCOHOLIC LIQUOR,

Furnishing to a minor, 58.12

Defense, 58.12-C

ALTERING A LEGISLATIVE DOCUMENT,

Elements instruction, 59.15

ALIBI,

Guiding instruction, 52.19

ALIEN, ILLEGAL,

Knowingly employing, 66.09

ALTERNATIVE CHARGES,

Guiding instruction, 68.09-A

AMMONIA,

Anhydrous or pressurized,

Use or possession with intent to use, 67.17

ANABOLIC STEROIDS,

Offer to sell with intent to sell, 67.14

Possession, 67.16

Possession with intent to sell, 67.14

Selling, offering to sell, cultivating or dispensing, 67.15

ANHYDROUS AMMONIA,

Use or possession with intent to use, 67.17

ANIMALS,

Cruelty, 65.15

Defense, 65.16

Unlawful disposition, 65.17

ANTICIPATORY CRIMES,

Chapter containing, 55.00

APPEARANCE,

Aggravated failure to appear, 60.15

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Failure to appear, 60.15
- ARREST,**
 - Use of Force, 54.23, 54.24
 - Resisting use of force, 54.25
- ARSON,**
 - Aggravated, 59.22
 - Defraud an insurer or lienholder, 59.21, 59.21-A
 - Elements instruction, 59.20, 59.20-A
- ASSAULT,**
 - Aggravated, 56.14
 - Aggravated on law enforcement officer, 56.15
 - Elements instruction, 56.12
- ASSAULT ON LAW ENFORCEMENT OFFICER,**
 - Aggravated, 56.15
 - Elements instruction, 56.13
- ASSEMBLY,**
 - Unlawful, 63.02
- ASSISTING SUICIDE,**
 - Elements instruction, 56.08
- ATTEMPT,**
 - Elements instruction, 55.01
 - Impossibility, no defense, 55.02
- ATTEMPTED POISONING,**
 - Elements instruction, 56.21
- ATTEMPTING TO ELUDE POLICE OFFICER,**
 - Elements instruction, 70.09
- ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER,**
 - Elements instruction, 60.16
- ATTENDING AN UNLAWFUL DOG FIGHT,**
 - Elements instruction, 65.19
- AUTHORIZED INTERCEPTION OF A COMMUNICATION,**
 - Unlawful disclosure, 60.06-C
- AUTOMOBILE MASTER KEY VIOLATION,**
 - Elements instruction, 59.48
- BATTERY,**
 - Aggravated, 56.18
 - Aggravated sexual, 57.20, 57.24, 57.25
 - Aggravated against law enforcement officer, 56.19
 - Domestic, 56.16-A
 - Elements instruction, 56.16

PATTERN INSTRUCTIONS FOR KANSAS 3d

Law enforcement officer, 56.17

School employee, 56.16-B

Sexual, 57.19

Vehicular, 56.07-B

BEVERAGE CONTAINERS WITH DETACHABLE TABS,

Selling, 64.18

BIGAMY,

Affirmative defense, 58.02

Defense, 58.02

Elements instruction, 58.01

BINGO,

Illegal operations, 65.06-A

BLACKMAIL,

Elements instruction, 56.32

BREACH OF PRIVACY - DIVULGING MESSAGE,

Elements instruction, 62.04

BREACH OF PRIVACY - INTERCEPTING MESSAGE,

Elements instruction, 62.03

BRIBERY,

Commercial, 66.05

Elements instruction, 61.01

Sports, 66.06

Receiving, 66.07

BURDEN OF PROOF,

Affirmative defenses, 52.08

Guiding instruction, 52.02

Upward durational departure, 71.02

BURGLARY,

Aggravated, 59.18

Elements instruction, 59.17

Possession of tools, 59.19

BUSINESS,

Crimes against, Chapter 66.00

CABLE TELEVISION SERVICES THEFT,

Elements instruction, 59.57

CAMERAS IN THE COURTROOM,

Instruction, 51.11

PATTERN INSTRUCTIONS FOR KANSAS 3d

CAPITAL MURDER, 56.00-A, et seq.

- Concluding instruction, sentencing proceeding, 68.01-A
- Illustrative Instructions, 69.04
- Penalty not to be considered by jury, 51.10-A
- Pre-voir dire instruction, 56.00
- Verdict Forms, 68.03, 68.14-A-1, 68.14-B-1, 68.17

CARRYING CONCEALED EXPLOSIVES,

- Elements instruction, 64.12

CASTING OBJECT ONTO STREET OR ROAD,

- Elements instruction, 59.52, 59.55

CAUSING AN UNLAWFUL PROSECUTION FOR A WORTHLESS CHECK,

- Elements instruction, 59.10

CAUTIONARY INSTRUCTIONS,

- Application, 51.02
- Chapter containing, 51.00
- Consideration of instructions, 51.02, 51.03
- Court rulings, 51.05
- Penalty, consideration by jury, 51.10, 51.10-A
- Prejudice, 51.07
- Receipt by jury before close of case, 51.09
- Rulings of court, 51.05
- Statements of counsel, 51.06
- Sympathy, 51.07

CEREAL MALT BEVERAGE,

- Furnishing to a minor, 58.12
- Defense, 58.12-C
- Hosting minors consuming, 58.12-E

CHECK, WORTHLESS,

- See worthless check, this index.

CHILD,

- Aggravated abandonment, 58.05-A
- Aggravated endangering, 58.10-B
- Aggravated indecent liberties, 57.06
- Aggravated indecent solicitation of, 57.13
- Abandonment, 58.05
- Abuse, 58.11
- Contributing to misconduct or deprivation, 58.14
- Endangering, 58.10

PATTERN INSTRUCTIONS FOR KANSAS 3d

Aggravated, 58.10-B

Affirmative defense, 58.10-A

Enticement, 57.11

Hearsay evidence, 52.21

Indecent liberties, 57.05, 57.05-A

Affirmative defense, 57.05-B

Indecent solicitation, 57.12

Nonsupport, 58.06

Promoting prostitution, under 16, 57.15-A

Sexual exploitation, 57.12-A

Sodomy, 57.05-A, 57.08

Solicitation,

Aggravated indecent, 57.13

Indecent, 57.12

CHILDREN,

Crimes affecting, Chapter 58.00

CHILD'S HEARSAY EVIDENCE,

Instruction, 52.21

CIRCULATING FALSE RUMORS CONCERNING FINANCIAL STATUS,

Elements instruction, 62.08

CIRCUMSTANTIAL EVIDENCE,

Guiding instruction, 52.16

CITY ORDINANCE,

Violation, 70.05

CIVIL RIGHTS,

Denial, 62.05

CLAIM, FALSE,

Presenting, 61.05

Permitting, 61.06

COIN-OPERATED MACHINES,

Opening, damaging or removing, 59.50

Possession of tools, 59.51

COMMERCIAL BRIBERY,

Elements instruction, 66.05

COMMERCIAL GAMBLING,

Elements instruction, 65.08

COMMERCIAL PRACTICES,

Deceptive, 66.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

- COMMITMENT,**
 - Insanity, 54.10-A
- COMMITTED PERSON, CUSTODY,**
 - Interference, 56.27
- COMMUNICABLE DISEASE,**
 - Unlawfully exposing another, 56.40
- COMMUNICATION,**
 - Unlawful disclosure of authorized interception, 60.06-C
- COMMUNICATION FACILITY,**
 - Unlawful use to facilitate felony drug transaction, 67.22
- COMMUNICATION WITH JURORS,**
 - Post-trial, 68.13
- COMPENSATION FOR PAST OFFICIAL ACTS,**
 - Defense, 61.04
 - Elements instruction, 61.03
- COMPOUNDING A CRIME,**
 - Elements instruction, 60.07
- COMPULSION,**
 - Instruction of principle, 54.13
- COMPUTER CRIME,**
 - Defense, 59.64-A
 - Elements instruction, 59.64
 - Trespass, 59.64-B
- CONCEALED WEAPONS,**
 - Carrying, 64.12
- CONCLUDING INSTRUCTIONS AND VERDICT FORMS,**
 - Chapter containing, 68.00
- CONDONATION,**
 - Instruction on principle, 54.15
- CONDUCT,**
 - Disorderly, 63.01
- CONDUCT BY JUROR,**
 - Corrupt, 60.18
- CONFESSION,**
 - Guiding instruction, 52.17
- CONFINED PERSON,**
 - Mistreatment, 56.29

PATTERN INSTRUCTIONS FOR KANSAS 3d

CONFLICTS OF INTEREST,

- Lottery,
 - Commission member, 65.30
 - Contractor, 65.31
 - Employee, 65.30
 - Retailer, 65.31

CONSPIRACY,

- Act in Furtherance, 55.06
- Declarations of conspirator, 55.07
- Defense, 55.04
- Defined, 55.05
- Elements instruction, 55.03
- Subsequent entry, 55.08

CONSUMER,

- Obtaining information, 62.15
- Unlawfully providing information, 62.14

CONSUMING ALCOHOL OR CEREAL MALT BEVERAGES,

- Unlawfully hosting minor, 58.12-E

CONTRABAND,

- Traffic in correctional institution, 60.27

CONTRIBUTING TO A CHILD'S MISCONDUCT OR DEPRIVATION,

- Elements instruction, 58.14

CONTROLLED STIMULANTS, DEPRESSANTS, HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS,

- Cultivating, 67.15
- Manufacture or dispensation, 67.15
- Possession, 67.14, 67.16
- Selling or offering to sell, 67.15

CONTROLLED SUBSTANCES,

- Analog, 67.26
- Chapter relating to, 67.00
- Medicinals, 67.23
- Possession, 67.23
 - Defined, 67.13-D
- Representation noncontrolled substance is -
 - Presumption, 67.20-A
- Selling, offering to sell, possessing with intent to sell or dispensing to person under 18 years of age, 67.23
- Sale defined, 67.13-A

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Sale, etc., 67.13-B
- Simulated, see simulated controlled substances, this index.
- Substances designated under K.S.A. 65-4113, 67.23
- Unlawfully manufacturing, 67.21
 - Before July 1, 1999, 67.21-A
- CONTROLLED SUBSTANCES ACT**, 67.13, 67.13-A, 67.13-B, 67.14, 67.15, 67.16, 67.23, 67.26
 - Receiving or acquiring proceeds derived from violation, 67.25
- CORPORATIONS**,
 - Criminal responsibility for acts of agents, 54.08
 - Responsibility for crime, 54.08, 54.09
- CORRECTIONAL INSTITUTION**,
 - Traffic in contraband, 60.27
- CORROBORATION**,
 - Rape case, 57.04
- CORRUPT CONDUCT BY JUROR**,
 - Elements instruction, 60.18
- CORRUPTLY INFLUENCING A WITNESS**,
 - Elements instruction, 60.06
- COUNSEL**,
 - Arguments and statements, cautionary instruction, 51.06
- COUNTERFEITING MERCHANDISE OR SERVICES**,
 - Elements instruction, 59.68
 - Value or units in issue, 59.70-A
 - Verdict Form, 68.11-A
- COURT**,
 - Harassment by telefacsimile, 60.31
 - Rulings, cautionary instruction, 51.05
- COURTROOM**,
 - Cameras, 51.11
- CREATING A HAZARD**,
 - Elements instruction, 64.14
- CREDIBILITY**,
 - Of witness, 52.09
 - Rape case, prosecutrix's testimony, 57.03
- CRIME**,
 - Commission in Different Ways, 68.09-A
 - Compounding, 60.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

Falsely reporting, 60.19

CRIME, PROOF OF OTHER,

Evidence, admissibility, 52.06

CRIMES,

Anticipatory, Chapter 55.00

Corporations,

Responsibility, 54.08, 54.09

Defenses, see Defenses, this index.

Other, proof, 52.06

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN,

Chapter containing, 58.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS,

Chapter containing, 60.00

CRIMES AFFECTING PUBLIC TRUST,

Chapter containing, 61.00

CRIMES AFFECTING BUSINESS,

Chapter containing, 66.00

CRIMES AGAINST PERSONS,

Chapter containing, 56.00

CRIMES AGAINST PROPERTY,

Chapter containing, 59.00

CRIMES AGAINST THE PUBLIC MORALS,

Chapter containing, 65.00

CRIMES AGAINST THE PUBLIC PEACE,

Chapter containing, 63.00

CRIMES AGAINST THE PUBLIC SAFETY,

Chapter containing, 64.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS,

Chapter containing, 62.00

CRIMES OF ANOTHER,

Responsibility, 54.05

Actor not prosecuted, 54.07

Crime not intended, 54.06

CRIMINAL ABORTION,

Elements instruction, 56.10

Justification, 56.11

CRIMINAL DAMAGE TO PROPERTY - WITH INTENT TO DEFRAUD AN INSURER OR LIENHOLDER,

Elements instruction, 59.24

PATTERN INSTRUCTIONS FOR KANSAS 3d

- CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT,**
 - Elements instruction, 59.23
- CRIMINAL DEFAMATION,**
 - Elements instruction, 62.06
 - Truth as defense, 62.07
- CRIMINAL DEPRIVATION OF PROPERTY,**
 - Elements instruction, 59.04
- CRIMINAL DESECRATION,**
 - Cemeteries, 63.12
 - Dead Bodies, 63.13
 - Flags, 63.11
 - Monuments, 63.12
 - Places of worship, 63.12
- CRIMINAL DISCHARGE OF FIREARM,**
 - Affirmative defense, 64.02-B
 - Felony, 64.02-A-1
 - Misdemeanor, 64.02-A
- CRIMINAL DISCLOSURE OF A WARRANT,**
 - Elements instruction, 60.28
- CRIMINAL DISPOSAL OF EXPLOSIVES,**
 - Elements instruction, 64.11
- CRIMINAL DISPOSAL OF FIREARMS,**
 - Elements instruction, 64.05
- CRIMINAL HUNTING,**
 - Defense, 59.33-B
 - Elements instruction, 59.33
 - Posted land, 59.33-A
- CRIMINAL INJURY TO PERSON,**
 - Elements instruction, 56.18-A
- CRIMINAL INTENT,**
 - General, 54.01-A
 - Inference, 54.01
- CRIMINAL LIABILITY,**
 - Defenses, see Defenses, this index.
 - Principles, Chapter 54.00
- CRIMINAL POSSESSION OF EXPLOSIVE,**
 - Defense, 64.11-B
 - Elements instruction, 64.11-A

PATTERN INSTRUCTIONS FOR KANSAS 3d

CRIMINAL POSSESSION OF A FIREARM,

Felony, 64.06

Juvenile, 64.07-B

Affirmative Defenses, 64.07-C

Misdemeanor, 64.07

CRIMINAL POSSESSION OF A FIREARM - MISDEMEANOR,

Elements instruction, 64.07

CRIMINAL RESTRAINT,

Elements instruction, 56.28

CRIMINAL SODOMY,

Aggravated, 57.08, 57.08-A, 57.08-B

Elements instruction, 57.07

CRIMINAL SOLICITATION,

Defense, 55.10

Elements instruction, 55.09

CRIMINAL SYNDICALISM,

Permitting premises to be used for, 60.04

CRIMINAL TRESPASS,

Elements instruction, 59.25

Health care facility, 59.25-A

Railroad property, 59.25-B

CRIMINAL USE OF EXPLOSIVES,

Elements instruction, 59.38

CRIMINAL USE OF NOXIOUS MATTER,

Elements instruction, 59.40

CRIMINAL THREAT,

Adulteration or contamination of food or drink, 56.23-A

Aggravated, 56.23-B

Elements instruction, 56.23

CRUELTY TO ANIMALS,

Defense, 65.16

Elements instruction, 65.15

CULTIVATING,

Controlled stimulants, depressants, hallucinogenic drugs or
anabolic steroids, 67.15

CUSTODY,

Aggravated escape from, 60.11

Escape from, 60.10

CUSTODY, COMMITTED PERSON,

Interference, 56.27

PATTERN INSTRUCTIONS FOR KANSAS 3d

CUSTODY, PARENTAL,

Aggravated interference, 56.26-A, 56.26-B, 56.26-C

Interference, 56.26

DAMAGE TO PROPERTY,

Criminal, without consent, 59.23

Intent to defraud insurer or lienholder, 59.24

DANGEROUS ANIMAL,

Permitting to be at large, 56.22

DEADLOCKED JURY,

Instruction, 68.12

DEALER,

Possession - no tax stamp, 67.24

DEALING IN FALSE IDENTIFICATION DOCUMENTS,

Elements instruction, 60.30

DEALING IN GAMBLING DEVICES,

Defense, 65.10-A

Elements instruction, 65.10

Presumption, 65.11

DEALING IN PIRATED RECORDINGS,

Elements instruction, 59.58-A

DEATH PENALTY,

See Capital Murder, this index.

DEATH SENTENCE,

See Capital Murder, this index.

Aggravating Circumstances, 56.00-C, 56.00-F

Burden of Proof, 56.00-E

Mitigating Circumstances, 56.00-D, 56.00-F

Theory of Comparing Aggravating and Mitigating, 56.00-F

Reasonable Doubt, 56.00-G

Sentencing Proceeding, 56.00-B

Sentencing Recommendation, 56.00-H

Verdict Forms, 68.14-A-1, 68.14-B-1, 68.17

DEBT ADJUSTING,

Elements instruction, 66.02

DECEPTIVE COMMERCIAL PRACTICES,

Elements instruction, 66.03

DEFAMATION,

Criminal, 62.06

Defense, 62.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

DEFACING IDENTIFICATION MARKS OF A FIREARM,

Elements instruction, 64.08

DEFENDANTS,

Failure to testify, 52.13

Multiple, 52.07

Witness, 52.10

DEFENSE OF PERSON,

Use of force, 54.17

DEFENSES,

Abortion, 56.11

Age of minor, 54.02

Animals, cruelty, 65.15

Attempt, 55.02

Bigamy, 58.02

Compensation for past official acts, 61.04

Compulsion, 54.13

Computer crime, 59.64-A

Condonation, 54.15

Conspiracy, 55.04

Crime of another, 54.05, 54.06, 54.07

Crime of corporation, 54.08, 54.09

Criminal hunting, 59.33-B

Cruelty to animals, 65.15

Dealing in gambling devices, 65.10-A

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Disclosing information obtained in preparing tax returns,
56.34

Driving while license is canceled, suspended
or revoked, 70.10-A

Eavesdropping, 62.02

Entrapment, 54.14

General intent crime, voluntary intoxication, 54.12

Ignorance of fact, 54.03

Ignorance of law, 54.04

Ignorance of statute, 54.02

Impossibility of committing offense, attempt, 55.02

Insanity, mental disease or defect, 54.10

Intoxication,

PATTERN INSTRUCTIONS FOR KANSAS 3d

- Involuntary, 54.11
- Voluntary,
 - General intent crime, 54.12
 - Particular state of mind, 54.12-A-1
 - Specific intent crime, 54.12-A
- Law, mistake or ignorance, 54.04
- Minor, age, 54.02
- Mistake of fact, 54.03
- Mistake of law, 54.04
- Obscenity, promoting, 65.05
- Possession of gambling device, 65.12-A
- Procuring agent, 54.14-A
- Promoting obscenity, 65.05
- Promoting obscenity to a minor, 65.05-A
- Restitution, 54.16
- Self-defense, 54.17, 54.17-A, 54.18, 54.19
- Specific intent crime, voluntary intoxication, 54.12-A
- Unlawful discharge of firearm, 64.02-B
- Unlawful use of weapons, 64.04
- Voluntary intoxication,
 - General intent crime, 54.12
 - Particular state of mind, 54.12-A-1
 - Specific intent crime, 54.12-A
- Withdrawal, conspiracy, 55.04
- Worthless check, 59.07

DEFINITIONS,

- Chapter containing, 53.00
- Conspiracy-Act in furtherance, 55.06
- Drug paraphernalia, 67.18-B
- Drug sale, 67.13-A
- Explosives, 64.10-A
- Gambling, 65.07
- Homicide definitions, 56.04
- Kansas Parimutuel Racing Act, 65.52
- Lottery, 65.35
- Obscenity, 65.03
 - Promoting, 65.03
- Possession of a controlled substance, 67.13-D
- Sale, drugs, 67.13-A
- Sex offenses, 57.18

PATTERN INSTRUCTIONS FOR KANSAS 3d

Sexual intercourse, 57.02
Simulated controlled substance, 67.18-B

DEFRAUDING AN INNKEEPER,

Elements instruction, 59.61

DELINQUENCY, JUVENILE,

Aggravated, 58.13

DELIVERY OF DRUG PARAPHERNALIA,

Elements instruction, 67.18-A

DELIVERY OF STORED GOODS,

Unauthorized, 59.47

DENIAL OF CIVIL RIGHTS,

Elements instruction, 62.05

DEPARTURE SENTENCE,

See Upward Durational Departure, this index.

DEPENDANT ADULT,

Mistreatment, 56.37

Affirmative Defense, 56.38

DEPOSITION,

Guiding instruction, 52.12

DEPRESSANTS,

Cultivating, 67.15

Manufacture or dispensation, 67.15

Offer to sell with intent to sell, 67.14

Possession, 67.16

Possession with intent to sell, 67.14

Selling or offering to sell, 67.15

DEPRIVATION,

Child's, contributing, 58.14

DEPRIVATION OF PROPERTY,

Criminal, 59.04

DESECRATION,

Unlawful, 63.11, 63.12, 63.13

DESECRATION OF FLAGS,

Elements instruction, 63.15

DESTROYING A WRITTEN INSTRUMENT,

Elements instruction, 59.14

DIMINISHED MENTAL CAPACITY,

Elements instruction, 54.12-B

PATTERN INSTRUCTIONS FOR KANSAS 3d

**DISCLOSING INFORMATION OBTAINED IN PREPARING
TAX RETURNS,**

Defense, 56.34

Elements instruction, 56.33

DISCOUNTING A PUBLIC CLAIM,

Elements instruction, 61.07

**DISCLOSURE OF AUTHORIZED INTERCEPTION OF
COMMUNICATIONS,**

Unauthorized, 60.06-C

DISCLOSURE OF A WARRANT,

Unlawful, 60.28

DISEASE, COMMUNICABLE,

Unlawfully exposing another, 56.40

DISORDERLY CONDUCT,

Elements instruction, 63.01

DISPENSATION,

Controlled stimulants, depressants, hallucinogenic drugs or
anabolic steroids, 67.15

DISPOSAL OF EXPLOSIVES,

Criminal, 64.11

DISPOSAL OF FIREARMS,

Criminal, 64.05

DOCKAGE,

Adding to grain, 59.63-B

DOCUMENT,

Fraudulently obtaining execution, 59.05

DOG,

Fight,

Attending unlawful, 65.19

Unlawful conduct, 65.18

Illegal ownership or keeping, 65.20

DOMESTIC ANIMAL,

Injury, 59.32

DOMESTIC BATTERY,

Elements instruction, 56.16-A

DRIVE-BY SHOOTING,

Elements instruction, 64.02-A-1

DRIVING,

License canceled, suspended, revoked, or while
habitual violator, 70.10

PATTERN INSTRUCTIONS FOR KANSAS 3d

Affirmative defense, 70.10-A

Privileges suspended, revoked or while habitual violator,
Felony, 70.11

Under the influence of alcohol or drugs,

Alcohol concentration .08 or more, 70.01-A

B.A.T. .08 or more charged in alternative, 70.01-B

Chemical test used, 70.02

Elements instruction, 70.01

Involuntary manslaughter, 56.06-A

DRIVING WHILE LICENSE IS CANCELED, SUSPENDED, REVOKED, OR WHILE HABITUAL VIOLATOR,

Elements instruction, 70.10

Affirmative defense, 70.10-A

DRUGS, NARCOTIC,

See Controlled Substances, this index.

DRUG PARAPHERNALIA,

Definition, 67.18-B

Delivery, 67.18-A

Factors to be considered, 67.18-C

Use or Possession with intent to use, 67.17

DRUG TRANSACTION, FELONY,

Unlawful use of communications facility to facilitate, 67.22

DURATIONAL DEPARTURE,

See Upward Durational Departure, this index.

DUTY TO RETREAT,

Use of Force, 54.17-A

EAVESDROPPING,

Defense of public utility employee, 62.02

Elements instruction, 62.01

EMBEZZLEMENT,

Grain, 59.62

ENCOURAGING JUVENILE MISCONDUCT,

Elements instruction, 58.09

ENDANGERING A CHILD,

Affirmative defense, 58.10

Aggravated, 58.10-B

Elements instruction, 58.10

ENTICEMENT OF A CHILD,

Elements instruction, 57.11

PATTERN INSTRUCTIONS FOR KANSAS 3d

ENTRAPMENT,

Instruction on principle, 54.14

EQUITY SKIMMING,

Elements instruction, 66.10

ESCAPE,

Aiding, 60.12

ESCAPE FROM CUSTODY,

Aggravated, 60.11

Elements instruction, 60.10

EVIDENCE,

Admissibility,

More than one defendant, 52.07

Proof of other crime, 52.06

Admissions, 52.05

Affirmative defenses, 52.08

Alibi, 52.19

Burden of proof, 52.02, 52.08

Cautionary instructions, 51.01, 51.04

Child's hearsay, 52.21

Circumstantial, 52.16

Confession, 52.17

Consideration, 51.04

Credibility, 52.09

Defendant as witness, 52.10

Deposition testimony, 52.12

Guides for consideration, 52.00

Hearsay, child's, 52.21

Indictment, 52.01

Information, 52.01

Introduction, instructions before, 51.01

Multiple defendants, 52.07

Number of witnesses, 52.11

Presumption of innocence, 52.02, 52.03

Proof of other crime, 52.06

Reasonable doubt, 52.02, 52.04

Stipulations, 52.05

Testimony,

Accomplice, 52.18

Defendant's failure, 52.13

Deposition, 52.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

Expert witness, 52.14

Impeachment, 52.15

Witnesses, number, 52.11

EXECUTION OF DOCUMENTS,

Fraudulently obtaining, 59.05

EXHIBITION,

Hypnotic, 62.10

EXPERT WITNESSES,

Guiding instruction, 52.14

EXPLANATIONS OF TERMS,

Chapter containing, 53.00

EXPLOITATION OF A CHILD,

Sexual, 57.12-A

EXPLOSIVE DEVICES,

Possession, 59.39

Transportation, 59.39

EXPLOSIVES,

Criminal possession, 64.11-A

Defense, 64.11-B

Criminal use, 59.38

Definition, 64.10-A

Disposal, criminal, 64.11

Failure to register receipt, 64.10

Failure to register sale, 64.09

EXPOSING A PAROLED OR DISCHARGED PERSON,

Elements instruction, 62.09

EXPOSING ANOTHER TO A COMMUNICABLE DISEASE,

Unlawfully, 56.40

EYEWITNESS IDENTIFICATION,

Elements instruction, 52.20

FAILURE TO APPEAR,

Elements instruction, 60.15

**FAILURE TO POST SMOKING PROHIBITED AND
DESIGNATED SMOKING AREA SIGNS,**

Elements instruction, 62.11-A

FAILURE TO REGISTER AN AIRCRAFT,

Elements instruction, 60.32

FAILURE TO REGISTER AS AN OFFENDER,

Elements instruction, 64.19

PATTERN INSTRUCTIONS FOR KANSAS 3d

- FAILURE TO REGISTER RECEIPT OF EXPLOSIVES,**
 - Elements instruction, 64.10
- FAILURE TO REGISTER SALE OF EXPLOSIVES,**
 - Elements instruction, 64.09
- FAILURE TO REPORT A WOUND,**
 - Elements instruction, 64.15
- FALSE ALARM,**
 - Giving, 63.10
- FALSE CLAIM,**
 - Presenting, 61.05
- FALSE IDENTIFICATION DOCUMENTS,**
 - Elements instruction, 60.30
- FALSE IMPERSONATION,**
 - Aggravated, 60.26
 - Elements instruction, 60.25
- FALSE INFORMATION**
 - Making, 59.13
- FALSE MEMBERSHIP CLAIM,**
 - Elements instruction, 65.14
- FALSE RUMORS,**
 - Concerning financial status, 62.08
- FALSE SIGNING OF PETITION,**
 - Elements instruction, 60.24
- FALSE TOKENS,**
 - Disposal, 59.37
 - Manufacture, 59.37
- FALSE WRITING,**
 - Making, 59.13
- FALSELY REPORTING A CRIME,**
 - Elements instruction, 60.19
- FAMILY RELATIONSHIPS,**
 - Crimes affecting, Chapter 58.00
- FAX,**
 - Harassment of court by, 60.31
- FELON,**
 - Aiding, 60.13
 - Forcible, use of force, 54.20
 - Class A, punishment, 68.04
 - Class A, verdicts, 68.05

PATTERN INSTRUCTIONS FOR KANSAS 3d

Possession of firearms, 64.06

Unlawful use of weapons, 64.01

**FELONY DRIVING WHILE PRIVILEGES SUSPENDED,
REVOKED, OR WHILE HABITUAL VIOLATOR,**

Elements instruction, 70.11

FELONY DRUG TRANSACTION,

Communication facility to facilitate, 67.22

FELONY MURDER,

Alternatives instruction, 56.02-A

Instruction, 56.02

Verdict forms, 68.15, 68.16

FINANCIAL CARD,

Altered or nonexistent, 59.36

Cancelled, use of, 59.35

Use of another, 59.34

FINANCIAL STATUS,

Circulating false rumors concerning, 62.08

FIREARMS,

Criminal discharge,

Defense, 64.02-B

Felony, 64.02-A-1

Misdemeanor, 64.02-A

Criminal disposal, 64.05

Criminal possession,

Felony, 64.06

Juvenile, 64.07-B

Affirmative Defenses, 64.07-C

Misdemeanor, 64.07

Identification marks, defacing, 64.08

Possession in state building or county courthouse, 64.07-A

FIREFIGHTER,

Unlawful interference, 56.20

FIRST DEGREE MURDER,

Felony murder alternatives, 56.02-A

Felony murder instruction, 56.02

Illustrative instructions, 69.01

Mandatory minimum 40 year sentence,

Aggravating circumstances, 56.01-B

Burden of proof, 56.01-D

Mitigating circumstances, 56.01-C

PATTERN INSTRUCTIONS FOR KANSAS 3d

Reasonable doubt, 56.01-F
Sentencing procedure, 56.01-A
Sentencing recommendation, 56.01-G
Theory of comparison, 56.01-E
Verdict form, 68.14-A

FLAGS,

Desecration, 63.15

FLEEING OR ATTEMPTING TO ELUDE POLICE OFFICER,

Elements instruction, 70.09

FOOD OR DRINK,

Adulteration or contamination - criminal threat, 56.23-A

FORCE, USE,

Defense of dwelling, 54.18

Defense of person, 54.17

Defense of property other than dwelling, 54.19

Duty to retreat, 54.17-A

Felon, forcible, 54.20

Initial aggressor, 54.22

Law enforcement officer, 54.23

Private person,

Not summoned to assist, 54.24

Summoned to assist, 54.23

Resisting arrest, 54.25

FOREIGN MATERIAL,

Adding to grain, 59.63-B

FORGERY,

Lottery ticket, 65.32

Making or issuing a forged instrument, 59.11

Passing a forged instrument, 59.12

Possession of devices, 59.16

FORMS, VERDICT,

Multiple counts, 68.08

Value in Issue, 68.11

FRAUD, WAREHOUSE RECEIPT,

Duplicate or additional receipt, 59.46

Original receipt, 59.45

FRAUDULENT ACTS RELATING TO AIRCRAFT

IDENTIFICATION NUMBERS,

Elements instruction, 60.35

PATTERN INSTRUCTIONS FOR KANSAS 3d

FRAUDULENT REGISTRATION OF AIRCRAFT,

Elements instruction, 60.33

Supplying false information, 60.34

FRAUDULENT RELEASE OF A SECURITY AGREEMENT,

Elements instruction, 59.44

FRAUDULENTLY OBTAINING EXECUTION OF A DOCUMENT,

Elements instruction, 59.05

FURNISHING ALCOHOLIC BEVERAGES TO A MINOR FOR ILLICIT PURPOSES,

Elements instruction, 58.12-B

FURNISHING ALCOHOLIC LIQUOR OR CEREAL MALT BEVERAGE TO A MINOR,

Elements instruction, 58.12

Defense, 58.12-C

FURNISHING CEREAL MALT BEVERAGE TO MINOR,

Elements instruction, 58.12-A

Defense, 58.12-D

GAMBLING,

Commercial, 65.08

Definition, 65.07

Elements instruction, 65.06

Permitting premises to be used for commercial, 65.09

GAMBLING, DEVICES,

Dealing in, 65.10

Defense, 65.10-A

Possession, 65.12

Defense, 65.12-A

Presumption, 65.11

GAMING LAW,

Violations of Tribal, 65.36

GENERAL CRIMINAL INTENT,

Instruction, 54.01-A

GENERAL INTENT CRIME,

Voluntary intoxication defense, 54.12

PATTERN INSTRUCTIONS FOR KANSAS 3d

GIVING A FALSE ALARM,

Elements instruction, 63.10

GOVERNMENTAL FUNCTIONS,

Crimes affecting, Chapter 60.00

GRAIN EMBEZZLEMENT,

Elements instruction, 59.62

GUILTY VERDICT,

General form, 68.02

HABITUALLY GIVING A WORTHLESS CHECK,

Same day, 59.09

Within two years, 59.08

HABITUALLY PROMOTING PROSTITUTION,

Elements instruction, 57.16

HALLUCINOGENIC DRUGS,

Cultivating, 67.15

Manufacture or dispensation, 67.15

Offer to sell with intent to sell, 67.14

Possession, 67.16

Possession with intent to sell, 67.14

Selling or offering to sell, 67.15

HARASSMENT BY TELEPHONE,

Elements instruction, 63.14

HARASSMENT OF COURT BY TELEFACSIMILE,

Elements instruction, 60.31

"HARD 40",

See Murder, First Degree, Mandatory minimum 40 year sentence, this index

HAZARD,

Creating, 64.14

HAZING,

Elements instruction, 56.36

HEARSAY EVIDENCE,

Child's, 52.21

HEALTH CARE FACILITY,

Criminal trespass, 59.25-A

HIGHWAY SIGN OR MARKER,

Landmark, tampering, 59.29

HOMICIDE,

Aggravated vehicular, 56.07-A

Definitions, 56.04

PATTERN INSTRUCTIONS FOR KANSAS 3d

Unintended victim, 56.09

**HOSTING MINORS CONSUMING ALCOHOL OR CEREAL
MALT BEVERAGES,**

Unlawfully, 58.12-E

HUNTING,

Criminal, 59.33

Defense, 59.33-B

Posted land, 59.33-A

IDENTIFICATION DOCUMENTS,

False, 60.30

IDENTIFICATION, EYEWITNESS,

Elements instruction, 52.20

IDENTIFICATION MARKS ON FIREARMS,

Defacing, 64.08

IDENTITY THEFT,

Elements instruction, 62.13

IGNITION INTERLOCK DEVICE VIOLATION,

Elements instruction, 70.08

IGNORANCE,

Of age of minor, 54.02

Of fact, 54.03

Of law, 54.04

Of statute, 54.02

ILLEGAL ALIEN,

Knowingly employing, 66.09

ILLEGAL BINGO OPERATION, 65.06-A

ILLUSTRATIVE SETS OF INSTRUCTIONS,

Chapter containing, 69.00

IMPAIRING A SECURITY INTEREST,

Concealment, 59.41

Destruction, 59.41

Exchange, 59.42

Failure to account, 59.43

Sale, 59.42

**IMPAIRING A SECURITY INTEREST - CONCEALMENT OR
DESTRUCTION,**

Elements instruction, 59.41

PATTERN INSTRUCTIONS FOR KANSAS 3d

- IMPERSONATION,**
 - Aggravated false, 60.26
 - False, 60.25
- INCENDIARY DEVICE,**
 - Possession, 59.39
 - Transportation, 59.39
- INCEST,**
 - Aggravated, 58.04
 - Elements instruction, 58.03
- INCITEMENT TO RIOT,**
 - Elements instruction, 63.05
- INCLUDED OFFENSES, LESSER, 68.09**
- INDECENT LIBERTIES WITH A CHILD,**
 - Aggravated, 57.06
 - Elements instruction, 57.05, 57.05-A
- INDECENT SOLICITATION OF A CHILD,**
 - Affirmative defenses, 57.05-B
 - Aggravated, 57.13
 - Elements instruction, 57.12
- INDICTMENT,**
 - Guiding instruction, 52.01
- INFERENCE OF INTENT,**
 - Instruction, 54.01
- INFLUENCE, JUDICIAL OFFICER,**
 - Attempting, 60.16
- INFLUENCING A WITNESS,**
 - Corruptly, 60.06
- INFORMATION,**
 - Guiding instruction, 52.01
 - Obtaining consumer, 62.15
 - Unlawfully providing, 62.14
- INFORMANT,**
 - Testimony - for benefits, 52.18-A
- INITIAL AGGRESSOR'S USE OF FORCE,**
 - Instruction, 54.22
- INJURING PREGNANT WOMAN,**
 - Elements instruction, 56.41
 - By Vehicle, 56.42

PATTERN INSTRUCTIONS FOR KANSAS 3d

INJURY TO A DOMESTIC ANIMAL,

Elements instruction, 59.32

INMATES, ETC.,

Unlawful sexual relations, 57.26

INNKEEPER, DEFRAUDING,

Elements instruction, 59.61

INSANITY,

See Mental Disease or Defect, this index

INSTALLING COMMUNICATION FACILITIES FOR

GAMBLERS,

Elements instruction, 65.13

INSURANCE CONTRACT,

Unlawful interest, 61.08

Unlawful procurement, 61.09

INSURER,

Arson to defraud, 59.21, 59.21-A

Damage to property to defraud, 59.24

INTENT,

Criminal, 54.02

Inference, 54.01

Instruction, 54.01-A

INTENT TO SELL,

Possession,

Controlled stimulants, depressants, hallucinogenic drugs or anabolic steroids, 67.14

INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE,

Elements Instruction, 60.17

INTERFERENCE WITH A FIREFIGHTER,

Unlawful, 56.20

INTERFERENCE WITH PARENTAL CUSTODY,

Aggravated, 56.26-A, 56.26-B, 56.26-C

Elements instruction, 56.26

INTERFERENCE WITH THE CONDUCT OF PUBLIC

BUSINESS IN A PUBLIC BUILDING,

Elements instruction 60.29

INTERFERENCE WITH THE CUSTODY OF A COMMITTED

PERSON,

Elements instruction, 56.27

PATTERN INSTRUCTIONS FOR KANSAS 3d

INTIMIDATION OF A WITNESS OR VICTIM,

Aggravated, 60.06-B

Elements instruction, 60.06-A

INTOXICATING LIQUOR OR DRUGS,

Operating aircraft, 70.06

If chemical test used, 70.07

INTOXICATION,

Involuntary, 54.11

Public, 63.09

Voluntary, 54.12, 54.12-A, 54.12-A-1

INTRODUCTORY INSTRUCTIONS,

Application, 51.02, 51.03

Arguments of counsel, 51.06

Binding application, 51.02

Capital murder - pre-voir dire instruction, 56.00

Chapter containing, 51.00

Close of case, jury receives before, 51.09

Consideration of evidence, 51.04

Consideration of instructions, 51.01, 51.02

Counsel, statements and arguments, 51.06

Court, rulings, 51.05

Evidence, 51.01

Evidence, consideration, 51.04

Guiding application, 51.03

Jury, consideration of penalty, 51.10

Jury receives before close of case, 51.09

Nature of, 51.02, 51.03

Penalty, consideration by jury, 51.10, 51.10-A

Prejudice, 51.07

Pronoun, form, 51.08

Statements of counsel, 51.06

Sympathy, 51.07

INVOLUNTARY INTOXICATION,

Defense, 54.11

INVOLUNTARY MANSLAUGHTER,

Driving under the influence, 56.06-A

Elements instruction, 56.06

ISSUING A FORGED INSTRUMENT,

Elements instruction, 59.11

PATTERN INSTRUCTIONS FOR KANSAS 3d

JUDICIAL OFFICER,

- Attempting to influence, 60.16
- Unlawful collection, 61.10

JUROR,

- Corrupt conduct, 60.18
- Note taking, 51.01-A

JURY,

- Consideration of penalty, cautionary instruction, 51.10, 51.10-A
- Deadlocked, 68.12
- Penalty, consideration, cautionary instruction, 51.10, 51.10-A
- Post-trial communication, 68.13
- Receipt of instructions before close of case, cautionary instruction, 51.09

JUSTICE, ADMINISTRATION OF,

- Interference, 60.17

JUVENILE DELINQUENCY,

- Aggravated, 58.13

JUVENILE MISCONDUCT,

- Encouraging, 58.09

KANSAS ODOMETER ACT,

- Violations, 59.65-A to 59.65-F

KANSAS PARIMUTUEL RACING ACT,

- Definitions, 65.52
- Violation, 65.51

KIDNAPPING,

- Aggravated, 56.25
- Elements instruction, 56.24

KNOWINGLY EMPLOYING AN ALIEN ILLEGALLY WITHIN THE UNITED STATES,

- Elements instruction, 66.09

LANDMARK,

- Highway sign or marker, 59.29
- Tampering, 59.28

LAW ENFORCEMENT OFFICER,

- Aggravated assault, 56.14
- Aggravated battery, 56.19
- Assault, 56.13
- Battery, 56.17

PATTERN INSTRUCTIONS FOR KANSAS 3d

LEGAL PROCESS,

Obstructing, 60.08

Simulating, 60.21

LEGISLATIVE DOCUMENT,

Altering, 59.15

LESSER INCLUDED OFFENSES,

Forms, 68.10

Instruction, 68.09

LEWD AND LASCIVIOUS BEHAVIOR,

Elements instruction, 57.10

LIABILITY,

Principles, Chapter 54.00

LIBERTIES WITH A CHILD,

Aggravated indecent, 57.06

Indecent, 57.05, 57.05-A

Affirmative defenses, 57.05-B

Sodomy, 57.05-A

LIENHOLDER,

Arson to defraud, 59.21, 59.21-A

Damage to property to defraud, 59.24

LITTERING,

Private property, 59.27

Public, 59.26

LOST OR MISLAID PROPERTY,

Theft, 59.02

LOTTERY,

Conflicts of interest,

Commission member, 65.30

Contractor, 65.31

Employee, 65.30

Retailer, 65.31

Definitions, 65.35

Forgery of ticket, 65.32

Ticket,

Forgery, 65.32

Unlawful purchase, 65.34

Unlawful sale, 65.33

Unlawful purchase of ticket, 65.34

Unlawful sale of ticket, 65.33

PATTERN INSTRUCTIONS FOR KANSAS 3d

MACHINES, COIN-OPERATED,

Opening, damaging or removing, 59.50

Possession of tools for opening, damaging or removing, 59.51

MAGAZINE SALE,

Tie-in, 66.04

MAINTAINING A PUBLIC NUISANCE,

Elements instruction, 63.06

MAKING FALSE INFORMATION,

Elements instruction, 59.13

MAKING A FORGED INSTRUMENT,

Elements instruction, 59.11

MAKING FALSE PUBLIC WAREHOUSE REPORTS,

Elements instruction, 59.63-A

MAKING FALSE PUBLIC WAREHOUSE RECORDS AND STATEMENTS,

Elements instruction, 59.63

MANDATORY MINIMUM 40 YEAR SENTENCE,

Aggravating circumstances, 56.01-B

Burden of proof, 56.01-D

Mitigating circumstances, 56.01-C

Reasonable doubt, 56.01-F

Sentencing procedure, 56.01-A

Sentencing recommendation, 56.01-G

Theory of comparison, 56.01-E

Verdict form, 68.14-A

MANSLAUGHTER,

Involuntary, 56.06

Driving under the influence, 56.06-A

Voluntary, 56.05

MANUFACTURE, SALE OR DISTRIBUTION OF A THEFT DETECTION SHIELDING DEVICE

Elements instruction, 59.67

MANUFACTURING,

Controlled stimulants, depressants, hallucinogenic drugs or anabolic steroids, 67.15

Controlled substance, 67.21

Before July 1, 1999, 67.21-A

MANUFACTURING A CONTROLLED SUBSTANCE,

Elements instruction, 67.21

PATTERN INSTRUCTIONS FOR KANSAS 3d

MARRIAGE,

Rape defense, 57.01-A

MASTER KEY,

Automobile, 59.48

MEMBERSHIP CLAIM,

False, 65.14

MENTAL DISEASE OR DEFECT,

Commitment, 54.10-A

Instruction on principle, 54.10

MENTAL CAPACITY,

Diminished, 54.12-B

MERCHANDISE,

Counterfeiting, 59.68

Value or units in issue, 59.70-A

Verdict Form, 68.11-A

METHAMPHETAMINE COMPONENTS,

Marketing, sale, etc.

Elements instruction, 67.28

Possession with intent to manufacture,

Elements instruction, 67.27

MINOR,

Consuming alcohol or cereal malt beverages,

Unlawfully hosting, 58.12-E

Furnishing alcoholic liquor or cereal malt beverage, 58.12

Defense, 58.12-C

MISCELLANEOUS CRIMES,

Chapter containing, 70.00

MISCONDUCT,

Contributing to a child's, 58.14

Official, 61.02

MISCONDUCT, JUVENILE,

Encouraging, 58.09

MISDEMEANORS,

Driving under the influence of intoxicating liquor or drugs,
70.01

Driving while intoxicated, chemical test used, 70.02

Driving while license is canceled, suspended, revoked, or while
habitual violator, 70.10

Operating aircraft under influence, 70.06

Reckless driving, 70.04

PATTERN INSTRUCTIONS FOR KANSAS 3d

Traffic offenses, 70.01

Transporting liquor in opened container, 70.03

Unlawful use of weapons, 64.02

Violation of city ordinance, 70.05

MISTAKE OF LAW,

Defense, 54.04

MISTREATMENT OF A CONFINED PERSON,

Elements instruction, 56.29

MISTREATMENT OF DEPENDANT ADULT,

Affirmative Defense, 56.38

MISUSE OF PUBLIC FUNDS,

Elements instruction, 61.11

MULTIPLE ACTS, 68.09-B

MULTIPLE COUNTS,

Forms, 68.08

Instructions, 68.07

MULTIPLE DEFENDANT,

Admissibility of evidence, 52.07

MURDER,

Alternatives, 56.02-A

Capital Murder, 56.00 *et seq.*

Illustrative Instructions, 69.04

Felony murder, 56.02

First degree, 56.01

First degree, mandatory minimum 40 year sentence,

Aggravating circumstances, 56.01-B

Burden of proof, 56.01-D

Mitigating circumstances, 56.01-C

Reasonable doubt, 56.01-F

Sentencing procedure, 56.01-A

Sentencing recommendation, 56.01-G

Theory of comparison, 56.01-E

Verdict form, 68.14-A

Homicide definitions, 56.04

Second degree, 56.03

Unintentional, 56.03-A

NARCOTICS,

Drug sale defined, 67.13-A

Sale, 67.13, 67.13-B

PATTERN INSTRUCTIONS FOR KANSAS 3d

- NARCOTIC DRUGS AND CERTAIN STIMULANTS,**
 - Offer to sell with intent to sell, 67.13-C
 - Possession, 67.13, 67.13-B, 67.13-C
 - Sale, 67.13-A, 67.13-B, 67.13-C
- NONCONTROLLED SUBSTANCE,**
 - Representation controlled, 67.20
 - Presumption, controlled, 67.20-A
- NONDISCLOSURE OF SOURCE OF RECORDINGS,**
 - Elements instruction, 59.60
- NONSUPPORT OF A CHILD,**
 - Elements instruction, 58.06
- NONSUPPORT OF A SPOUSE,**
 - Elements instruction, 58.07
- NOTETAKING BY JURORS, 51.01-A**
- NOT GUILTY VERDICT,**
 - Because of insanity, 68.06
 - General form, 68.03
- NOXIOUS MATTER,**
 - Criminal use, 59.40
- NUISANCE, PUBLIC,**
 - Maintaining, 63.06
 - Permitting, 63.07
- OBJECT ONTO STREET OR ROAD,**
 - Casting, 59.52, 59.53, 59.54, 59.55
- OBSCENITY,**
 - Promoting, 65.01
 - Affirmative defenses, 65.05
 - Definitions, 65.03
 - Minor, 65.02
 - Affirmative defenses, 65.05-A
 - Presumption, 65.04
- OBSTRUCTING LEGAL PROCESS,**
 - Elements instruction, 60.08
- OBSTRUCTING OFFICIAL DUTY,**
 - Elements instruction, 60.09
- OBTAINING CONSUMER INFORMATION,**
 - Elements instruction, 62.15
- ODOMETER, ACT,**
 - Violations, 59.65-A to 59.65-F

PATTERN INSTRUCTIONS FOR KANSAS 3d

OFFENDER,

Failure to register, 64.19

OFFENSES, LESSER INCLUDED,

Forms, 68.10

Instruction, 68.09

OFFICIAL ACTS, PAST,

Compensation, 61.03

Defense, 61.04

OFFICIAL ACT, UNAUTHORIZED,

Performance, 60.20

OFFICIAL DUTY,

Obstructing, 60.09

OFFICIAL MISCONDUCT,

Elements instruction, 61.02

OPENING, DAMAGING, OR REMOVING COIN-OPERATED MACHINES,

Elements instruction, 59.50

Possession of tools, 59.51

OPERATING AIRCRAFT,

While under influence, 70.06

If chemical test used, 70.07

OTHER CRIMES,

Instruction, 52.06

PARAPHERNALIA,

See Drug Paraphernalia, this index.

PARENTAL CUSTODY,

Aggravated interference, 56.26-A, 56.26-B, 56.26-C

Interference, 56.26

PARIMUTUEL RACING ACT,

Definitions, 65.52

Violations, 65.51

PAROLED OR DISCHARGED PERSON,

Exposing, 62.09

PARTY LINE, TELEPHONE,

Refusal to yield, 64.13

PASSING A FORGED INSTRUMENT,

Elements instruction, 59.12

PAST OFFICIAL ACTS,

Compensation, 61.03

Defense, 61.04

PATTERN INSTRUCTIONS FOR KANSAS 3d

PATRONIZING A PROSTITUTE,

Elements instruction, 57.17

PENALTY,

Consideration by jury, cautionary instruction, 51.10

PERFORMANCE OF AN UNAUTHORIZED OFFICIAL ACT,

Elements instruction, 60.20

PERJURY,

Elements instruction, 60.05

PERMITTING A FALSE CLAIM,

Elements instruction, 61.06

PERMITTING A PUBLIC NUISANCE,

Elements instruction, 63.07

PERMITTING DANGEROUS ANIMAL TO BE AT LARGE,

Elements instruction, 56.22

**PERMITTING PREMISES TO BE USED FOR COMMERCIAL
GAMBLING,**

Elements instruction, 65.09

**PERMITTING PREMISES TO BE USED FOR CRIMINAL
SYNDICALISM,**

Elements instruction, 60.04

PERSONAL RIGHTS,

Crimes involving, Chapter 62.00

PETITION SIGNING,

False, 60.24

PIRACY, AIRCRAFT,

Elements instruction, 56.35

PIRACY OF RECORDINGS,

Dealing in, 59.58-A

Defense, 59.59

Elements instruction, 59.58

Non-disclosure of source, 59.60

POISONING,

Attempted, 56.21

POLICE OFFICER,

Fleeing or attempting to elude, 70.09

POLITICAL PICTURES OR ADVERTISEMENTS,

Posting, 59.49

PATTERN INSTRUCTIONS FOR KANSAS 3d

POSSESSION,

Burglary tools, 59.19

Controlled stimulants, depressants, hallucinogenic
drugs or anabolic steroids, 67.16

With intent to sell, 67.14

Controlled substance,

Defined, 67.13-D

Firearm,

Felony, 64.06

Juvenile, 64.07-B

Affirmative Defenses, 64.07-C

Misdemeanor, 64.07

Forged instrument, 59.12

Forgery devices, 59.16

Gambling device, 65.12

Incendiary or explosive device, 59.39

Methamphetamine components, 67.27

Substances designated under K.S.A. 65-4113, 67.23

Theft detection shielding device, 59.67-A

POSSESSION BY DEALER - NO TAX STAMP,

Elements instruction, 67.24

POSSESSION OF CONTROLLED STIMULANTS, DEPRESSANTS, HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS,

Elements instruction, 67.16

Intent to sell, 67.14

POSSESSION OF FIREARM IN STATE BUILDING OR COUNTY COURTHOUSE,

Elements instruction, 64.07-A

POSSESSION OF A CONTROLLED SUBSTANCE,

Defined, 67.13-D

POSSESSION OF A GAMBLING DEVICE,

Elements instruction, 65.12

POSSESSION OF A THEFT DETECTION SHIELDING DEVICE,

Elements instruction, 59.67-A

POSSESSION OF SUBSTANCES UNDER K.S.A. 65-4113 WITH INTENT TO SELL,

Elements instruction, 67.23

PATTERN INSTRUCTIONS FOR KANSAS 3d

- POSSESSION WITH INTENT TO MANUFACTURE,**
 - Methamphetamine components, 67.27
- POSTED LAND,**
 - Unlawful hunting, 59.33-A
- POST-TRIAL COMMUNICATION WITH JURORS,**
 - Instruction, 68.13
- POSTING OF POLITICAL PICTURES OR ADVERTISEMENTS,**
 - Elements instruction, 59.49
- PRACTICING CRIMINAL SYNDICALISM,**
 - Elements instruction, 60.03
- PREGNANT WOMAN,**
 - Injuring, 56.41
 - By Vehicle, 56.42
- PREJUDICE,**
 - Cautionary instruction, 51.07
- PREMISES,**
 - Gambling, permitting use, 65.09
- PRESCRIPTION ONLY DRUG,**
 - Unlawfully obtaining, 64.16
 - For sale, 64.17
- PRESENTING A FALSE CLAIM,**
 - Elements instruction, 61.05
- PRESSURIZED AMMONIA,**
 - Use or possession with intent to use, 67.17
- PRESUMPTION OF INNOCENCE,**
 - Guiding instruction, 52.02, 52.03
- PRESUMPTION OF INTENT,**
 - To deprive, 54.01-B
- PRESUMPTIONS,**
 - Gambling devices, dealing, 65.11
 - Noncontrolled substance is controlled, 67.20-A
 - Obscenity, 65.04
- PRESUMPTIONS OF INTENT TO DEFRAUD,**
 - Worthless check, 59.06-A
- PRINCIPLES OF CRIMINAL LIABILITY,**
 - Chapter containing, 54.00
- PRIVACY, BREACH OF,**
 - Divulging message, 62.04
 - Intercepting message, 62.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

PROCURING AGENT,

Instruction, 54.14-A

PROMOTING OBSCENITY,

Affirmative defenses, 65.05

Definitions, 65.03

Elements instruction, 65.01

Presumptions, 65.04

PROMOTING OBSCENITY TO A MINOR,

Affirmative defenses, 65.05-A

Elements instruction, 65.02

PROMOTING PROSTITUTION,

Child under 16, 57.15-A

Elements instruction, 57.15

Habitually, 57.16

PROMOTING PYRAMID PROMOTIONAL SCHEME,

Elements instruction, 59.66

PROMOTING SEXUAL PERFORMANCE BY A MINOR,

Elements instruction, 57.12-B

PRONOUN FORM,

Cautionary instruction, 51.08

PROOF OF OTHER CRIME,

Admissibility of evidence, 52.06

PROPERTY,

Criminal damage with intent to defraud insurer
or lienholder, 59.24

Criminal damage - without consent, 59.23

Criminal deprivation, 59.04

PROPERTY, CRIMES AGAINST,

Chapter containing, 59.00

PROSTITUTION,

Elements instruction, 57.14

Habitually promoting, 57.16

Patronizing, 57.17

Promotion, 57.15

PROTECTIVE ORDER,

Violation, 60.36

PROVOCATION,

Retaliation, 54.21

PATTERN INSTRUCTIONS FOR KANSAS 3d

- PSUEDOPHEDRINE,**
 - Marketing, sale, etc., 67.28
 - Possession, 67.27
- PUBLIC BUILDING,**
 - Interference with conduct of public business, 60.29
- PUBLIC BUSINESS,**
 - Interference with conduct of in public building, 60.29
- PUBLIC CLAIM,**
 - Discounting, 61.07
- PUBLIC FUNDS,**
 - Misuse, 61.11
- PUBLIC INTOXICATION,**
 - Elements instruction, 63.09
- PUBLIC MORALS,**
 - Crimes, Chapter 65.00
- PUBLIC NOTICE,**
 - Tampering, 60.23
- PUBLIC NUISANCE,**
 - Maintaining, 63.06
 - Permitting, 63.07
- PUBLIC PEACE,**
 - Crimes against, Chapter 63.00
- PUBLIC RECORD,**
 - Tampering, 60.22
- PUBLIC SAFETY,**
 - Crimes against, Chapter 64.00
- PUBLIC TRUSTS,**
 - Crimes affecting, Chapter 61.00
- PUBLIC WAREHOUSE,**
 - Making false,
 - Records, 59.63
 - Reports, 59.63-A
 - Statements, 59.63
- PUBLIC UTILITY EMPLOYEE,**
 - Eavesdropping, 62.02
- PUNISHMENT,**
 - Felony, Class A, 68.04
- PYRAMID PROMOTIONAL SCHEME,**
 - Promoting, 59.66

PATTERN INSTRUCTIONS FOR KANSAS 3d

RACING ACT,

- Parimutuel,
- Definitions, 65.52
- Violations, 65.51

RACKETEERING,

- Elements instruction, 66.01

RAILROAD PROPERTY,

- Criminal trespass, 59.25-B

RAPE,

- Corroboration, necessity, 57.04
- Credibility of prosecutrix's testimony, 57.03
- Defense of marriage, 57.01-A
- Elements instruction, 57.01

REASONABLE DOUBT,

- Guiding instruction, 52.02, 52.04

RECEIPT OF EXPLOSIVES,

- Failure to register, 64.10

RECEIVING A SPORTS BRIBE,

- Elements instruction, 66.07

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

- Elements instruction, 67.25

RECENTLY STOLEN PROPERTY,

- Possession, 59.01

RECKLESS DRIVING,

- Elements instruction, 70.04

RECORDINGS,

- Piracy, 59.58
 - Dealing in, 59.58-A
 - Defense, 59.59
 - Non-disclosure of source, 59.60

RECUT TIRES,

- Sale, 59.56

REFUSAL TO YIELD A TELEPHONE PARTY LINE,

- Elements instruction, 64.13

REGISTER AS OFFENDER,

- Failure, 64.19

REMAINING AT AN UNLAWFUL ASSEMBLY,

- Elements instruction, 63.03

PATTERN INSTRUCTIONS FOR KANSAS 3d

- REMOVAL OF A THEFT DETECTION DEVICE,**
 - Elements instruction, 59.67-B
- REPORTING A CRIME,**
 - Falsely, 60.19
 - Resisting arrest, 54.25
- REPRESENTATION THAT NONCONTROLLED SUBSTANCE IS CONTROLLED SUBSTANCE-PRESUMPTION,**
 - Instruction, 67.20-A
- RESPONSIBILITY FOR CRIMES OF ANOTHER,**
 - Actor not prosecuted, 54.07
 - Crime not intended, 54.06
 - Instruction on principle, 54.05
- RESTITUTION,**
 - Instruction on principle, 54.16
- RESTRAINT,**
 - Criminal, 56.28
- RIOT,**
 - Elements instruction, 63.04
 - Incitement, 63.05
- ROBBERY,**
 - Aggravated, 56.31
 - Elements instruction, 56.30
- RULINGS OF COURT,**
 - Cautionary instructions, 51.05
- RUMORS, FALSE,**
 - Concerning financial status, 62.08
- SALE OF EXPLOSIVES,**
 - Failure to register, 64.09
- SALE OF RECUT TIRES,**
 - Elements instruction, 59.56
- SCHOOL EMPLOYEE,**
 - Battery against, 56.16-B
- SECOND DEGREE MURDER, 56.03**
 - Elements instruction, 56.03
 - Unintentional, 56.03-A
- SECURITY AGREEMENT,**
 - Fraudulent release, 59.44
 - Definition, Chapter 53.00

PATTERN INSTRUCTIONS FOR KANSAS 3d

SECURITY INTEREST,

Definition, Chapter 53.00

Impairing,

Concealment, 59.41

Destruction, 59.41

Exchange, 59.42

Failure to account, 59.43

Sale, 59.42

SEDITION,

Elements instruction, 60.02

SELF-DEFENSE,

Defense of dwelling, 54.18

Defense of person, 54.17, 54.17-A

Defense of property other than dwelling, 54.19

Felon, forcible, 54.20

Force, use of, 54.17, 54.18, 54.19, 54.20

**SELLING, OFFERING TO SELL, CULTIVATING OR
DISPENSING CONTROLLED STIMULANTS,
DEPRESSANTS, HALLUCINOGENIC DRUGS OR
ANABOLIC STEROIDS,**

Elements instruction, 67.15

**SELLING, OFFERING TO SELL, POSSESSING WITH INTENT
TO SELL OR DISPENSING SUBSTANCES DESIGNATED
UNDER K.S.A. 65-4113 TO A PERSON UNDER 18 YEARS
OF AGE,**

Elements instruction, 67.23

**SELLING BEVERAGE CONTAINER WITH DETACHABLE
TABS,**

Elements instruction, 64.18

SENTENCING PROCEEDINGS,

Cases that include, 51.10-A

Upward durational departure, 71.01 et. seq.

SERVICES,

Counterfeiting, 59.68

Value or units in issue, 59.70-A

Verdict Form, 68.11-A

Theft, 59.03

SEX OFFENSES,

Chapter containing, 57.00

Definitions, 57.18

PATTERN INSTRUCTIONS FOR KANSAS 3d

SEXUAL BATTERY,

Aggravated, 57.20, 57.24, 57.25

Elements instruction, 57.19

SEXUAL EXPLOITATION OF A CHILD,

Elements instruction, 57.12-A

SEXUAL INTERCOURSE,

Definition, 57.02

SEXUAL PERFORMANCE,

Promoting by a minor, 57.12-B

SEXUAL PREDATOR,

Civil commitment, 57.40

Burden of Proof, 57.42

Definitions, 57.41

SEXUAL RELATIONS,

Unlawful voluntary, 57.27

With Inmates, Etc., 57.26

SHOOTING,

Drive By, 64.02-A-1

SIGNING OF PETITION,

False, 60.24

SIMULATED CONTROLLED SUBSTANCES,

Definition, 67.18-B

Manufacture, 67.18

Possession, 67.18

Possession with intent to use, 67.17

Promotion, 67.19

Use, 67.17

SIMULATING LEGAL PROCESS,

Elements instruction, 60.21

SKIMMING,

Elements instruction, 66.10

SMOKING,

Failure to post signs, 62.11-A

SMOKING IN PUBLIC PLACE,

Unlawful, 62.11

Defense, 62.12

SODOMY,

Aggravated, 57.08, 57.08-A, 57.08-B

Elements instruction, 57.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

SOLICITATION, CRIMINAL,

Defense, 55.10

Elements instruction, 55.09

SOLICITATION OF A CHILD,

Aggravated indecent, 57.13

Indecent, 57.12

SPECIFIC INTENT CRIME,

Voluntary intoxication defense, 54.12-A

SPORTS BRIBERY,

Elements instruction, 66.06

SPORTS CONTEST,

Tampering, 66.08

SPOUSE,

Nonsupport, 58.07

STALKING, 56.39

STATE POSTAGE,

Unlawful use, 61.12

STATUTORY PRESUMPTION OF INTENT TO DEPRIVE,

Instruction, 54.01-B

STEROIDS,

Possession, 67.16

Possession with intent to sell, 67.14

Selling, offering to sell, cultivating or dispensing, 67.15

STIMULANTS,

Cultivating, 67.15

Dispensation, 67.15

Offer to sell with intent to sell, 67.14

Possession, 67.13, 67.16

Possession with intent to sell, 67.14

Selling or offering to sell, 67.13-B

STIPULATIONS,

Guiding instruction, 52.05

STORED GOODS,

Unauthorized delivery, 59.47

STREET OR ROAD,

Casting object onto, 59.52-59.55

PATTERN INSTRUCTIONS FOR KANSAS 3d

**SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113 -
SELLING, OFFERING TO SELL, POSSESSING WITH
INTENT TO SELL OR DISPENSING TO PERSON UNDER
18 YEARS OF AGE,**

Elements instruction, 67.23

SUICIDE,

Assisting, 56.08

SYMPATHY,

Cautionary instruction, 51.07

SYNDICALISM,

Permitting premises to be used for criminal, 60.04

Practicing criminal, 60.03

TAMPERING WITH A LANDMARK,

Elements instruction, 59.28

**TAMPERING WITH A LANDMARK - HIGHWAY SIGN OR
MARKER,**

Elements instruction, 59.29

TAMPERING WITH PUBLIC NOTICE,

Elements instruction, 60.23

TAMPERING WITH A PUBLIC RECORD,

Elements instruction, 60.22

TAMPERING WITH A SPORTS CONTEST,

Elements instruction, 66.08

TAMPERING WITH A TRAFFIC SIGNAL,

Aggravated, 59.31

Elements instruction, 59.30

TAX RETURNS,

Defense, 56.34

Disclosing information obtained in preparing, 56.33

TAX STAMP,

Possession by dealer without, 67.24

TELEFACSIMILE,

Harassment of court, 60.31

TELEPHONE,

Harassment, 63.14

Refusal to yield party line, 64.13

TERMS, EXPLANATIONS,

Chapter containing, 53.00

TESTIMONY,

Informant-for benefits, 52.18-A

PATTERN INSTRUCTIONS FOR KANSAS 3d

TESTIMONY OF INFORMANT FOR BENEFITS,

Instruction, 52.18-A

THEFT,

Elements instruction, 59.01

Identity, 62.13

Illustrative instructions, 69.02

Knowledge of property stolen, 59.01-A

Lost or mislaid property, 59.02

Multiple - Value not in issue, 59.01-C

Recently stolen property, 59.01; Notes on Use
Services, 59.03

Welfare fraud, 59.01-B

THEFT-MULTIPLE-VALUE NOT IN ISSUE,

Elements instruction, 59.01-C

THEFT DETECTION DEVICE,

Removal, 59.67-B

THEFT DETECTION SHIELDING DEVICE,

Manufacture, sale or distribution, 59.67

Possession, 59.67-A

THEFT OF CABLE TELEVISION SERVICES,

Elements instruction, 59.57

THEFT OF LOST OR MISLAID PROPERTY,

Elements instruction, 59.02

THEFT OF SERVICES,

Elements instruction, 59.03

THREAT,

Adulteration or contamination of food or drink, 56.23-A

Aggravated, 56.23-B

Criminal, 56.23

TIE-IN MAGAZINE SALE,

Elements instruction, 66.04

TIRES,

Sale of recut, 59.56

TOKENS, FALSE,

Disposal, 59.37

Manufacture, 59.37

TRAFFIC AND MISCELLANEOUS CRIMES,

Chapter containing, 70.00

PATTERN INSTRUCTIONS FOR KANSAS 3d

TRAFFIC OFFENSE,

Alcohol concentration of .08 or more, 70.01-A
B.A.T. .08 or more, 70.02-B
D.U.I., 70.01

**TRAFFIC IN CONTRABAND IN A CORRECTIONAL
INSTITUTION,**

Elements instruction, 60.27

TRAFFIC SIGNAL,

Aggravated tampering, 59.31
Tampering, 59.30

TRANSPORTATION,

Explosive device, 59.39
Incendiary device, 59.39

**TRANSPORTING ALCOHOLIC BEVERAGE IN OPENED
CONTAINER,**

Elements instruction, 70.03

TREASON,

Elements instruction, 60.01

TRESPASS,

Computer, 59.64-B
Criminal, 59.25-A
Health care facility, 59.25-A

TRIBAL GAMING LAW,

Violations, 65.36

UNAUTHORIZED DELIVERY OF STORED GOODS,

Elements instruction, 59.47

UNAUTHORIZED OFFICIAL ACT,

Performance, 60.20

UNIFORM CONTROLLED SUBSTANCES ACT,

67.13, 67.13-A, 67.13-B, 67.14, 67.15, 67.16
Receiving or acquiring proceeds derived from a violation,
67.25

UNLAWFUL ASSEMBLY,

Elements instruction, 63.02
Remaining, 63.03

UNLAWFUL COLLECTION BY A JUDICIAL OFFICER,

Elements instruction, 61.10

PATTERN INSTRUCTIONS FOR KANSAS 3d

- UNLAWFUL CONDUCT OF DOG FIGHTING,**
 - Attending, 65.19
 - Elements instruction, 65.18
- UNLAWFUL DEPRIVATION OF PROPERTY,**
 - Elements instruction, 59.04
- UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS,**
 - Elements instruction, 60.06-C
- UNLAWFUL DISCLOSURE OF A WARRANT,**
 - Elements instruction, 60.28
- UNLAWFUL DISPOSITION OF ANIMALS,**
 - Elements instruction, 65.17
- UNLAWFUL FAILURE TO REPORT A WOUND,**
 - Elements instruction, 64.15
- UNLAWFUL HUNTING,**
 - Posted land, 59.33-A
- UNLAWFUL INTEREST IN AN INSURANCE CONTRACT,**
 - Elements instruction, 61.08
- UNLAWFUL INTERFERENCE WITH A FIREFIGHTER,**
 - Elements instruction, 56.20
- UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS,**
 - Elements instruction, 59.37
- UNLAWFUL PROCUREMENT OF INSURANCE CONTRACT,**
 - Elements instruction, 61.09
- UNLAWFUL PURCHASE OF LOTTERY TICKET,**
 - Instruction, 65.34
- UNLAWFUL SALE OF LOTTERY TICKET,**
 - Instruction, 65.33
- UNLAWFUL SEXUAL RELATIONS WITH INMATES, ETC.,**
 - Elements instruction, 57.26
- UNLAWFUL SMOKING IN PUBLIC PLACE,**
 - Defense, 62.12
 - Elements instruction, 62.11
- UNLAWFUL USE OF A COMMUNICATION FACILITY TO FACILITATE FELONY DRUG TRANSACTION,**
 - Elements instruction, 67.22
- UNLAWFUL USE OF FINANCIAL CARD - ALTERED OR NONEXISTENT,**
 - Elements instruction, 59.36

PATTERN INSTRUCTIONS FOR KANSAS 3d

- UNLAWFUL USE OF FINANCIAL CARD - CANCELLED,**
Elements instruction, 59.35
- UNLAWFUL USE OF FINANCIAL CARD OF ANOTHER,**
Elements instruction, 59.34
- UNLAWFUL USE OF STATE POSTAGE,**
Elements instruction, 61.12
- UNLAWFUL USE OF WEAPONS - FELONY,**
Affirmative defense, 64.04
Elements instruction, 64.01
- UNLAWFUL USE OF WEAPONS - MISDEMEANOR,**
Affirmative defense, 64.04
Elements instruction, 64.02
- UNLAWFUL VOLUNTARY SEXUAL RELATIONS,**
Elements instruction, 57.27
- UNLAWFULLY EXPOSING ANOTHER TO A
COMMUNICABLE DISEASE,**
Elements instruction, 56.40
- UNLAWFULLY HOSTING MINORS CONSUMING ALCOHOL
OR CEREAL MALT BEVERAGES,**
Elements instruction, 58.12-E
- UNLAWFULLY MANUFACTURING A CONTROLLED
SUBSTANCE,**
Before July 1, 1999,
Elements Instruction, 67.21-A
Elements instruction, 67.21
- UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG,**
Elements instruction, 64.16
For resale, 64.17
- UNLAWFULLY PROVIDING INFORMATION ON AN
INDIVIDUAL CONSUMER,**
Elements instruction, 62.14
- UPWARD DURATIONAL DEPARTURE,**
Burden of proof, 71.02
Concluding instruction, 71.05
Effect on sentence, 71.04
Sentencing proceeding, 71.01
Unanimous verdict, 71.03
Verdict form,
Finding aggravating factor(s), 71.06
Sentence as provided by law, 71.07

PATTERN INSTRUCTIONS FOR KANSAS 3d

USE OF FORCE,

- Defense of dwelling, 54.18
- Defense of person, 54.17
- Defense of property other than dwelling, 54.19
- Duty to retreat, 54.17-A
- Felon, forcible, 54.20
- Initial aggressor, 54.22
- Law enforcement officer, 54.23
- Private person,
 - Not summoned to assist, 54.24
 - Summoned to assist, 54.23
- Resisting arrest, 54.25

VAGRANCY,

- Elements instruction, 63.08

VALUE IN ISSUE,

- Instruction, 59.70
- Verdict form, 68.11

VALUE NOT IN ISSUE,

- Theft, 59.01-C

VEHICULAR BATTERY,

- Elements instruction, 56.07-B

VEHICULAR HOMICIDE,

- Aggravated, 56.07-A
- Elements instruction, 56.07

VERDICT FORMS,

- Capital murder, 68.14-A-1, 68.14-B-1, 68.17
- Chapter containing, 68.00
- Counterfeiting merchandise or services, 68.11-A
- Guilty, form, 68.02
- Mental disease or defect, not guilty, 68.06
- Not guilty, form, 68.03
- Upward durational departure,
 - Finding aggravating factor(s), 71.06
 - Sentence as provided by law, 71.07
- Value in issue, 68.11

VICTIM OR WITNESS,

- Aggravated intimidation, 60.06-B
- Intimidation, 60.06-A

VIOLATION OF A PROTECTIVE ORDER,

- Elements instruction, 60.36

PATTERN INSTRUCTIONS FOR KANSAS 3d

VIOLATION OF CITY ORDINANCE,

Elements instruction, 70.05

VIOLATION OF KANSAS ODOMETER ACT,

Conspiring, 59.65-B

Operating a vehicle, 59.65-C

Tampering, 59.65-A

Unlawful device, 59.65-D

Unlawful sale, 59.65-E

Unlawful service, 59.65-F

VIOLATION OF PERSONAL RIGHTS,

Chapter containing, 62.00

VIOLATION OF TRIBAL GAMING LAW,

Elements Instruction, 65.36

VOLUNTARY INTOXICATION,

Defense, 54.12, 54.12-A-1

General intent crime, Defense, 54.12

Particular state of mind, Defense, 54.12-A-1

VOLUNTARY MANSLAUGHTER,

Elements instruction, 56.05

VOLUNTARY SEXUAL RELATIONS,

Unlawful, 57.27

**WAREHOUSE RECEIPT FRAUD - DUPLICATE OR
ADDITIONAL RECEIPT,**

Elements instruction, 59.46

WAREHOUSE RECEIPT FRAUD - ORIGINAL RECEIPT,

Elements instruction, 59.45

WARRANT, DISCLOSURE,

Unlawful, 60.28

WEAPONS,

Affirmative defense, 64.04

Aggravated violation, 64.03

Carrying concealed, 64.12

Unlawful use,

Felony, 64.01

Misdemeanor, 64.02

WELFARE FRAUD,

Theft, 59.01-B

WITNESS,

Corruptly influencing, 60.06

PATTERN INSTRUCTIONS FOR KANSAS 3d

WITNESSES,

- Credibility, 52.09
- Defendant, 52.10
- Expert, 52.14
- Number, 52.11

WITNESS OR VICTIM,

- Aggravated intimidation, 60.06-B
- Intimidation, 60.06-A

WORTHLESS CHECK,

- Causing unlawful prosecution, 59.10
- Defense, 59.07
- Elements instruction, 59.06
- Habitually giving on same day, 59.09
- Habitually giving within two years, 59.08
- Presumption of intent to defraud, 59.06-A

WOUND,

- Failure to report, 64.15

WRITTEN INSTRUMENT,

- Destroying, 59.14

