Pattern Instructions for Kansas—

CRIMINAL 3d

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(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 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). Such evidence need not be direct evidence of the charged crime. It may be circumstantial. *State v. Wilkerson*, 278 Kan. 147, Syl. ¶ 3, 91 P.3d 1181 (2004).

(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 to those of the criminal defendant. Exclusion of evidence of third party crimes is justified in many cases for the distinct reason that the risk

such evidence will mislead the jury or confuse the issues substantially outweighs its limited probative value, as where defendant offers evidence of other crimes to show a third party had a motive to kill the victim but offers no other evidence linking the third party to the crime. However, where there is conflicting evidence whether defendant or a third party killed the victim, evidence that the third party had killed others in the same distinctive way would be highly probative on the issue of identity. *Bryant* and related cases are criticized in Dennis Prated and Tammy M. Somogye, *Some Other Dude Did It (But Will You Be Allowed to Prove It?)*, 65 J. KAN. B.A. 28, 35 (May 1998). Authority under the Federal Rules of Evidence counterpart to K.S.A. 60-455 admits third party crimes evidence in these circumstances. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404 [15], p. 404-94 (1995) ["A defendant in order to prove mistaken identity may show that other crimes similar in detail have been committed at or about the same time by some person other than himself," citing *United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978), and *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965)]

The Committee believes it is unlikely that the rule stated in *Bryant* survives the decision in *State v. Marsh*, 278 Kan. 520, 529-532, 102 P.3d 445 (2004), *cert. granted on other issues* ___ U.S. ___, 125 S.Ct. 2517, 161 L.Ed.2d 1109 (2005). *Marsh* recognized that the "probative values" of direct and circumstantial evidence are intrinsically similar and disapproved decisions suggesting that when the prosecution relies upon direct evidence, such as eyewitness identification, circumstantial evidence offered by defendant that the crime may have been committed by a third party is inadmissible. The court limited the application of this so-called "third-party evidence rule" by tracing its origins to *State v. Neff*, 169 Kan. 116, Syl. ¶ 7, 218 P.2d 248, *cert. denied*, 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950), which stated the rule as follows: "Where the State relies on direct rather than on circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than defendant to commit the crime is incompetent *absent some other evidence to connect the third party with the crime.*" Evidence of the third party's motive alone would confuse the jury and permit it to indulge in speculation on collateral matters. Henceforth, "circumstantial evidence connecting a third party to a crime will not be excluded merely because the State relies upon direct evidence of the defendant's guilt." There is no bright line rule and admissibility is dependent upon the totality of circumstances. *See also State v. Evans*, 275 Kan. 95, 105, 63 P. 3d 220 (2003), which held that even when the State offers direct evidence from an eyewitness, "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 neither *Marsh* nor *Evans* involved evidence of third party crimes, their reasoning applies to such cases.

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

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

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

IV. CONCLUSIONS AND RECOMMENDATIONS

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

52.07 MORE THAN ONE DEFENDANT - LIMITED ADMISSIBILITY OF EVIDENCE

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

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

Notes on Use

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

Comment

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

which causes the trial court to question the reliability of the eyewitness identification, this instruction should not be given. *State v. Harris*, 266 Kan. 270, 278, 970 P.2d 519 (1998). The judge should omit from the instruction any factors that clearly do not relate to evidence introduced at trial. See, for example, *State v. Gaines*, 260 Kan. 752, 755, 926 P.2d 641 (1996), where the trial court modified PIK 52.20 by removing factor 6.

Comment

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

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

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

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

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

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

In *State v. Calvin*, 279 Kan. 193, 205-07, 105 P.3d 719 (2005), the court held the factors set out in PIK 3d 52.20 contemplate an eyewitness who does not know the defendant personally. Where the eyewitness personally knows the individual being identified, the cautionary eyewitness identification instruction is not necessary. The accuracy of the identification can be sufficiently challenged through cross-examination.

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.

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.

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

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

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

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

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

Accessory: The term "accessory" is not used in the Kansas Criminal Code. It is, however, used in K.S.A. 8-2101, Uniform Act Regulating Traffic, Parties to a crime established by uniform act; K.S.A. 48-3003, Code of Military Justice, Accessory after the fact; and K.S.A. 50-125, Restraint of trade, Acts deemed unlawful. In case law the term is used interchangeably with the concept of "aiding and abetting." See generally *State v, Kliewer*, 210 Kan. 820, 504 P.2d 580; *State v. McMullen*, 20 Kan. App. 2d 985, 894 P.2d 251 (1995); *State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999); and *State v. Davis*, 268 Kan. 661, 998 P.2d 1127 (2000). See also comment to PIK 3d 54.05 for discussion of the concept of "aiding and abetting."

Act: K.S.A. 21-3110 (1).

Agent of a Corporation: K.S.A. 21-3206 (2).

Aiding and Abetting: See Accessory above.

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

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

Believes: See Reasonable Belief.

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

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

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

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

Compulsion: K.S.A. 21-3209; PIK 3d 54.13, Compulsion; *State v. Dunn*, 243 Kan. 414, 421, 758 P.2d 718 (1988); *State v. Davis*, 256 Kan. 1, 883 P.2d 735 (1994). See *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993) for discussion of defense of compulsion and necessity. See *State v. Alexander*, 24 Kan. App. 2d 817, 953 P.2d 685 (1998), for discussion that compulsion does not include an emergency absent a third party threat.

Conduct: K.S.A. 21-3110 (3).

Conduct, Intentional: K.S.A. 21-3201 (b). See *State v. Coyote*, 268 Kan. 726, 1 P.3d 836 (2000).

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

Consideration: K.S.A. 21-4302 (c); PIK 3d 65.07, Gambling - Definitions.

Conspiracy: K.S.A. 21-3302; See generally *State v. Crockett*, 26 Kan. App. 2d 202, 987 P.2d 1101 (1999); *State v. Smith*, 268 Kan. 222, 993 P.2d 1213 (1999); PIK 3d 55.05, Conspiracy - Defined.

Contraband: K.S.A. 21-3826 pertaining to contraband in a correctional institution. PIK 3d 60.27, Traffic in Contraband in a Correctional Institution.

Conviction: K.S.A. 21-3110 (4). See also, K.S.A. 8-285 (b).

Copulation: See *State v. Switzer*, 244 Kan. 449, 769 P.2d 645 (1989).

Committed Person: K.S.A. 21-3423.

Crime: K.S.A. 21-3105. See also K.S.A. 21-3102(1) regarding definitions of crimes.

Criminal Intent: K.S.A. 21-3201; exclusion 21-3202.

Criminal Purpose: A general intent or purpose to commit a crime when an opportunity or facility is afforded for the commission thereof. *State v. Houpt*, 210 Kan. 778, 782, 504 P.2d 570 (1972); *State v. Bagemehl*, 213 Kan. 210, 515 P.2d 1104 (1973), as the term is used in K.S.A. 21-3201.

Criminal Solicitation: K.S.A. 21-3303; PIK 3d 55.09, Criminal Solicitation.

Deadly Weapon: An instrument which, from the manner in which it is used, is calculated or likely to produce death or serious injury. *State v. Guebara*, 24 Kan. App. 2d 260, 944 P.2d 164 (1997); *State v. Colbert*, 244 Kan. 422, 769 P.2d 1168 (1989). When applied in an aggravated robbery case, this definition is applied subjectively, from the victim's point of view. In an aggravated battery case, the victim's perceptions of the instrument used are irrelevant. *Colbert*, 244 Kan. at 426.

Death: K.S.A. 77-205.

Deception: K.S.A. 21-3110 (5).

Deprive Permanently: K.S.A. 21-3110 (6).

Drug Paraphernalia: See PIK 3d 67.18-B.

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

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

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

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

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

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

Firearm: K.S.A. 21-3110(9).

Forcible Felony: K.S.A. 21-3110 (9). A crime not specifically listed in K.S.A. 21-3110(8) [*now 21-3110(9)*] but declared inherently dangerous in K.S.A. 21-3436 may be a forcible felony if the circumstances of the commission of the crime and the abstract elements of the crime indicate the threat or use of physical force or violence against a person. *State v. Mitchell*, 262 Kan. 687, 942 P.2d 1 (1997).

Gambling: K.S.A. 21-4303.

Gambling Device: K.S.A. 21-4302 (d)(1); PIK 3d 65.07, Gambling - Definitions.

Gambling Place: K.S.A. 21-4302 (e); PIK 3d 65.07, Gambling - Definitions; *State v. Schlein*, 253 Kan. 205, 854 P.2d 296 (1993).

Hearing Officer: K.S.A. 21-3110 (20) (d).

Heat of Passion: Any intense or vehement emotional excitement such as rage, anger, hatred, furious resentment, fright, or terror which was spontaneously provoked from the circumstances. Such emotional state of mind must be of such a degree as would cause an ordinary person to act on impulse without reflection. *State v. Gadelkarim*, 247 Kan. 505, 802 P.2d 507 (1990); *State v. Guebara*, 236 Kan. 791, 696 P.2d 381 (1985); *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979); *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); *State v. McDermott*, 202 Kan. 399, 449 P.2d 545 (1969); PIK 3d 56.04(e), Homicide Definitions.

Inherently Dangerous Felony: K.S.A. 21-3436.

Intent to Defraud: K.S.A. 21-3110 (10).

Intentional Conduct: K.S.A. 21-3201(b).

Intoxication or Intoxicated: K.S.A. 65-4003(10), and 65-5201(g) & (z). See also K.S.A. 21-3208 and PIK 3d 54.11 through 54.12-A-1.

Jeopardy: K.S.A. 21-3108 (1) (c).

Judicial Officer: K.S.A. 21-3110(20)(c).

Knowing or Knowingly: K.S.A. 21-3201 (b).

Law Enforcement Officer: K.S.A. 21-3110 (11).

Lewd Fondling or Touching: In a prosecution for indecent liberties with a child (K.S.A. 21-3503), *lewd fondling or touching* may be defined as a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the child or the offender or both. Lewd fondling or touching does not require contact with the sex organ of one or the other. *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977). Definition approved and further held that lewd

fondling or touching is not the equivalent of rude or insulting touching as found in K.S.A. 21-3412, battery. *State v. Banks*, 273 Kan. 738, 46 P.3d 546, 553 (2002).

Lottery: K.S.A. 21-4302 (b). *State ex rel. Stephen v. Finney*, 254 Kan. 632, 867 P.2d 1034 (1994).

Material: K.S.A. 21-4301 (c) (2) (for obscenity).

Merchandise: K.S.A. 21-4403 (b) (1) (for deceptive commercial practice).

Misdemeanor: K.S.A. 21-3105.

Necessitous Circumstances: PIK 3d 58.06 and 58.07; *State v. Filor*, 28 Kan. App. 2d 208, 13 P.3d 926 (2000).

Obscene Material: K.S.A. 21-4301 (c); K.S.A. 21-4301a(a); PIK 3d 65.03, Promoting Obscenity - Definitions.

Obtain: K.S.A. 21-3110 (12).

Obtains or Exerts Control: K.S.A. 21-3110 (13); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974).

Offense: A violation of any penal statute of this State. See "crime" above.

Overt Act: For attempt, see Comment to PIK 3d 55.01, Attempt; for conspiracy, see PIK 3d 55.06, Conspiracy-Act in Furtherance Defined.

Owner: K.S.A. 21-3110 (14); *State v. Parsons*, 11 Kan. App. 2d 220, 720 P.2d 671 (1986).

Party Line: K.S.A. 21-4211 (2) (a).

Passenger Vehicle: K.S.A. 21-3744; K.S.A. 8-126(x).

Peace Officer: See *Law Enforcement Officer*, above.

Penal Institution: A penitentiary, state farm, reformatory, prison, jail, house of correction, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses. *State, ex rel., v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966). See also, K.S.A. 21-3826 (traffic in contraband in a correctional institution).

Performance: K.S.A. 21-4301(c)(4) (for obscenity).

Person: K.S.A. 21-3110 (15).

Personal Property: K.S.A. 21-3110 (16).

Possession: Having control over a place or thing with knowledge of and the intent to have such control. *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). Definition approved in *City of Overland Park v. McBride*, 253 Kan. 774, 861 P.2d 1323 (1993); *State v. Graham*, 244 Kan. 194, 768 P.2d 259 (1989); *State v. Kulper*, 12 Kan. App. 2d 301, 744 P.2d 519 (1987); *State v. Flinchpaugh*, 232 Kan. 831, 833, 659 P.2d 208 (1983); *State v. Adams*, 223 Kan. 254, 256, 573 P.2d 604 (1977); *State v. Goodseal*, 220 Kan. 487, 553 P.2d 279 (1976); and *State v. Neal*, 215 Kan. 737, 529 P.2d 114 (1974). This definition, which focuses on control, was approved in *State v. Curry*, 29 Kan. App. 2d 392, 395, 28 P.3d 1019 (2001). For definition of constructive possession, see *State v. Galloway*, 16 Kan. App. 2d 54, 63, 817 P.2d 1124 (1991). See Comment to PIK 3d 64.06, Criminal Possession of a Firearm - Felony. See also PIK 3d 67.13-D, Possession of a Controlled Substance Defined.

Premeditation: See PIK 3d 56.04, Homicide Definitions.

Presumption, Evidentiary: An assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. K.S.A. 60-413. But see *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983). (The jury must be clearly instructed as to the nature and extent of presumptions and that such does not shift the burden of proof to the defendant.)

Private Place: K.S.A. 21-4001 (b).

Probable Cause: Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the matter being sought to be proved. *State v. Starks*, 249 Kan. 516, 820 P.2d 1243 (1991).

Property: K.S.A. 21-3110 (17).

Prosecution: K.S.A. 21-3110 (18).

Public Employee: K.S.A. 21-3110 (19).

Public Officer: K.S.A. 21-3110 (20). A list of public officers is included under this section.

Purposeful: K.S.A. 21-3201 (b).

Real Property or Real Estate: K.S.A. 21-3110 (21).

Reasonable Belief: A belief based on circumstances that would lead a reasonable person to that belief. *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). See *Probable Cause*, above.

Reasonable Doubt: See PIK 3d 52.04, Reasonable Doubt.

Reckless Conduct: K.S.A. 21-3201 (c).

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

Retailer: See K.S.A. 21-4404(b)(1) pertaining to tie-in magazine sales.

Sale: K.S.A. 21-4403 (b) (3), as it relates to deceptive commercial practices. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

Scope of Authority: The performance of services for which an employee has been employed or which are reasonably incidental to his or her employment. See PIK-Civil 3d 107.06, Agent - Issue as to Scope of Authority.

Security Agreement: K.S.A. 84-9-105 (l).

Security Interest: K.S.A. 84-1-201(37).

Sell: K.S.A. 21-4404 (b) (3) for tie-in magazine sales. See PIK 3d 67.13-A, Controlled Substances - Sale Defined.

Services: K.S.A. 21-3704 (b).

Sexual Intercourse: K.S.A. 21-3501 (1).

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

Solicit or Solicitation: K.S.A. 21-3110 (22).

Sports Contest, Participant and Official: K.S.A. 21-4406.

State: K.S.A. 21-3110 (23).

Stolen Property: K.S.A. 21-3110 (24).

Temporarily Deprive: To take from the owner the possession, use, or benefit of his or her property with intent to deprive the owner of the temporary use thereof. See PIK 3d 59.04, Criminal Deprivation of Property.

Terror and Terrorize: The word "terror" means an extreme fear or fear that agitates body and mind; and "terrorize" means to reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

Threat: K.S.A. 21-3110 (25). See *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994), regarding differences between threat in robbery and threat in theft by threat; and *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998) (utterance must be more than mere political statement or idle talk; proper test to determine whether a statement is a threat is objective, not subjective, i.e., that of a reasonable person). See also *State v. Moore*, 269 Kan. 27, 4 P.3d 1141 (2000), for the proposition and discussion that in a robbery case actual fear generally need not be strictly proven, but that the law will presume fear if there are adequate indications of the victim's state of mind.

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

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

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

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

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

Written Instrument: K.S.A. 21-3110 (26).

[leased or rented the property] [borrowed the book(s) or other material from a library] as the address appears in the information supplied by the person at the time of the [leasing or renting] [borrowing] or at [his][her] last known address.)

Notes on Use

For authority, see K.S.A. 21-3702(a)(1) on false identification; (a)(2) on failure to return leased or rented property; (a)(3) on destroying locks and other securing devices; (a)(4) on destroying the property taken; and (b) on failure to return book(s) or other material from a library. "Notice" is defined in 21-3702(c). See PIK 3d Chapter 59.00, Crimes Against Property, for the use of this instruction. Paragraph (e) of the instruction is to be used only for prosecution of a misdemeanor under K.S.A. 21-3701 where the object of the alleged theft is a book or other material borrowed from a library.

Comment

State v. Smith, 223 Kan. 192, 573 P.2d 985 (1977), upheld the constitutionality of a statutory presumption where it is rebuttable and governs only the burden of going forward with the evidence, not the ultimate burden of proof. The Court stated: ". . . the use of a presumption to establish prima facie evidence does not destroy a defendant's presumption of innocence, nor does it invade the province of the jury as fact finders." It does require the defendant to go forward with evidence to rebut the presumption. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976). See Comment to PIK 3d 54.01, Inference of Intent, on the matter of shifting the burden on the defendant to produce evidence.

State v. Johnson, 233 Kan. 981, 986, 666 P.2d 706 (1983), again affirms that this instruction protects the defendant's rights when there exists a statutory presumption of intent to deprive.

54.02 CRIMINAL INTENT - IGNORANCE OF STATUTE OR AGE OF MINOR IS NOT A DEFENSE

It is not a defense that the accused did not have knowledge of (the existence or constitutionality of or the scope or meaning of the terms used in the statute under which the accused is prosecuted) (the age of a minor, even though age is a material element of the crime with which [he][she] is charged).

Notes on Use

For authority, see K.S.A. 21-3202.

54.03 IGNORANCE OR MISTAKE OF FACT

It is a defense in this case if by reason of ignorance or mistake the defendant did not have at the time the mental state which the statute requires as an element of the crime. (The defendant may be convicted of a lesser offense if the facts were as [he][she] believed them to be and the other evidence in the case establishes such lesser offense.)

Notes on Use

For authority, see K.S.A. 21-3203 (1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

The parenthetical material should only be given in cases where a lesser offense is included in the greater offense committed.

As provided by the authorizing statute (K.S.A. 21-3203), this should not be given in cases where there are exclusions of requirement of proof of criminal intent. See K.S.A. 21-3202 and PIK 3d 54.02, Criminal Intent - Ignorance of Statute or Age of Minor Is Not a Defense.

Likewise, this instruction has no application to and should not be given in circumstances involving statutes providing for guilt without criminal intent. See Comment to PIK 3d 54.01-A, General Criminal Intent.

54.04 IGNORANCE OR MISTAKE OF LAW - REASONABLE BELIEF

It is a defense to the charge made against the defendant if the defendant reasonably believed that (his)(her) conduct did not constitute a crime and:

(the crime was defined by an administrative regulation or order which was not known to the defendant and had not been published, as provided by law, and the defendant could not have acquired such knowledge by the exercise of ordinary care.)

(the defendant acted in reliance upon a statute which later was determined to be invalid.)

(the defendant acted in reliance upon an order or opinion [of the Supreme Court of Kansas] or [a United States appellate court] later overruled or reversed.)

(the defendant acted in reliance upon an official interpretation of the [statute] [regulation] or [order] defining the crime made by a [public officer] or [agency] legally authorized to interpret such statute.)

Notes on Use

For authority, see K.S.A. 21-3203(2). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

Whether there has been a publication of the administrative regulations, a determination of the invalidity of statute, an overruling of court decisions or official interpretations by officer or agency legally authorized, are all matters of judicial notice and the existence of which can and should be determined and instructed on as a matter of law. The defendant's act in reliance thereon and the other provisions are questions of fact to be determined by the jury.

This defense is not applicable when reliance is based on decisions of the various district, county or other lower courts of the State. The term "public officer" in subparagraph (d) of K.S.A. 21-3203(2) does not include judges and magistrates. *State v. V.F.W. Post No. 3722*, 215 Kan. 693, 527 P.2d 1020 (1974).

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

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

State v. Jackson, 280 Kan. 16 , 118 P.3d 1238 (2005), held the trial court did not err when it gave PIK 54.05 and substituted the following language for PIK 54.06:

> "In addition, a person is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.
>
> "All participants in a crime are equally guilty without regard to the extent of their participation. However, 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 or abettor. To be guilty of aiding and abetting in the commission of a crime the defendant must wilfully and knowingly associate himself with the unlawful venture and wilfully participate in it as he would in something he wishes to bring about or make succeed."

The instruction was warranted by unique facts in the case and, because withdrawal was not available as a defense, did not improperly preclude the jury from considering defendant's claim of dissociation from other participants.

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 the 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); *State v. Percival*, 32 Kan. App. 2d 82, 95, 79 P.3d 211 (2003) (while prosecution offered evidence defendant participated in robbery, jury could 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.

State v. Engelhardt, 280 Kan. 113, 119 P.3d 1148 (2005), held it was error to give PIK 54.06 in addition to PIK 54.05 in a prosecution for premeditated first-degree murder. Under K.S.A. 21-3205(1), upon which PIK 54.05 is based, a person to be guilty of aiding and abetting a premeditated first-degree murder must be found, beyond a reasonable doubt, to have had the requisite premeditation to murder the victim. Because the jury could have found the person defendant aided never intended to kill the victim during a stabbing, the jury improperly could have understood PIK 54.06 to permit it to convict, without a finding of premeditation, because the murder was reasonably foreseeable. If the person defendant aided intended only to inflict serious bodily harm, *i.e.* aggravated battery, defendant could have been held liable as an aider and abettor of felony murder. However, no instruction was given on felony murder or aggravated battery. Further, if an instruction on felony murder had been given, it is well settled that PIK 54.05 rather than 54.06 is the appropriate aiding and abetting instruction. *State v. Gleason, supra.*

When this instruction is properly given, the fact that specific intent is required to support conviction as an aider or abetter does not make it improper or confusing also to instruct the jury that specific intent is not required to support conviction as a principal. *State v. Mehling*, 34 Kan.App.2d 122, 115 P.3d 771 (2005) (violations of securities laws).

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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.

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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.

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).

Even when it is appropriate to give this instruction in a prosecution for premeditated first-degree murder or intentional second-degree murder, evidence of voluntary intoxication *alone* will not justify an instruction on unintentional but reckless second-degree murder as a lesser included offense. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004).

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.

54.13 COMPULSION

Compulsion is a defense if the defendant acted under the compulsion or threat of imminent infliction of death or great bodily harm, and (he)(she) reasonably believed that death or great bodily harm would have been inflicted upon (him)(her) or upon (his)(her) [(parent) (spouse) (child) (brother) (sister)] had (he)(she) not acted as (he)(she) did.

(Such a defense is not available to one who willfully or wantonly placed [himself][herself] in a situation in which it was probable that [he][she] would have been subjected to compulsion or threat.)

Notes on Use

For authority, see K.S.A. 21-3209. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

This instruction is not to be used in cases of murder or voluntary manslaughter. K.S.A. 21-3209.

The second paragraph should be used only when there is some evidence indicating that the defendant willfully or wantonly placed himself or herself in the situation indicated.

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17, Use of Force in Defense of a Person, in the use of "immediate" in lieu of the statutory "imminent". The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate."

The Committee is of the opinion that the same rationale the Court applied in *Hundley* applies in compulsion cases.

In *State v. Crawford*, 253 Kan. 629, 861 P.2d 791 (1993), the Supreme Court held that the district court did not err by adding the following language to the

instruction: "A threat of future injury is not enough, particularly after danger from the threat has passed."

In *State v. Hunter*, 241 Kan. 629, 642, 740 P.2d 559 (1987), the Court considered the statutory prohibition on use of the compulsion defense to charges of murder and manslaughter. The Court held that compulsion may be used as a defense to felony murder when compulsion is a defense to the underlying felony.

A person charged with escape from lawful custody may not claim the defense of compulsion unless the following conditions exist: (1) The prisoner is faced with a threat of imminent infliction of death or great bodily harm; (2) there is no time for complaint to the authorities or there exists a history of futile complaints which makes any result from such complaints illusory; (3) there is not time or opportunity to resort to the courts; (4) there is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992). The Court noted that the fifth condition should refer to "imminent threat", rather than "immediate threat", to conform to the statutory language. 250 Kan. at 309.

The defense of compulsion is applicable to absolute liability traffic offenses. *State v. Riedl*, 15 Kan. App. 2d 326, 329, 807 P.2d 697 (1991).

The defense of compulsion requires coercion or duress to be present, imminent, impending, and continuous. It may not be invoked when the defendant had a reasonable opportunity to escape or avoid the criminal act without undue exposure to death or serious bodily harm. *State v. Matson*, 260 Kan. 366, 385, 921 P.2d 790 (1996); *State v. Jackson*, 280 Kan. 16, 118 P.3d 1238 (2005).

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

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

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

The defense of self-defense requires both a subjective and a reasonable belief that use of force was necessary. In contrast, voluntary manslaughter is an intentional killing upon an unreasonable belief that self-defense is necessary. K.S.A. 21-3403(b); *State v. Holmes*, 278 Kan. 603, 102 P.3d 406 (2004).

54.17-A NO DUTY TO RETREAT

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

Notes on Use

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

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

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 21-3301(e), (f).

If the information charges an attempted crime, omit paragraph B. However, if the attempted crime is submitted as a lesser included offense, omit paragraph A.

If the attempted crime is submitted as a lesser offense, PIK 3d 68.09, Lesser Included Offenses, should be given.

The elements of the applicable substantive crime should be referred to or set forth in the concluding portion of the instruction.

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

Comment

Under K.S.A. 21-3301, an attempt to commit a crime consists of three essential elements: (1) the intent to commit the crime, (2) an overt act toward the perpetration of the crime, and (3) a failure to consummate it. *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995); *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994); *State v. Cory*, 211 Kan. 528, 532, 506 P.2d 1115 (1973); *State v. Gobin*, 216 Kan. 278, 280, 281, 531 P.2d 16 (1975).

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

recognized as a crime in Kansas, as it would required proof of an intent to commit an unintentional act, a logical impossibility. *State v. Shannon*, 258 Kan. at 429. In *State v. Clark*, 261 Kan. 460, 466-67, 931 P.2d 664 (1997), the Court acknowledged the propriety of an instruction on attempted second-degree murder charged under subsection (a) of K.S.A. 21-3402, though the Court held that the evidence in that particular case did not warrant the instruction.

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. There is no definitive rule concerning what constitutes an overt act; each case depends on the inferences a jury may reasonably draw from the facts. The overt act necessarily must extend beyond mere preparations made by the accused and must approach sufficiently near to consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. *State v. Zimmerman*, 251 Kan. 54, 833 P.2d 925 (1992); *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988); *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985). See also, *State v. Salcido-Corral*, 262 Kan. 392, 940 P.2d 11 (1997); *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993); *State v. Carr*, 230 Kan. 322, 327, 634 P.2d 1104 (1981); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 305, 624 P.2d 964 (1981); *State v. Sullivan & Sullivan*, 224 Kan. 110, 122, 578 P.2d 1108 (1978); *State v. Gobin*, 216 Kan. at 280-281.

In *State v. Kleypas*, 272 Kan. 894, 940-41, 40 P.3d 139 (2001), the Supreme Court recommended that PIK 55.01 be amended to include the term "overt act" rather than "act" and to include language indicating that mere preparation is insufficient to constitute an overt act. The Committee's definitional paragraph also includes language from *State v. Gobin*, 216 Kan. at Syl. 3.

In *State v. Calvin*, 279 Kan. 193, 204, 105 P.3d 710 (2005), the Supreme Court noted that the better practice is to include the definition of "overt act" that is contained in PIK 55.01 whenever the court is instructing on an attempted crime, though in that particular case, the Court refused to reverse, because the defendant had not requested the instructions, and the court found that the jury could not have been mislead into believing that mere preparations constituted the overt act.

Holding that attempted rape does not require attempted penetration or even that the defendant be in close proximity to the victim, the Supreme Court upheld the conviction for attempted rape in *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005). The Court noted that the line between preparation and overt act may be indistinct, and held that each case is dependent on its particular facts and the reasonable inferences the jury may draw from those facts. The Court stated, "Although the overt act does not have to be the last proximate act in the consummation of the crime, it must be either the first or some subsequent step in a direct movement toward the commission of the crime after the preparations are made."

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

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

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

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

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

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

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

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

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

In *State v. Martens*, 273 Kan. 179, 42 P.3d 142, *modified* 274 Kan. 459, 54 P.3d 960 (2002), the Supreme Court reversed a conviction under K.S.A. 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.

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55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

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

Comment

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

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

In *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005), the Supreme Court relied upon *Jones* to uphold a defendant's conviction for attempted rape of a child even though the individual whom he had solicited to procure a child for him to have sex with had created a fictional child to describe to defendant. The Court rejected the defendant's argument that he could not have committed attempted rape against a fictional victim, holding that K.S.A. 21-3301(b) "eliminates both factual and legal impossibility as a defense."

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

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).

Evidence of defendant's voluntary intoxication alone will not justify an instruction on reckless second degree murder as a lesser offense of premeditated first-degree murder. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004).

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).

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).

Evidence of defendant's voluntary intoxication alone will not justify an instruction on reckless second degree murder as a lesser offense of premeditated first-degree murder. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004).

56.39 STALKING

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

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

1. **That the defendant intentionally, maliciously and repeatedly (followed) (harassed) _____;**
2. **That the defendant made a credible threat against _____ with the intent to place _____ in reasonable fear for (his)(her) safety; and**
3. **That these acts occurred between the _____ day of _____, _____, and the _____ day of _____, _____, in _____ County, Kansas.**

[Harassment means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.]

[Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.]

[Credible threat means a verbal or written threat, including that which is communicated via electronic means, or a threat implied by a pattern of conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety.]

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

Notes on Use

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

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

This statute was amended by the Legislature in 1994 and 1995. Please consult the 1993 Stalking instruction for offenses between July 1, 1993 and June 30, 1994. The 1994 statute was declared unconstitutional in *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

In *Smith v. Martens*, 279 Kan. 242, 106 P.3d 28 (2005), defendant challenged the constitutionality of the Protection from Stalking Act, K.S.A. 60-31a01 *et seq.* The Court ruled that K.S.A. 60-31a02, which contains definitions of "Stalking," "Harassment," and "Course of Conduct" is neither unconstitutionally vague nor overbroad.

The bracketed definitions should be given when harassment is alleged.

This statute does not apply to conduct which occurs during labor picketing.

Constitutionally protected activity is not included within the meaning of "course of conduct."

CHAPTER 57.00

SEX OFFENSES

57.01 RAPE

The defendant is charged with the crime of rape. 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 the act of sexual intercourse was committed without the consent of _____ under circumstances when:

(a) (she)(he) was overcome by (force) (fear); and

or

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

or

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

or

(d) (she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and

or

2. That _____ was under 14 years of age when the act of sexual intercourse occurred; and

or

2. That _____ consented to sexual intercourse but (his) (her) consent was obtained by the defendant knowingly misrepresenting that the sexual intercourse was a (medically) (therapeutically) necessary procedure; and

or

2. That _____ consented to sexual intercourse but (his) (her) consent was obtained by the defendant

knowingly misrepresenting that the sexual intercourse was a legally required procedure within the scope of the defendant's authority; and

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

Notes on Use

For authority, see K.S.A. 21-3502. Rape is a severity level 1, person felony unless the intercourse was consensual and the consent was obtained by a knowing misrepresentation made by the defendant that the intercourse was medically, therapeutically, or legally necessary procedure, then rape is a severity level 2, person felony.

The appropriate category for paragraph two of the instruction should be selected as required by the facts.

In addition, PIK 3d 57.02, Sexual Intercourse - Definition, should be given.

Comment

In 1996, the Legislature amended K.S.A. 21-3502 to include as rape, consensual sexual intercourse when the consent was obtained by a knowing misrepresentation of medical, therapeutic or legal necessity.

Whether a victim is overcome by fear, for purposes of K.S.A. 21-3502(a)(1)(A), is a question to be resolved by the fact finder. The force required to sustain a rape conviction does not require a rape victim to resist the assailant to the point of becoming the victim of a battery or aggravated assault nor does Kansas law require that a rape victim be physically overcome by force in the form of beating or physical restraint in addition to forced sexual intercourse. See *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994).

Comprehensive amendments in 1993 to the statutes defining sex crimes defined sexual intercourse or sodomy with a child who is less than 16 years of age as crimes regardless of whether the defendant is related to the victim or not. In cases involving sexual intercourse, defendant is guilty of rape or aggravated indecent liberties, and in cases of sodomy, defendant is guilty of criminal sodomy or aggravated criminal sodomy, depending upon whether the child is under 14 years of age or is between 14 and 16 years of age. Aggravated incest under K.S.A. 21-3603(2)(A) now applies only to "otherwise lawful sexual intercourse or sodomy." Thus, it does not apply to sexual intercourse or sodomy with a child who is less than 16, since such conduct is unlawful. Nor does it apply to non-consensual sexual intercourse with a child who is between 16 and 18 years of age since that conduct is, respectively, rape or criminal sodomy. It applies only to consensual conduct with a child who is between 16 and

18 years of age. Thus, *State v. Sims*, 33 Kan. App. 2d 762, 108 P.3d 1007 (2005), held a parent was properly charged with rape of his child who was less than 14 years of age and could not be charged with aggravated incest. Decisions under former statutes, such as *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), and *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), holding that parents could be charged with aggravated incest but not with forcible rape or indecent liberties with a child are not authoritative under current statutes.

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

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. Schriner*, 215 Kan. 86, 90, 523 P.2d 703 (1974); *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). However, rape constitutes "bodily harm" to make a kidnapping aggravated

kidnapping. *State v. Barry*, 216 Kan. 609, 618, 533 P.2d 1308 (1974); *State v. Ponds and Garrett*, 218 Kan. 416, 420-421, 543 P.2d 967 (1975); *State v. Adams*, 218 Kan. 495, 504, 545 P.2d 1134 (1976).

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

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

The crime of 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 [2(a), (b) and (c)] absent substantial evidence to support each alternative means. *State v. Ice*, 27 Kan. App. 2d 1, 997 P.2d 737 (2000).

57.01-A RAPE - DEFENSE OF MARRIAGE

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

Notes on Use

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

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

57.02 SEXUAL INTERCOURSE - DEFINITION

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

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

(a) Generally recognized health care practices; or

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

Notes on Use

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

Comment

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

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

The sufficiency of penetration is discussed in *State v. Ragland*, 173 Kan. 265, 246 P.2d 276 (1952). In *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994), the Kansas Supreme Court held that actual penetration of the vagina or rupturing of the hymen is not required; penetration of the vulva or labia is sufficient to constitute sexual intercourse.

57.03 RAPE, CREDIBILITY OF PROSECUTRIX'S TESTIMONY

The Committee recommends that there be no separate instruction given.

Comment

The Committee believes PIK 3d 52.09, Credibility of Witnesses, adequately covers the credibility of the testimony of the prosecutrix. See *State v. Loomer*, 105 Kan. 410, 184 Pac. 723 (1919) and 65 Am. Jur. 2d, Rape §§ 86-87.

The credibility of the prosecutrix's testimony is a question of fact for the jury. See *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973), a prosecution for rape and indecent liberties with a child; *State v. Griffin*, 210 Kan. 729, 504 P.2d 150 (1972), a prosecution for indecent liberties with a child; *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971), a prosecution for forcible rape; and *State v. Wade*, 203 Kan. 811, 457 P.2d 158 (1969), a prosecution for burglary and attempted forcible rape.

In *Nichols*, the Supreme Court approved the trial court's refusal to give a requested cautionary instruction on the testimony of a 13-year-old prosecutrix where the instructions as a whole were adequate.

Cases Dealing With Rape Shield Statute (K.S.A. 21-3525)

Under K.S.A. 21-3525, a complaining witness' prior sexual conduct is generally inadmissible since prior sexual activity, even with the accused, does not imply consent to the complained of act. The statute requires that the defendant file a written motion at least seven days prior to trial if such inquiry will be made and requires the court to conduct an in camera hearing to determine if the proffered evidence is relevant and admissible.

The rape shield statute was held to be constitutional in *In re Nichols*, 2 Kan.App.2d 431, 580 P.2d 1370 (1978); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979).

In *State v. Williams,* 235 Kan. 485, 681 P.2d 660 (1984), the Supreme Court held that testimony concerning a rape victim's prior sexual conduct with the defendant was properly held irrelevant because it was too remote.

A complaining witness' statement to the defendant that she had gonorrhea, to stop an ongoing sexual assault upon her, did not justify inquiry into her prior history of gonorrhea in order to attack her credibility. *State v. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984).

However, the rape shield statute does allow evidence of a victim's prior sexual conduct if it is proved relevant to any fact at issue. When consent is the sole issue in a disputed rape charge, the truthfulness of the complaining witness' testimony is

an essential element in the State's prosecution and it is prejudicial error to exclude rebuttal evidence bearing on the complaining witness' credibility even where such testimony is collateral to the issue of consent. *State v. Beans*, 247 Kan. 343, 800 P.2d 145 (1990).

In *State v. Atkinson*, 276 Kan. 921, 80 P.3d 1143 (2003), the Supreme Court held that the defendant's fundamental right to a fair trial was violated when the trial court refused to allow the defendant to confront the prosecuting witness on a prior incident which could have explained the presence of defendant's semen found during the rape examination.

In *State v. Perez*, 26 Kan.App.2d 777, 995 P.2d 372 (1999), *rev. denied* 269 Kan. 939 (2000), the Court of Appeals held that the reliance on K.S.A. 21-3525 to exclude evidence which is an integral part of the defendant's theory violates the defendant's fundamental right to a fair trial as the right to present one's theory of defense is absolute.

The *Perez* opinion further provides that in a prosecution for sex offenses, when addressing whether prior sexual conduct of a complaining witness is relevant to the issues of consent and credibility, factors to be considered include: (1) whether there was prior sexual conduct by complainant with defendant; (2) whether the prior sexual conduct rebuts medical evidence on proof of origin of semen, venereal disease, or pregnancy; (3) whether distinctive sexual patterns so closely resembled defendant's version of the alleged encounter so as to tend to prove consent or to diminish complainant's credibility on the questioned occasion; (4) whether prior sexual conduct by complainant with others, known to the defendant, tends to prove he or she believed the complainant was consenting to his or her sexual advances; (5) whether sexual conduct tends to prove complainant's motive to fabricate the charge; (6) whether evidence tends to rebut proof by the prosecution regarding the complainant's past sexual conduct; (7) whether evidence of sexual conduct is offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts charged; and (8) whether the prior sexual conduct and the charged act of the defendant are proximate in time. 26 Kan.App.2d at 781.

57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

Comment

At common law the evidence of the prosecutrix was sufficient to sustain a conviction without corroboration. This was true even though the prosecutrix was an infant. Several states have modified the common law and require some corroboration by statute to sustain a conviction. See 65 Am. Jur. 2d, Rape, § 96. Kansas has not modified the common law and a conviction can be had without corroboration. See *State v. Tinkler*, 72 Kan. 262, 83 Pac. 830 (1905); *State v. Morgan*, 207 Kan. 581, 485 P.2d 1371 (1971); *State v. Robinson*, 219 Kan. 218, 220, 547 P.2d 335 (1976); and *State v. Sanders*, 227 Kan. 892, 895, 610 P.2d 633 (1980).

In *State v. Matlock*, 233 Kan. 1, 6, 660 P.2d 945 (1983), the Kansas Supreme Court retained the rule that the uncorroborated testimony of the prosecutrix may be sufficient to convict a defendant of rape. However, in that case the Court held that no rational factfinder could have believed the uncorroborated testimony of the prosecutrix to find the defendant guilty beyond a reasonable doubt. In accord see *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994) where the Kansas Supreme Court reaffirmed that corroborative evidence is not necessary to sustain a rape conviction as long as the evidence is clear and convincing and is not so incredible and improbable as to defy belief.

57.05 INDECENT LIBERTIES WITH A CHILD

The defendant is charged with the crime of 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 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 solicited _____ to engage in lewd fondling or touching of the person of another with the intent to arouse or to satisfy the sexual desires of _____, the defendant or another;
2. **That _____ was then a child 14 or more years of age but less than 16 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. 21-3503. If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00.

Indecent liberties with a child is a severity level 5, person felony.

Comment

In 1992, the Legislature amended K.S.A. 21-3503 to remove "sexual intercourse" from the statute. Sexual intercourse with children under 14 years of

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).

In *State v. Taylor*, 33 Kan.App.2d 284, 101 P.3d 1283 (2004), *rev. denied* 279 Kan. 1010 (2005), the Court of Appeals held that K.S.A. 21-3504(a)(1) is constitutional.

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

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

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

Notes on Use

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

(a) sexual intercourse with a child;

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

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

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

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

57.07 CRIMINAL SODOMY

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

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

1. **That the defendant engaged in sodomy with an animal;**
   and
   or
   That the defendant engaged in sodomy with a child who was 14 or more years of age but less than 16 years of age; and
   or
   That the defendant caused a child 14 or more years of age but less than 16 years of age to engage in sodomy with (any person) (an animal); and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

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

Notes on Use

For authority, see K.S.A. 21-3505. Criminal sodomy between the defendant and 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

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.

K.S.A. 21-3505(a)(1) provides that sodomy between persons who are 16 or more years of age and members of the same sex is a Class B misdemeanor. However, in 2003, the U.S. Supreme Court held that a Texas statute which prohibited certain sexual conduct between consenting adults of the same sex was unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

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57.07-A AFFIRMATIVE DEFENSE TO CRIMINAL SODOMY

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

Notes on Use

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

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

57.08 AGGRAVATED CRIMINAL SODOMY - CHILD UNDER 14

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

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

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

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

Notes on Use

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

Comment

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

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

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

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

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

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

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

57.08-B AGGRAVATED CRIMINAL SODOMY - NO CONSENT

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

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

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

   or

   That the defendant caused _____ to engage in sodomy with (any person) (an animal);

2. **That the act of sodomy was committed without the consent of _____ under circumstances when:**

   (a) **(she)(he) was overcome by (force) (fear); and**

   or

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

   or

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

   or

   (d) **(she)(he) was incapable of giving a valid consent because of the effect of any (alcoholic liquor) (narcotic) (drug) (other substance), which condition was known by the defendant or was reasonably apparent to the defendant; and**

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

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

Notes on Use

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

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

Comment

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

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

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

57.08-C AFFIRMATIVE DEFENSE TO AGGRAVATED CRIMINAL SODOMY

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

Notes on Use

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

Comment

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

57.12 INDECENT SOLICITATION OF A CHILD

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

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

1. **That the defendant (enticed) (solicited) _____ to (commit) (submit to) an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery);**

   or

   That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter any (vehicle) (building) (room) (secluded place) with intent to commit an act of [(rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery)] [(upon) (with)] _____;

2. **That _____ was then 14 or more years of age but less than 16 years of age; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) means:_____.

Notes on Use

For authority, see K.S.A. 21-3510. Indecent solicitation of a child is a severity level 7, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction.

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to whether the child is under 12 years of age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

57.12-A SEXUAL EXPLOITATION OF A CHILD

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

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

1. **That the defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) insert name of child under the age of 18 years to engage in sexually explicit conduct for the purpose of promoting a performance; and**

OR

1. **That the defendant possessed any visual depiction, including any photograph, film, video picture, digital or computer generated image or picture, whether made or produced by electronic, mechanical or other means, where such visual depiction of a child under 18 years of age is shown or heard engaging in sexually explicit conduct; and**
2. **That the defendant did so with the intent to arouse and satisfy the sexual desires or appeal to the prurient interest of the defendant, the child, or another; and**

OR

1. **That the defendant is a (parent) (guardian) (other person having custody or control) of insert name of child under 18 years of age; and**
2. **That the defendant knowingly permitted insert name of child to engage in, or assist another in sexually explicit conduct (for the purpose of promoting any performance) (with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the defendant, the child, or another); and**

OR

1. **That the defendant promoted any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance; and**

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

These definitions apply to this instruction:

a. **"Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sadomasochistic abuse for the purpose of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.**

b. **"Promoting" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, dissemination, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising, for pecuniary profit or with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the defendant, the child or another.**

c. **"Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, 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).

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).

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

(e) Criminal sodomy.

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

(f) Aggravated criminal sodomy.

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

(g) Lewd and lascivious behavior.

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

(h) Lewd fondling or touching.

Lewd fondling or touching means fondling or touching in a manner which tends to undermine the morals of the

victim, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of either the victim or the offender or both. Lewd fondling or touching does not require contact with the sex organ of one or the other.

(i) Sexual battery.

Sexual battery means the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent to the touching, with the intent to arouse or to satisfy the sexual desires of the offender or another.

(j) Aggravated sexual battery.

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

Notes on Use

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

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

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

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

Notes on Use

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

Comment

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

57.26 UNLAWFUL SEXUAL RELATIONS

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

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

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

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

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

OR

[3. That the defendant was a (parole officer) (employee of a contractor who was under contract to provide supervision services for persons on parole, conditional release or post-release supervision);

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

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

[3. That the defendant was (an employee of the department of social and rehabilitation services) (an

employee of a contractor who was under contract to provide services in a social and rehabilitation services institution);

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

OR

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

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

OR

[3. That the defendant was (a court services officer) (an employee of a contractor who was under contract to provide supervision services for persons under court services supervision);

4. That _____ was a person 16 years of age or older who had been placed on probation under the supervision and control of court services and the defendant had knowledge that the person was under the supervision of court services;] and

OR

[3. That the defendant was (a community correctional services officer) (an employee of a contractor who was under contract to provide supervision services for persons under community corrections supervision);

4. That _____ was a person 16 years of age or older who had been assigned to a community correctional services program under the supervision and control of community corrections and the defendant had knowledge that the person was under the supervision of community corrections;] and

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

Notes on Use

For authority and a list of definitions of terms used in this instruction, see K.S.A. 21-3520. Unlawful sexual relations is a severity level 10, person felony.

Comment

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

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

57.27 UNLAWFUL VOLUNTARY SEXUAL RELATIONS

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

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

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

Notes on Use

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

58.04 AGGRAVATED INCEST

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

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

1. **That the defendant married _____ who was under 18 years of age;**
2. **That the defendant knew that _____ was related to the defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]);**

OR

1. **That the defendant engaged in (sexual intercourse) (sodomy) with _____; or**
   That the defendant (engaged in lewd fondling or touching of the person of _____) (submitted to lewd fondling or touching of [his][her] person by _____) with the intent to arouse or to satisfy the sexual desires of either _____ or the defendant, or both;
2. **That _____ was at least 16 years old but under 18 years old;**
3. **That the defendant knew that _____ was related to defendant as ([biological] [adopted] [step]) ([child] [grandchild of any degree] [brother] [sister] [half-brother] [half-sister] [uncle] [aunt] [nephew] [niece]); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3603. Aggravated incest is a severity level 7, person felony, except when it results from otherwise lawful sexual intercourse or sodomy which is a severity level 5, person felony.

As the facts require, reference should be made to PIK 3d 57.02, Sexual

Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

Comment

Comprehensive amendments in 1993 to the statutes defining sex crimes defined sexual intercourse or sodomy with a child who is less than 16 years of age as crimes regardless of whether the defendant is related to the victim or not. In cases involving sexual intercourse, defendant is guilty of rape or aggravated indecent liberties, and in cases of sodomy, defendant is guilty of criminal sodomy or aggravated criminal sodomy, depending upon whether the child is under 14 years of age or is between 14 and 16 years of age. Aggravated incest under K.S.A. 21-3603(2)(A) now applies only to "otherwise lawful sexual intercourse or sodomy." Thus, it does not apply to sexual intercourse or sodomy with a child who is less than 16, since such conduct is unlawful. Nor does it apply to non-consensual sexual intercourse with a child who is between 16 and 18 years of age since that conduct is, respectively, rape or criminal sodomy. It applies only to consensual conduct with a child who is between 16 and 18 years of age. Thus, *State v. Sims*, 33 Kan. App. 2d 762, 108 P.3d 1007 (2005), held a parent was properly charged with rape of his child who was less than 14 years of age and could not be charged with aggravated incest. Decisions under former statutes, such as *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), and *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), holding that parents could be charged with aggravated incest but not with forcible rape or indecent liberties with a child are not authoritative under current statutes.

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

It is the Committee's opinion that the words "otherwise lawful" are intended to distinguish this crime from other offenses and are not necessary in the instruction.

Lewd fondling or touching has been defined as: "fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person and which is done with a specific intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977). Also refer to PIK 3d 57.05, Indecent Liberties with a Child, Notes on Use.

The aggravated incest statute, K.S.A. 21-3603, is not applicable to the sexual relationship between a half-blood uncle and the minor daughter of a half-brother. *State v. Craig*, 254 Kan. 575, 867 P.2d 1013 (1994) (Overruling *State v. Reedy*, 44 Kan. 190, 24 Pac. 66 [1890]).

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

58.10-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.

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" (K.S.A. 65-4107(d)(3) and (f)(1)), "manufacture" (K.S.A. 65-4101(n)), and "drug paraphernalia" (K.S.A. 65-4150(c)) are defined by statute.

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).

In a felony-murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide, following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge of abuse of a child may meet the *Rueckert* test for merger into a charge of felony-first-degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the Court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony-murder."

In *State v. Lucas*, 243 Kan. 462, 759 P.2d 90 (1988), *aff'd on rehearing* 244 Kan. 193, 767 P.2d 1308 (1989), the Court addressed the question left open in *Brown*. The Court concluded that a single instance of assaultive conduct cannot be the underlying felony justifying a charge of felony-murder. Moreover, when a child dies from an act of assaultive conduct, prior acts of abuse cannot be used as the basis for charging felony-murder. See also, *State v. Prouse*, 244 Kan. 292, 297, 767 P.2d 1308 (1989).

In *Lucas*, the Court expressed concern that the *Rueckert* test for merger is misleading. The key is "whether the elements of the underlying felony are so distinct from the homicide so as not to be an ingredient of the homicide." 243 Kan. at 469.

After the *Lucas* and *Prouse* decisions, the Legislature amended K.S.A. 21-3401 to provide that felony murder includes a killing committed in the perpetration of abuse of a child. In 1993, the Legislature included abuse of a child in the list of inherently dangerous felonies for purposes of felony murder. See K.S.A. 21-3436. In *State v. Smallwood*, 264 Kan. 69, 955 P.2d 1209 (1998), the court held that a single instance of child abuse could be the underlying felony for a felony murder conviction.

In *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991), the Supreme Court held K.S.A. 21-3609 to be constitutional and that it does not require proof of a specific intent to injure. On July 1, 1995, K.S.A. 21-3609 was amended by inserting the words, "shaking which results in great bodily harm." After this amendment, the court was asked in *State v. Carr*, 265 Kan. 608, to revisit the constitutionality of the statute and concluded that the statute was not vague.

The words "willfully torturing" in K.S.A. 21-3609 do not cause child abuse to be a specific intent crime. *State v. Bruce*, 255 Kan. 388, 874 P.2d 1165 (1994).

In *State v. Mercer*, 33 Kan. App. 2d 308, 317, 101 P.3d 732 (2004), the court of appeals affirmed the trial court's conviction of defendant for child abuse under K.S.A. 21-3609 after defendant contended that trial court erred in supplementing PIK 58.11 by defining the word "torture" for jurors. The appellate court ruled that because the definition offered by the trial court was the same definition offered by the Kansas Supreme Court in *State v. Bruce*, 255 Kan. 388, 874 P.2d 1165 (1994), the trial court's instructions were not misleading and did not constitute reversible error. The definition of "torture," as used by the Kansas Supreme Court in *Bruce*, is "[t]o inflict intense pain to body or mind for purposes of punishment."

58.12 FURNISHING ALCOHOLIC LIQUOR OR CEREAL MALT BEVERAGE TO A MINOR

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

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

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

   OR

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

Notes on Use

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

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

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

Comment

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

See *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986) (knowledge of the age of a minor is not a requirement of the statute).

K.S.A. 21-3610 is not intended to impose civil liability for injuries or death sustained by a minor as a result of having become intoxicated. *Mills v. City of Overland Park*, 251 Kan. 434, 837 P.2d 370 (1992).

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

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

CHAPTER 59.00

CRIMES AGAINST PROPERTY

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59.01 THEFT

The defendant is charged with the crime of theft of property of the value of ($100,000 or more) (at least $25,000 but less than $100,000) (at least $1,000 but less than $25,000) (less than $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 $1,000 but less than $25,000) (less than $1,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 2004 Supp. 21-3701. 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 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.

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."

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.

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).

59.01-B THEFT - WELFARE FRAUD

The defendant is charged with the crime of theft of social welfare assistance of the value of ($100,000 or more) (at least $25,000 but less than $100,000) (at least $1,000 but less than $25,000)(less than $1,000). The defendant pleads not guilty.

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

1. **That the defendant (obtained) (attempted to obtain) (aided or abetted [name of applicant or client] to obtain) assistance in the form of (describe applicable assistance as defined in K.S.A. 39-702(d)) to which (defendant or name of other applicant or client) was not entitled;**
2. **That the defendant did so by (means of a willfully false statement or representation) (impersonation) (collusion) (fraudulent device);**
3. **That the value of the assistance was ($100,000 or more) (at least $25,000 but less than $100,000) (at least $1,000 but less than $25,000)(less than $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. 39-720, 39-702(d) and 21-3701. Effective July 1, 2004, theft of assistance of the value of $100,000 or more is a severity level 5, nonpersons felony. Theft of assistance of the value of $25,000 but less than $100,000 is a severity level 7, nonperson felony. Theft of assistance of the value of at least $1,000 but less than $25,000 is a severity level 9, nonperson felony. Theft of assistance of the value of less than $1,000 is a class A, nonperson misdemeanor, except that theft of assistance of the value of less than $1,000 is a severity level 9, nonperson felony if committed by a person who has 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.

Comment

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.

59.01-C THEFT-MULTIPLE ACTS-VALUE NOT IN ISSUE

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

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

1. **That [list all victims] were the owners of the property;**
2. **That the defendant (obtained) (exerted) unauthorized control over the property;**

   OR

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

   OR

   That the defendant obtained by threat control over property;

   OR

   That the defendant obtained control over property knowing the property to have been stolen by another;
3. **That the defendant intended to deprive [list all victims] permanently of the use or benefit of the property;**
4. **That [list all victims] were operating mercantile establishments;**
5. **That all of the above acts occurred within a 72-hour period and were each part of a common scheme or course of conduct; and**
6. **That these acts occurred on or between the _____ days of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3701. This is a severity level 9 nonperson felony. In *State v. Barnes*, 31 Kan. App. 2d 825, 74 P.3d 591 (2003), the Court of Appeals construed K.S.A. 21-3701(b)(3) to provide two forms of felony theft regardless of the

value of the items stolen. One is by theft in three mercantile establishments within a 72 hour period, and the second is theft in two or more acts or transactions connected together or constituting part of a common scheme or design. PIK 59.01-C should be used if the complaint charges the first type of theft.

59.01-D THEFT-MULTIPLE ACTS-COMMON SCHEME-VALUE NOT IN ISSUE

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

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

1. **That _____ owned 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 _____ (was)(were) operating (a) mercantile establishment(s);**
5. **That two or more of the above acts occurred as part of a common scheme or course of conduct; and**
6. **That these acts occurred on or between the _____ days of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3701. This is a severity level 9 nonperson felony. In *State v. Barnes*, 31 Kan. App. 2d 825, 74 P.3d 591 (2003), the Court of Appeals construed K.S.A. 21-3701(b)(3) to provide two forms of felony theft regardless of the

value of the items stolen. One is by theft in three mercantile establishments within a 72 hour period, and the second is theft in two or more acts or transactions connected together or constituting part of a common scheme or design. PIK 59.01-D should be used if the complaint charges the second type of theft.

Multiple victims should be listed separately in elements 1, 2, 3, and 4.

59.06 WORTHLESS CHECK

The defendant is charged with the crime of giving a worthless check. The defendant pleads not guilty.

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

1. **That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to _____;**

   or

   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to _____;
2. **That the defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;**
3. **That the defendant intended to defraud _____;**
4. **That the amount of the (check) (order) (draft) was ($25,000 or more) (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.**

Notes on Use

For authority, see K.S.A. 21-3707. Giving a worthless check is a severity level 7, nonperson felony if the check, order, or draft is drawn for $25,000 or more. Effective July 1, 2005, giving a worthless check is a severity level 9, nonperson felony if the check, order, or draft is drawn for at least $1,000 but less than $25,000. Giving a worthless check is a class A, nonperson misdemeanor if the check, order, or draft is drawn for less than $1,000, except it is a severity level 9, nonperson felony if committed by a person who has been convicted of giving a worthless check two or more times within five years immediately preceding the commission of the present crime.

If the amount of the check, order or draft is in issue, it will be necessary to include PIK 3d 59.70 in the jury instruction and to use PIK 3d 68.11, Verdict Form.

Defenses to the charge of giving a worthless check are set forth in PIK 3d 59.07, Worthless Check - Defense.

If an issue exists as to whether the defendant had the intent to defraud and/or knowledge of insufficient funds in, or on deposit, and notice is claimed to have been given the defendant as provided by K.S.A. 21-3707(b), then PIK 3d 59.06-A, should be given and modified accordingly.

Comment

Presentation for payment at drawee bank is not an element of the offense. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Imprisonment for a worthless check offense does not violate either Section 16 in the Bill of Rights of the Kansas Constitution, or the Fourteenth Amendment to the United States Constitution. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973); *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982).

For a discussion of the intent of the worthless check statute, K.S.A. 21-3707, what constitutes the gravamen of the offense and the proof required by the defendant to rebut the statutory presumption, see *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

In *State v. Ringi*, 238 Kan. 523, Syl. ¶¶ 1, 2, 712 P.2d 1223 (1986), the Court held: (1) "Under K.S.A. 1984 Supp. 21-3707, it is not necessary for the worthless check or draft to be used to obtain possession of money, merchandise or anything of value in order to constitute the crime of passing a worthless check," and (2) "The charge of theft by deception under K.S.A. 1984 Supp. 21-3707(b) is a separate crime from giving a worthless check under K.S.A. 1984 Supp. 21-3703. A defendant may be charged with both offenses when they occur as separate transactions."

K.S.A. 21-3711, Making a false writing, is a general statute under which charges may range from falsifying bank statements to making false statements under the Campaign Finance Act. K.S.A. 21-3707, Giving a worthless check, is a specific statute covering the making, drawing, issuing, and delivering of any check, order, or draft on a financial institution with intent to defraud and knowing that the maker has no deposit in or credits with the drawee for the payment of such check, order, or draft in full upon its presentment. Under the facts of this case, the specific statute of Giving a worthless check under K.S.A. 21-3707, rather than the general statute of Making a false writing under K.S.A. 21-3711, must be the basis for the crimes charged. *State v. Montgomery*, 14 Kan. App. 2d 577, 796 P.2d 559 (1990).

59.06-A STATUTORY PRESUMPTION OF INTENT TO DEFRAUD - KNOWLEDGE OF INSUFFICIENT FUNDS

There is a presumption that defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with a (bank) (credit union) (savings and loan association) (depository) where the defendant's (check) (order) (draft) has been refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds and:

1. **Defendant failed to pay the holder of the (check) (order) (draft) the amount due thereon and a lawful service charge for each (check) (order) (draft) within seven days after defendant received notice that the (check) (order) (draft) was not paid by the (bank) (credit union) (savings and loan association) (depository); or**
2. **Defendant postdated the (check) (order) (draft) without the knowledge and consent of the payee.**

[There is a presumption that the defendant received the notice that the (check) (order) (draft) was refused by the (bank) (credit union) (savings and loan association) (depository) because of insufficient funds where the notice was deposited as restricted matter in the United States mail, addressed to the defendant at the address which appeared on the (check) (order) (draft).]

The presumption may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had the intent to defraud and knowledge of insufficient funds in, or on deposit with the (bank) (credit union) (savings and loan association) (depository). This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-3707(b). If an issue exists as to the receipt of

written notice given when deposited as restricted matter in the United States mail, the second paragraph should be used, otherwise it should be omitted.

Comment

State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973), upheld the constitutionality of the statutory presumption of K.S.A. 21-3707(b) which enables the State to establish a *prima facie* case in a worthless check prosecution by proof of failure of payment by a defendant within seven days after notice of non-payment. For further discussion of the constitutionality of statutory presumptions, see *State v. Smith*, 223 Kan. 192, 573 P.2d 985 (1977), and Comment to PIK 3d 54.01 on the matter of shifting the burden on the defendant to produce evidence. A discussion of what constitutes "deposited as restricted matter in the United States mail" is found in *State v. Calhoun*, 224 Kan. 579, 581 P.2d 397 (1978).

State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976), recognizes that K.S.A. 21-3707(b) is simply a permissive rule of evidence and does not add to the elements of the offense of giving a worthless check.

The mailing of a notice, by certified mail, restricted delivery, addressed to the maker of a check at the address shown thereon, although delivered to one other than the defendant, is sufficient to raise the rebuttable presumption provided by K.S.A. 21-3707(b). *State v. Calhoun*, supra.

Haremza is cited for the proposition that the statutory presumption created by K.S.A. 21-3707(b) can be rebutted by defendant's knowing that he or she had a reasonable expectation that the check would be paid on presentation. *State v. McConnell*, 9 Kan. App. 2d 688, 688 P.2d 1224 (1984).

59.06-B WORTHLESS CHECK - MULTIPLE

The defendant is charged with the crime of giving a worthless check more than once within a 7 day period. The defendant pleads not guilty.

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

1. **That a (check) (order) (draft) was (made) (drawn) (issued) (delivered) by the defendant to [list as many recipients as are shown by the evidence to exist];**
   or
   That a (check) (order) (draft) was caused or directed to be (made) (drawn) (issued) (delivered) by the defendant to [list as many recipients as are shown by the evidence to exist];
2. **That the defendant knew that there were (no monies or credits) (not sufficient funds) with the (bank) (credit union) (savings and loan association) (depository) at the time of the (making) (drawing) (issuing) (delivering) of the (check) (order) (draft) for payment in full of the (check) (order) (draft) on its presentation;**
3. **That the defendant intended to defraud [list recipients];**
4. **That the total amount of the (checks) (orders) (drafts) was ($25,000 or more) (at least $1,000 but less than $25,000) (less than $1,000); and**
5. **That these acts occurred between the _____ day of _____, _____, and the _____ day of _____, _____ in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3707. Giving a worthless check more than once within a seven day period is a severity level 7, nonperson felony if the combined total of the checks is $25,000 or more and a severity level 9, nonperson felony if the combined total is at least $1,000 but less than $25,000.

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Comment

It should be noted that the Legislature did not make "breaking" an element of this crime.

Merger doctrine is not applicable to prevent prosecution for felony murder where underlying felony is aggravated burglary based on the aggravated assault on the victim. *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

In *State v. Walters*, 8 Kan. App. 2d 237, 655 P.2d 947 (1982), K.S.A. 21-3716 was held to be constitutional in that it did not violate due process or equal protection requirements by allowing for a conviction of aggravated burglary even if a burglar has no knowledge of the presence of another in the structure the burglar is entering.

The crime of aggravated burglary occurs whenever a human being is present in a building during the course of the burglary. An information that charges the offense of aggravated burglary need not specify the point in time at which a victim was present, so long as it alleges that a human being was present sometime during the course of the burglary. *State v. Reed*, 8 Kan. App. 2d 615, 663 P.2d 680 (1983); *State v. Romero*, 31 Kan.App.2d 609, 69 P.3d 205 (2003).

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson*, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985).

In *State v. Holcomb*, 240 Kan. 715, 732 P.2d 1272 (1987), the Court held that it was not multiplicitous to charge the defendant with aggravated burglary and aggravated robbery arising from a single transaction because each offense requires proof of facts not required to prove the other. See *State v. Higgins*, 243 Kan. 48, 755 P.2d 12 (1988).

The aggravated burglary requirement under K.S.A. 21-3716 that a burglarized building be occupied should be broadly interpreted to include multi-unit structures in which there is a possibility of contact between the victim and the burglar. *State v. Dorsey*, 13 Kan. App. 2d 286, 769 P.2d 38, *rev. denied* 244 Kan. 739 (1989).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994) and *State v. Richmond*, 258 Kan. 449, 904 P.2d 981 (1995).

Criminal trespass is not a lesser included offense of burglary because "criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

59.19 POSSESSION OF BURGLARY TOOLS

The statute upon which this instruction was based (K.S.A. 21-3717) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

Subsection (d) provides that nothing in the statute shall be construed as limiting a representative or member of a labor organization which represents or is seeking to represent the employees of the railroad, from conducting such business as provided under the railway labor act (45 U.S.C. 151, et sec.) and under other federal labor laws.

59.26 LITTERING - PUBLIC

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

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

1. **That the defendant intentionally or recklessly (deposited) (caused to be deposited) _____ (on) (in) a public_____;**
2. **That the defendant was acting without the permission of any public officer or public employee who had authority to grant such permission; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3722(a)(1). Littering is an unclassified misdemeanor.

59.27 LITTERING - PRIVATE PROPERTY

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

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

1. **That the defendant intentionally or recklessly [(deposited) (caused to be deposited)] [(object or substance)] on private property;**
2. **That the defendant was acting without the permission of _____, (the owner) (the occupant) of the property; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3722(a)(2). Littering is an unclassified misdemeanor.

59.28 TAMPERING WITH A LANDMARK

The defendant is charged with the crime of tampering with a landmark. The defendant pleads not guilty.

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

1. **That the defendant removed a marker designating a boundary for real estate;**
   or
   That the defendant (defaced) (altered) marks made for the purpose of designating a boundary for real estate;
   or
   That the defendant (cut down) (removed) _____, which had marks upon it to designate a boundary for real estate;
   or
   That the defendant (altered) (removed) (damaged) (destroyed) a public land survey corner or accessory and failed to comply with the Land Survey Act by (state act or omission whereby K.S.A. 58-2011 was violated);
2. **That the defendant did so willfully and maliciously; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3724(a), (b), (c) and (f). Tampering with a landmark is a class C misdemeanor.

This section should not be used for K.S.A. 21-3724(d) or (e).

When using paragraph four of Element No. 1, the applicable act or omission should be stated.

60.07 COMPOUNDING A CRIME

The defendant is charged with compounding a crime. The defendant pleads not guilty.

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

1. **That the defendant knew _____ had committed a crime;**
2. **That the defendant intentionally (accepted) (agreed to accept) anything of value as consideration for a promise [not to (initiate) (aid in) the prosecution of _____] [to (conceal evidence of a crime) (destroy evidence of a crime)]; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3807. Compounding a felony is a severity level 8, nonperson felony. Compounding a misdemeanor is a class A, nonperson misdemeanor.

60.08 OBSTRUCTING LEGAL PROCESS

The defendant is charged with the crime of obstructing legal process. The defendant pleads not guilty.

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

1. **That _____ was authorized by law to serve _____;**
2. **That the defendant knowingly and intentionally (obstructed) (resisted) (opposed) _____ in the (service) (execution) of the _____;**
3. **That at the time the defendant knew or should have known that _____ was authorized by law to _____; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3808. If the state charges obstruction in the service or execution of process or order of a court by an officer not in uniform, PIK 60.08 should be used. If the state charges obstruction of an officer in the discharge of official duty or if the officer is in uniform, PIK 60.09 should be used. *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998); *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

In the second blank of Element Nos. 1 and 2, the Court should insert the name of the paper or instrument involved in the particular case such as writ, warrant, or summons. In the second blank of Element No. 3, the Court should insert the particular act the person was authorized by law to perform.

Obstructing legal process in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony. Obstructing legal process in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A, nonperson misdemeanor.

The committee recognizes that a question of fact may arise whether the official duty attempted by the officer was the investigation of a misdemeanor or felony. In that case, the court should ask the jury to decide by having them answer a question, such as, "Was the officer performing an investigation of (circle one) a felony / a misdemeanor?"

Comment

In *State v. Hatfield*, 213 Kan. 832, 518 P.2d 389 (1974), the Court held that obstructing legal process or official duty included any willful act which obstructs or resists or opposes an officer in the discharge of his official duty and does not necessarily require the employment of direct force or the exercise of direct means.

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

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

60.09 OBSTRUCTING OFFICIAL DUTY

The defendant is charged with the crime of obstructing official duty. The defendant pleads not guilty.

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

1. **That _____ was discharging an official duty, namely _____;**
2. **That the defendant knowingly and intentionally (obstructed) (resisted) (opposed) _____ in discharging (his)(her) official duty;**
3. **That the act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty;**
4. **That at the time the defendant knew or should have known that _____ was a law enforcement officer; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3808. If the state charges obstruction in the service or execution of process or order of a court by an officer not in uniform, PIK 60.08 should be used. If the state charges obstruction of an officer in the discharge of official duty or if the officer is in uniform, PIK 60.09 should be used. *State v. Timley*, 25 Kan. App. 2d 779, 785-86, 975 P.2d 264 (1998); *State v. Lyne*, 17 Kan. App. 2d 761, 844 P.2d 734 (1992).

In the second blank of Element No. 1, the Court should insert the duty the officer named in the first blank was attempting perform.

Obstructing official duty in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony. Obstructing official duty in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a class A, nonperson misdemeanor.

The committee recognizes that a question of fact may arise whether the official duty attempted by the officer was the investigation of a misdemeanor or felony. In that case, the court should ask the jury to decide by having them answer a question, such as, "Was the officer performing an investigation of (circle one) a felony / a misdemeanor?"

Comment

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

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

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

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

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

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

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

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

60.10 ESCAPE FROM CUSTODY

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

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

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

   OR

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

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

of undress;

for the purpose of viewing (the body of) (the undergarments worn by) _____, without the consent or knowledge of _____, with the intent to invade the privacy of _____ under circumstances in which _____ has a reasonable expectation of privacy; and

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

Private place means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but does not include a place to which the public has lawful access.

Notes on Use

For authority, see K.S.A. 21-4001. Eavesdropping is a class A, nonperson misdemeanor.

Comment

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

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

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

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

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

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

62.09 EXPOSING A PAROLED OR DISCHARGED PERSON

The defendant is charged with the crime of exposing a paroled or discharged person. The defendant pleads not guilty.

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

1. **That the defendant maliciously and intentionally (communicated) (threatened to communicate) to another an oral or written statement that _____ has been charged with or convicted of a felony;**
2. **That the defendant did so with the intent to interfere with the employment or business of _____ _____; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4006. Exposing a paroled or discharged person is a class B, nonperson misdemeanor.

This offense does not apply to a person or organization furnishing such information at the request of another person or organization.

62.10 HYPNOTIC EXHIBITION

This instruction has been deleted. The statute on which it was based was repealed effective July 1, 2004.

62.12 UNLAWFUL SMOKING - DEFENSE OF SMOKING IN DESIGNATED SMOKING AREA

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

Notes on Use

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

For the instruction concerning the elements of unlawful smoking in a public place, see PIK 3d 62.11, Unlawfully Smoking in a Public Place.

62.13 IDENTITY THEFT

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

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

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

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

Notes on Use

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

Comment

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

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

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

Comment

In *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980), the Court found the statute as applied to conduct involving only speech was facially overbroad. It upheld the statute by construing it to prohibit only speech amounting to "fighting words." In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942), the Court upheld a state statute which, as construed by the state court, prohibited only words "plainly likely to cause a breach of the peace by the addressee." See also, *State v. Heiskell*, 8 Kan. App. 2d 667, 666 P.2d 207 (1983), disapproving former PIK 2d 63.01 as applied to speech; and *City of Wichita v. Edwards*, 23 Kan. App. 2d 962, 939 P.2d 942 (1997). In *State v. Phelps*, 28 Kan. App. 2d 690, 20 P.3d 731 (2001), the Court stated that a necessary element of "fighting words" is that the words be directed to a specific person or group. The court further stated that the phrase "breach of the peace" is commonly understood and is not in need of further definition by the trial court.

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

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

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

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

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

63.02 UNLAWFUL ASSEMBLY

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

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

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

   OR

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

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

Notes on Use

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

65.52 PARIMUTUEL RACING ACT - DEFINITIONS

Certain terms used in the preceding instructions are defined as follows:

Breakage means the odd cents by which the amount payable on each dollar wagered in a parimutuel pool exceeds:

1. A multiple of $.10, for parimutuel pools from races conducted in this state; and
2. A multiple of such other number of cents as provided by law of the host jurisdiction, for interstate combined wagering pools.

Commission means the Kansas Racing Commission created by this Act.

Concessionaire licensee means a person, partnership, corporation or association licensed by the commission to utilize a space or privilege within a racetrack facility to sell goods.

Contract means an agreement, written or oral, between two or more persons, partnerships, corporations or associations, or any combination thereof, which creates an obligation between the parties.

Crossover employment means a situation in which an occupational licensee is concurrently employed at the same racing facility by an organization licensee and a facility owner licensee or facility manager licensee.

Dual racetrack facility means a racetrack facility for the racing of both horses and greyhounds or two immediately adjacent racetrack facilities, owned by the same licensee, one for racing horses and one for racing greyhounds.

Executive Director means the executive director of the commission.

Facility manager licensee means a person, partnership, corporation or association licensed by the commission and having a contract with an organization licensee to manage a racetrack facility.

Facility owner licensee means a person, partnership, corporation or association, or the State of Kansas or any political subdivision thereof, licensed by the commission to construct or own a racetrack facility but does not mean an organization licensee which owns the racetrack facility in which it conducts horse or greyhound racing.

Fair association means an association organized pursuant to Kansas Law (see 2-125 *et seq.*) or a nonprofit association determined by the commission to be otherwise organized to conduct fair activities pursuant to findings of fact entered by the commission in a license order.

Financial interest means an interest that could result directly or indirectly in receiving a pecuniary gain or sustaining a pecuniary loss as a result of ownership or interest in a business entity or activity or as a result of a salary, gratuity or other compensation or remuneration from any person.

Greyhound means any greyhound breed of dog properly registered with the National Greyhound Association of Abilene, Kansas.

Horsemen's association means any association or corporation:

1. **All officers, directors, members and shareholders of which are licensed owners of horses or licensed trainers of horses, or both;**
2. **which is applying for or has been issued a facility owner license authorizing ownership of Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities; and**
3. **none of the officers, directors, members or shareholders of which holds another facility owner license or is an officer, director, member or shareholder of another facility owner licensee.**

Horsemen's nonprofit organization means any nonprofit organization:

1. All officers, directors, members or shareholders of which are licensed owners of horses or licensed trainers of horses, or both; and
2. which is applying for or has been issued an organization license authorizing the conduct or horse races at Eureka Downs, Anthony Downs or a racetrack facility on or adjacent to premises used by a fair association to conduct fair activities.

Host facility means the racetrack at which the race is run or, if the race is run in a jurisdiction which is not participating in the interstate combined wagering pool, the racetrack or other facility which is designated as the host facility.

Host jurisdiction means the jurisdiction where the host facility is located.

Interstate combined wagering pool means a parimutuel pool established in one jurisdiction which is combined with comparable parimutuel pools from one or more racing jurisdictions for the purpose of establishing the amount of money returned on a successful wager in the participating jurisdictions.

Intertrack wagering means wagering on a simulcast race at a licensed racetrack facility or at a facility which is licensed in its racing jurisdiction to conduct live races.

Intrastate combined wagering pool means a parimutuel pool which is combined with comparable parimutuel pools from one or more racetrack facilities for the purpose of establishing the amount of money returned on a successful wager at the participating racetrack facilities.

Kansas-whelped greyhound means a greyhound whelped and raised in Kansas for the first six months of its life.

Minus pool means a parimutuel pool in which, after deducting the takeout, not enough money remains in the pool to pay the legally prescribed minimum return to those placing winning wagers, and in which the organization licensee would be required to pay the remaining amount due.

Nonprofit organization means:

1. **A corporation which is incorporated in Kansas as a not-for-profit corporation pursuant to Kansas general corporation code and the net earnings of which do not inure to the benefit of any shareholder, individual member or person; or**
2. **a fair association.**

Occupation licensee means a person licensed by the commission to perform an occupation or provide services which the commission has identified as requiring a license pursuant to this Act.

Off-track wagering means wagering on a simulcast race at a facility which is not licensed in its jurisdiction to conduct live races.

Organization licensee means a nonprofit organization licensed by the commission to conduct races pursuant to this Act and, if the license so provides, to construct or own a racetrack facility.

Parimutuel pool means the total money wagered by individuals on one or more horses or greyhounds in a particular horse or greyhound race to win, place or show, or combinations thereof, as established by the commission, and held by the organization licensee pursuant to the parimutuel system of wagering. There is a separate parimutuel pool for win, for place, for show and for each of the other forms of betting provided for by the rules and regulations of the commission.

Parimutuel wagering means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denomination on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are paid prizes from such pool in amounts proportional to the total receipts in the pool.

Race meeting means one or more periods of racing days during a calendar year designated by the commission for which an organization licensee has been approved by the commission to hold live or simulcast horse or greyhound

races at which parimutuel wagering is conducted, including such additional time as designated by the Commission for the conduct of official business before or after the races.

Racetrack facility means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials and such additional areas as designated by the commission.

Racing jurisdiction or jurisdiction means a governmental authority which is responsible for the regulation of live or simulcast racing in its jurisdiction.

Racing or wagering equipment or services licensee means any person, partnership, corporation or association licensed by the commission to provide integral racing or wagering equipment or services, as designated by the commission, to an organization licensee.

Recognized greyhound owners' group means the duly recognized group elected by a majority of the Kansas licensed greyhound owners at the racetrack facility.

Recognized horsemen's group means the duly recognized group, representing the breeds of horses running at a racetrack facility, elected by a majority of the licensed owners and trainers at the racetrack facility. If the licensee does not have a recognized horsemen's group, the Commission shall designate as the recognized horsemen's group one that serves another organization licensee, but not one that serves a county fair association organization licensee.

Simulcast means a live audio-visual broadcast of an actual horse or greyhound race at the time it is run.

Takeout means the total amount of money withheld from each parimutuel pool for the payment of purses, taxes and shares to be kept by the organization licensee. Takeout does not include the breakage. The balance of each pool less the breakage is distributed to the holders of winning parimutuel tickets.

Notes on Use

For authority, see K.S.A. 74-8802.

67.17 SIMULATED CONTROLLED SUBSTANCES, DRUG PARAPHERNALIA, ANHYDROUS AMMONIA OR PRESSURIZED AMMONIA - USE OR POSSESSION WITH INTENT TO USE

The defendant is charged with the crime of unlawfully (using) (possessing with intent to use) [insert name of simulated controlled substance, drug paraphernalia, anhydrous ammonia or pressurized ammonia]. The defendant pleads not guilty.

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

1. **That the defendant knowingly (used) (possessed with the intent to use)**
   - (a) **[insert name of simulated controlled substance]; and**

   OR

   - (b) **drug paraphernalia to (use, store, contain, conceal [insert name of controlled substance]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance] into the human body); and**

   OR

   - (c) **drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute [insert name of controlled substance]; and**

   OR

   - (d) **anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas Department of Agriculture; and**
2. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4152. A violation based on option 1(a) or 1(b) is a class A nonperson misdemeanor. K.S.A. 65-4152(b). A violation based on option 1(c) or 1(d) is a drug severity level 4 felony, except that a violation which involves the possession of drug paraphernalia for the "planting, propagation, growing or harvesting of less than five marijuana plants" is a class A nonperson misdemeanor. K.S.A. 65-4152(c) and (d).

If the charge involves the use or possession of drug paraphernalia, PIK 3d 67.18-B defining "drug paraphernalia" should be given. Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in the instruction. PIK 3d 67.18-C setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

If the charge involves a simulated controlled substance, PIK 3d 67.18-B defining "simulated controlled substance" should be given.

Inapplicable words should be stricken when either element 1(b) or 1(c) is given. When element 1(b) or 1(c) is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known by the defendant must be named.

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

Comment

The drug paraphernalia portion of the Uniform Controlled Substances Act of Kansas (K.S.A. 65-4150 through 65-4157) is in substantial conformity with the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Administration of the United States Department of Justice. In *Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980), the Court determined a less restrictive Overland Park act to be constitutional on an attack of its being overbroad, or vague, or an infringement on the right of commercial speech. The Court noted that the Model Drug Paraphernalia Act has been substantially upheld wherever challenged. See also *State v. Dunn*, 233 Kan. 411, 662 P.2d 1286 (1983).

All drug paraphernalia and simulated controlled substances are subject to seizure and forfeiture as provided in K.S.A. 65-4156.

Possession of cocaine and possession of drug paraphernalia are two independent crimes. Where the only cocaine possessed is the residue on the drug paraphernalia, both crimes may be charged. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991), *rev denied* 250 Kan. 806 (1992).

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).

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).

In *State v. Capps*, 33 Kan. App. 2d 37, 39, 40, 99 P.3d 138 (2004), the Court held that when instructing a jury on attempted manufacture of methamphetamine, it is not adequate to merely add the word "attempted" to the elements instruction for the manufacture of methamphetamine. Rather, the trial court must also give PIK 3d 55.01, the elements of attempt.

68.12 DEADLOCKED JURY

Like all cases, this is an important case. If you fail to reach a decision on some or all of the charges, that charge or charges are left undecided for the time being. It is then up to the state to decide whether to resubmit the undecided charge(s) to a different jury at a later time. Another trial would be a burden on both sides.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion.

You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.

Notes on Use

The Committee has modified this instruction. Much of the wording in the pre-2005 version was determined to be unhelpful or legally incorrect.

In considering whether to give this instruction, the trial court should be mindful not only of the wording of the instruction but also of the timing of the instruction. If given at all, the Committee recommends this instruction be given before the jury begins its deliberations.

Comment

In *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015 (1971), the Supreme Court reiterated this warning: "The practice of submitting a forcing type instruction after the jury has reported its failure to agree on a verdict is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would be well advised to submit the same before the jury retires, not afterward."

In *State v. Roadenbaugh*, 234 Kan. 474, 483, 673 P.2d 1166 (1983), the Court held it is not error to give the Allen charge before the jury retires.

In *State v. Poole*, 252 Kan. 108, 843 P.2d 689 (1992), the Kansas Supreme Court emphasized the need to exercise caution in giving the Allen-type instruction. The Court stressed that ". . . timing can be very important in determining prejudicial error." It observed that the defendant had failed to furnish a record that affirmatively reflected prejudicial error as to when the deliberations began, when the Allen-type instruction was given, if the trial judge made additional remarks, and when the jury reached its verdict. In the absence of such record, the Court acknowledged that there is a presumption that the actions of the trial court were proper.

For discussion of the Allen charge in Kansas in criminal cases, see "Criminal Law - Jury Instructions - The Allen Charge," 6 Washburn L.J. 517 (1967).

In *State v. Noriega,* 261 Kan. 440, 452-56, 932 P.2d 940 (1997), without objection of the defendant, a modified *Allen* instruction was given to the jury before retiring to deliberate. On appeal, the defendant complained that the instruction was coercive. The Supreme Court noted that although there was no compelling reason to have departed from PIK Crim. 68.12, the defendant failed to show his right to a fair trial or a unanimous verdict was prejudiced.

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

The Supreme Court's reasoning for continued disapproval of a deadlock instruction given after the jury has begun deliberations is that such an instruction could be coercive or exert undue pressure on the jury to reach a verdict. One of the primary concerns with an *Allen*-type instruction has always been its timing. When the instruction is given before jury deliberations, some of the questions as to its coercive effect are removed. *State v. Struzik*, 269 Kan. 95, 5 P.3d 502 (2000). See also, *State v. Makthepharak*, 276 Kan. 563, 568-569, 78 P.3d 412 (2003).

In *State v. Turner*, 34 Kan. App. 2d 131, 115 P.3d 776 (2005), the language of former PIK Crim. 3d 68.12 which instructed the jury that "[l]ike all cases, it [the case] must be decided sometime" was disapproved as an inaccurate statement of the law.

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68.13 POST-TRIAL COMMUNICATION WITH JURORS

You have now completed your duties as jurors in this case and are discharged with the thanks of the Court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance, the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Notes on Use

See Rules of Supreme Court Rule No. 169. Under this rule, the Court shall give the substance of the above instruction upon completion of the jury trial and before discharge of the jury.

Supreme Court Rule No. 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the Court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized, if possible.

Supreme Court Rule 226 MRPC 3.5 provides that "[a] lawyer shall not: communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case."

Comment

Jurors shall not be called for posttrial hearings without an order of the Court after motion. The burden is upon the party seeking the order to show the necessity for the order. *Cornejo v. Probst*, 6 Kan. App. 2d 529, 630 P.2d 1202

Instruction No. 4.

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

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

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

(PIK 3d 56.03)

Instruction No. 5.

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

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

(PIK 3d 56.05)

Instruction No. 6.

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

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

1. **That the defendant unintentionally killed Joe Jones;**

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

(PIK 3d 56.06)

Instruction No. 7.

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

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

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

(PIK 3d 56.04)

Instruction No. 8.

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

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

(PIK 3d 54.17)

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

In *State v. Silva*, 25 Kan. App. 2d 437, 962 P.2d 1146 (1998), the Court of Appeals held that an intoxilyzer test result obtained 4 ½ hours after a defendant operated his vehicle is admissible as "other competent evidence" in a DUI prosecution pursuant to K.S.A. 8-1567(a)(1), and the State is not required to present an expert witness to explain those results and to interpret how the 4 ½ hour delay affected the defendant's alcohol concentration at the time he drove his vehicle.

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

A refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both. See K.S.A. 8-1001(f)(G), and *State v. Armstrong*, 236 Kan. 290, 689 P.2d 897 (1984).

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435, 710 P.2d 1325 (1985).

Conviction of a law enforcement officer for reckless driving while on duty affirmed. Conduct not privileged under K.S.A. 8-1506. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

In *State v. Remmers*, 278 Kan. 598, 102 P.3d 433 (2004), the Supreme Court held that reckless driving encompasses more than ordinary inattentive driving.

70.05 VIOLATION OF CITY ORDINANCE

The ordinance of the City of _____, Kansas, makes it unlawful for any person to (_state offense charged_) within the city. The defendant is charged with violating this ordinance. The defendant pleads not guilty.

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

1. (_List the various elements of the offense._)

2.

3.

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

Notes on Use

The elements of the applicable substantive crime should be set forth in the concluding portion of the instruction.

Notes on Use

For authority see K.S.A. 8-1568. A first conviction of subsection (a) is a class B non-person misdemeanor. A second conviction of subsection (a) is a class A non-person misdemeanor. A third or subsequent conviction of subsection (a) is a severity level 9, person felony. A conviction of subsection (b) is a severity level 9, person felony.

Under circumstances where "reckless driving" should be defined see K.S.A. 8-1566.

Where necessary the intended felony should be referred to or set forth in the concluding portion of the instruction.

70.10 DRIVING WHILE LICENSE IS CANCELED, SUSPENDED, REVOKED, OR WHILE HABITUAL VIOLATOR

The defendant is charged with driving a motor vehicle while the defendant's driving privileges were (canceled) (suspended) (revoked) (revoked because the division of motor vehicles determined the defendant to be an habitual violator). The defendant pleads not guilty.

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

1. That the defendant drove a motor vehicle;

[2. That the defendant's driving privileges were (canceled) (suspended) (revoked) by the division of motor vehicles;]

OR

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

OR

[2. That the division of motor vehicles had determined the defendant to be an habitual violator and had revoked the defendant's driving privileges;]

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

OR

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

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

As used in this instruction, proof of knowledge may be evidence of actual knowledge or by circumstantial evidence indicating a deliberate ignorance on the part of _____ _____.

Knowledge can be, but is not required to be, inferred from the fact that notification [that _____'s driving privileges had been (canceled)(suspended)(revoked)] [of _____'s status as an habitual violator] was mailed to _____ at _____ _____'s last known official address.

Notes on Use

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

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

For the definitions of cancellation see K.S.A. 8-1408, suspension see K.S.A. 8-1474, and revocation see K.S.A. 8-1457.

Comment

K.S.A. 8-287 specifies that an habitual violator may only violate the statute by operating a motor vehicle, unlike our driving while intoxicated statute (K.S.A. 8-1567). The driving while an habitual violator statute does not criminalize attempting to operate a motor vehicle. *State v. Thomas*, 28 Kan. App. 2d 655, 20 P.3d 82 (2001). The *Thomas* opinion further provides that an individual "operates a motor vehicle" when he or she puts a self-propelled device, other than a motorized bicycle or a motorized wheelchair, into motion on a public thoroughfare by coasting.

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

In *State v. Lewis* 263 Kan. 843, 953 P.2d 1016 (1998), the Supreme Court held that an individual's knowledge of his or her status as a habitual violator is a required element of the crime of driving while a habitual violator.

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

It is an affirmative defense if at the time of arrest the defendant was entitled to the return of his or her driver's license.

Notes on Use

For authority, see K.S.A. 8-262(a)(2).

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