Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

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

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

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

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

Until all of the evidence has been presented and the final instructions have been given by me, you must not discuss the case among yourselves or with anyone else, including anyone outside the courthouse. If anyone attempts to talk with you about the case, you should tell this person that such conversation is not proper and should cease. You should also report the matter to the bailiff at the earliest opportunity.

You must receive all your information about the case from the trial itself, and you must not rely on any other source of information. You must not search for, read or listen to any information from the internet relating in any way to the case.

You must avoid listening to, reading or viewing any media coverage of the case. If during the trial you learn some information about the case from outside the trial, you should inform the judge. You must not mention any such information to other jurors. You must never inspect the scene where the events have occurred. If such an inspection becomes necessary, I will have you go as a group to the scene.

Notes on Use

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

Comment

The Committee recommends that the above basic instructions be given to the jury before the introduction of evidence, so that the jury will have a better understanding of its function. This instruction informs the jury about the elements of the crime, the burden of proof (PIK 3d 52.02), consideration of the evidence (PIK 3d 51.04), and weighing the credibility of witnesses (PIK 3d 52.09).

The second paragraph of the above instruction relative to the elements of the crime must be supplemented by setting forth the elements in detail for the particular crime. These elements will be found by referring to that section of this book which deals with that crime. If the defendant is charged with more than one crime, then the judge should list the elements of each offense.

Usually, lesser included offenses should not be given in introductory instructions. A judge cannot be sure if any lesser included offenses are proper for jury consideration until the judge hears the evidence. Two factors suggest, however, the desirability of alerting the jury that there is the possibility of a lesser offense for the jury to consider: (1) A judge's communication should be consistent from the start to the finish of the trial, and (2) it seems unfair for the jury to first learn at the end of the trial that there may be a number of crimes to consider in addition to the crime charged.

The last two paragraphs of the instruction include general admonitions to the jury not to discuss the case with anyone until all the evidence has been presented and not to investigate the case through outside sources including the internet. The jury should be reminded of these admonitions throughout the trial.

51.01-A NOTE TAKING BY JURORS

Members of the jury, you will be permitted to take notes during the trial. Whether you do so is entirely up to you. However, do not allow the taking of notes to distract you from listening attentively to the testimony of a witness.

You may use your notes to refresh your memory as you deliberate. However, your deliberations must be based upon the collective memory and recollection of the entire jury as to the evidence admitted. Notes should be used only as an aid to this function and not as a substitute.

You must not remove any of your notes from the courthouse. At the beginning of a recess give your packet of notes to the bailiff. Your notes will be returned to you when court reconvenes.

At the conclusion of the trial, all notes must be given to the bailiff for immediate destruction.

Notes on Use

The court may wish to consider the anticipated length of the trial, the technical nature of the subjects about which the witnesses will testify, and the amount of detail which must be sifted through by the jurors in order to be competent fact finders.

Comment

Note taking by jurors is a matter of "sound judicial discretion." *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968), *cert. denied* 394 U.S. 908, 22 L. Ed 2d 219, 89 S. Ct. 1019 (1969), overruled on other grounds in *State v. Mims*, 220 Kan. 726, 556 P.2d 387 (1976). A more comprehensive review of the subject is contained in 14 ALR 3rd 831.

52.05 STIPULATIONS AND ADMISSIONS

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

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

Notes on Use

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

Comment

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

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

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

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

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

52.06 PROOF OF OTHER CRIME - LIMITED ADMISSIBILITY OF EVIDENCE

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

Notes on Use

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

In *every* case where evidence of other crimes is admitted either for a purpose listed in K.S.A. 60-455 or for some other relevant purpose not relying upon inferences from propensity, the trial court must give an instruction (PIK 3d 52.06) limiting the purpose for which evidence of other offenses is to be considered by the jury. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). The instruction need not be given contemporaneously with the evidence; timing of the instruction is left to the court's discretion. *State v. Hall*, 246 Kan. 728, 740-41, 793 P.2d 737 (1990). The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. An instruction concerning the purpose of evidence of other offenses should include only those factors that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397 (1974).

The Kansas Supreme Court has taken a firm stand concerning the need for a proper limiting instruction. Erroneous admission of evidence under one exception is not considered harmless merely because it *would* have been admissible under another exception not instructed upon. *State v. McCorgary*, 224 Kan. 677, 686, 585 P.2d 1024 (1978); *State v. Marquez*, 222 Kan. 441, 447-448, 565 P.2d 245 (1977).

The giving of a "shotgun" instruction has been frequently criticized and was held to be clearly erroneous in *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976), requiring reversal. When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984). When defendant neither requests a limiting instruction nor objects to its omission, the failure to give the instruction is reversible only if it is clearly erroneous. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). If defendant's request for a limiting instruction is refused in error, the conviction will be reversed unless failure to give the instruction is harmless error. *Id. See also State v. Denney*, 258 Kan. 437, 446, 905 P.2d 657

(1995) ("we caution trial judges that a limiting instruction should be given when requested by the defendant in every case where prior crimes evidence is admissible for one purpose but not for another, as is mandated by K.S.A. 60-406."). *State v. Wilkerson*, 278 Kan. 147, 91 P.3d 1181 (2004), found failure to give an instruction was not reversible error, under the unique facts of the case, where the other crimes evidence was so interwoven with the commission of the crime and defendant's arrest that there was little or no chance the jury would have used the evidence solely for the propensity inference.

Comment

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

I. INTRODUCTION

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

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

> "First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might

conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed. Thus, in several ways the defendant is prejudiced by such evidence."

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

II. ADMISSION FOR NON-PROPENSITY INFERENCES

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

"Subject to K.S.A. 60-447, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Under the statute, evidence of other crimes may be admitted following a separate hearing if relevant for a purpose that does not rely upon an inference from defendant's general propensity, *e.g.*, for violence, and if the evidence meets the other criteria of admissibility set out below.

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

B. *Test of Admissibility.* In accordance with the restrictive stance of the Court regarding admission of other crimes or civil wrongs, the trial court must employ a three-part test to determine whether such evidence may be admitted. Before admitting

the evidence, the trial court must find that the other crime is: (1) *relevant* to prove; (2) a *material fact that is substantially in issue*; and (3) then *balance* the *probative value* of the evidence against its *prejudicial effect*.

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

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

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

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

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

(3) *Balancing*. As the third step of the test, the trial court must weigh the probative value of the evidence for the limited purpose for which it is offered against the risk of undue prejudice. *State v. Marquez*, 222 Kan. at 445. If the potential for natural bias and prejudice overbalances the contribution to the rational

development of the case, the evidence must be barred. *State v. Bly*, 215 Kan. at 175. The balancing process is discussed extensively in *State v. Davis*, 213 Kan. 54, 57-59, 515 P.2d 802 (1973).

C. *Eight Listed Factors.* K.S.A. 60-455 lists eight examples of uses of evidence of other crimes and civil wrongs that do not rely upon the prohibited propensity inference. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), overrules prior case law and holds that the statutory list of examples is not exclusive and that K.S.A. 60-455 applies whenever evidence is relevant for a purpose not relying upon the propensity inference. However, it remains important to understand what evidence is material to prove each of the specified factors. As noted above, prior to admitting evidence to prove one of these factors, it is important to establish the nature, facts, and circumstances of the other crimes.

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

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

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

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

(3) *Intent.* For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent has no probative value and should

not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). However, the crucial distinction in admitting other crimes evidence on the issue of intent is not whether the crime is a specific or general intent crime, but whether the defendant has claimed his acts were innocent. *State v. Graham*, 244 Kan. 194, 198, 768 P.2d 259 (1989). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal. In that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

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

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), acknowledged that Kansas case law has not always been consistent on the question whether other crimes evidence is admissible to show intent when defendant simply denies that the acts charged ever occurred. The court concluded that the trend of the most recent cases is to require defendant to have asserted an innocent explanation for an acknowledged act before intent will be considered a disputed material issue. Thus, where defendant was charged with sexual abuse of his stepson, evidence that he previously had engaged in other forms of sexual abuse with two stepdaughters and a sister-in-law was not admissible to prove intent or absence of mistake or accident where defendant denied that the incidents with the stepson occurred. Further, intent was not made an issue by defendant's statement to a KBI investigator admitting that unintentional touching had occurred on a separate occasion when defendant awakened to find his stepson in his bed.

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

(4) *Preparation.* Preparation for an offense consists of devising or arranging means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts may have strong probative

value in showing preparation if such acts convince a reasonable person that the actor intended that prior activities culminate in the commission of the crime at issue. *State v. Grissom*, 251 Kan. 851, 925, 840 P.2d 1142 (1992); Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

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

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), held it was reversible error in a prosecution for child sexual abuse to admit other crimes evidence to show plan based upon common modus operandi, where the similarities between the charged crime and the other crimes "are present in nearly all . . . scenarios" in which the charged crime occurs and there are significant dissimilarities. *Id.*

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

Kackley, 32 Kan. App. 2d 927, 92 P.3d 1128 (2004), which distinguishes *Jones* and admits another incident of indecent liberties with a child to show plan where it involved striking similarities amounting to a signature.

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

(7) *Identity.* Where a similar offense is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both of the offenses. *State v. Bly*, 215 Kan. at 177. Similarity must be shown in order to establish relevancy. *State v. Henson,* 221 Kan. 635, 644, 562 P.2d 51 (1977). The quality of sameness *is* important when pondering the admission of other crimes to prove identity. *State v. Johnson*, 210 Kan. 288, 294, 502 P.2d 802 (1972) (citing Slough, 20 Kan. L. Rev. at 420). In general, see Note, *Evidence: Admissibility of Similar Offenses as Evidence of Identity in a Criminal Trial*, 14 Washburn L. J. 367 (1975). See also, *State v. Smith*, 245 Kan. 381, 389, 781 P.2d 666 (1989); *State v. Searles*, 246 Kan. 567, 577, 793 P.2d 724 (1990); *State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).

For examples, see *State v. Higgenbotham*, 271 Kan. 582, 23 P.3d 874 (2001) (where prior murder was committed in similar manner); *State v. Lane*, 262 Kan. 373, 940 P.2d 422 (1997) (murders of abducted children held sufficiently similar); *State v. Richmond*, 258 Kan. 449, 904 P.2d 974 (where prior rape and robbery were committed in similar manner).

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

D. *Other Considerations.* The trial court should consider several other issues relating to the introduction of other-crimes evidence under K.S.A. 60-455.

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

* *Acquittal as a Collateral Estoppel. Dowling v. United States*, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990), holds that the doctrine of collateral estoppel implicit in the Double Jeopardy Clause of the Fifth Amendment ordinarily does not bar receipt of evidence of other crimes that is relevant for a purpose

permitted by Federal Rule of Evidence 404(b), the counterpart of K.S.A. 60-455, even though criminal charges based upon that evidence resulted in an acquittal. Acquittal means only that the jury did not find defendant guilty beyond a reasonable doubt based upon the evidence. Under *Huddleston v. United States,* 485 U.S. 681, 99 L. Ed. 2d 771, 108 S.Ct. 1496 (1988), evidence need not satisfy the "beyond a reasonable doubt" standard to be admissible for a purpose identified in Rule 404(b). All that is required is evidence sufficient to permit a jury reasonably to conclude that the act occurred and that defendant was the actor. *Dowling* distinguished *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970), which held that defendant's acquittal of robbing one of six men playing poker in a home precluded, under the doctrine of collateral estoppel, subsequent prosecution of defendant for robbing a second of the six men. In *Ashe*, both prosecutions involved the same ultimate facts; in *Dowling*, the second prosecution involved different ultimate facts.

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

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

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

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

State v. O'Neal, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction).

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

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

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

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

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

III. ADMISSION FOR PURPOSES OTHER THAN THE EIGHT LISTED IN K.S.A. 60-455

A. *Separate Hearing Required.* As with evidence admitted for one of the eight purposes listed in K.S.A. 60-455, it is the better practice to determine the admissibility of evidence of other crimes for other relevant purposes in advance of trial and in the absence of the jury. See discussion in Section II.A., Separate Hearing Required.

B. *Other Categories of Admissible Evidence.* Because the list of permissible uses in K.S.A. 60-455 is illustrative only, evidence of other crimes or civil wrongs may be introduced, subject to the balancing test, whenever it is relevant for a non-propensity purpose, and also when there is express statutory authority. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

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

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

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

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

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

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

(3) *Res Gestae.* Prior to adoption of the Kansas rules of evidence, the common law doctrine of *res gestae* often was used to justify admission of other crimes evidence. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), holds that *res gestae*

no longer is an independent basis for admission of evidence of prior crimes or of hearsay. Admissibility must be determined by the same standards, including the determination of relevance and the balancing of probative value against prejudice, that apply to other crimes evidence generally. *Id.*

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

State v. Ward, 31 Kan. App. 2d 284, 288, 64 P.3d 972 (2003), held that mere temporal proximity of the other crime to the crime charged is insufficient to make the other crime relevant. The court reversed the trial court for admitting as *res gestae* evidence of a drug transaction that preceded the charged sex offense where the drug crime was "not logically related to one or more of the material facts in issue," since it did not explain why the charged crime occurred, did not facilitate it, and was not naturally, necessarily or logically connected with it or illustrative of it.

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim often is relevant to establish one of the eight factors listed in K.S.A. 60-455, such as motive, intent or absence of mistake or accident, to show the relationship and continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness about the act charged. However, as in other cases, the trial court must determine the evidence is relevant other than by showing defendant's general propensity, *e.g.*, for violence, and must balance probative value against prejudice. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

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

(5) *Other Crime as Element of Crime Charged.* Evidence of a prior conviction is relevant 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).

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), *reversed on other grounds sub. nom Kansas v. Marsh*, ___U.S.___, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006). *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. *See also Holmes v. South Carolina*, ___ U.S. ___, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

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.

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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.

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

54.05 RESPONSIBILITY FOR CRIMES OF ANOTHER

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

Notes on Use

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

Comment

When this instruction is given and the prosecution's theory is that defendant is guilty as an aider and abettor, it is not error for the court to modify the elements instruction to indicate that defendant "or another for whose conduct he is criminally responsible" committed the act charged, when the modification clarifies to the jury that defendant is not charged as a principal actor. *State v. Burton*, 35 Kan. App. 2d 876, 136 P.3d 945 (2006). The trial court is not required to modify the elements in this way. *Id.*

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); *State v. Davis*, ___ Kan. ___, 148 P.3d 510 (2006) refused to consider the holding in *Hunter*. *See also State v. Francis*, 282 Kan. 120, 145 P.3d 48 (2006).

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). *See also State v. Francis*, 282 Kan. 120, 145 P.3d 48 (2006) (instruction appropriate despite prosecutor's opening statement that evidence would show defendant fired fatal shots when evidence at trial failed to establish which shots were fatal ones).

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).

A parent's awareness of a child's injuries and failure to do anything to discover their cause or prevent their reoccurrence may be sufficient evidence to warrant an instruction on aiding and abetting abuse of the child. *State v. Smolin*, 221 Kan. 149, 557 P.2d 1241 (1976).

54.16 RESTITUTION

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

Comment

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

54.17 USE OF FORCE IN DEFENSE OF A PERSON

Defendant claims (his)(her) use of force was permitted as (self-defense) (the defense of another person).

Defendant is permitted to use force against another person when and to the extent that it appears to (him)(her) and (he)(she) reasonably believes such force is necessary to defend (himself)(herself)(someone else) against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

[Defendant is permitted to use deadly force against another person only when and to the extent that it appears to (him)(her) and (he)(she) reasonably believes deadly force is necessary to prevent death or great bodily harm to (himself)(herself)(someone else) from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.]

When use of force is permitted as (self-defense) (defense of someone else), there is no requirement to retreat.

Notes on Use

For authority, see K.S.A. 21-3211 as amended July 1, 2006, and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982). When there is evidence that an attacker initially used force against defendant, PIK 3d 54.17-A, No Duty to Retreat, should be given. When there is no evidence of an attack upon defendant, PIK 3d 54.17, Use of Force in Defense of a Person, should be given. In appropriate cases, PIK 3d 54.17-A and this instruction both should be given.

The language in brackets should be given when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, the language in brackets should be used in lieu of the language in the second paragraph.

It may be helpful in some cases to insert the names of defendant and the other persons in place of the terms "defendant," "another person," and "someone else."

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

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

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

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK 2d 54.17 in the use of "immediate" in lieu of the statutory "imminent." The Court held it to be reversible error to use the word "immediate" in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word "imminent" would describe this defense more accurately, as the definition implies "impending or near at hand, rather than immediate." See also, *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

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

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

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).

Because premeditation requires reason and imperfect self-defense requires the absence of reason, it is not error to instruct the jury to consider first-degree premeditated murder before considering imperfect self-defense. *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006).

54.17-A NO DUTY TO RETREAT

A person who is not engaged in an unlawful activity and who is attacked in a place where (he)(she) has a right to be has no duty to retreat. (He)(She) has the right to stand (his)(her) ground and to meet force with force.

Notes on Use

For authority, see K.S.A. 21-3218. Formerly, the "no duty to retreat" instruction was 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).

This instruction is appropriate when there is evidence the attacker first used force against defendant. In appropriate cases, such as when the evidence is disputed whether defendant was attacked first, PIK 3d 54.17, 54.18, or 54.19 also may be given.

54.18 USE OF FORCE IN DEFENSE OF A DWELLING OR OCCUPIED VEHICLE

Defendant claims (his)(her) conduct was permitted as a lawful defense of [(his)(her)] (dwelling) (occupied vehicle).

Defendant is permitted to use force to the extent that it appears to (him)(her) and (he)(she) reasonably believes that such force is necessary to prevent another person from unlawfully (entering into) (remaining in) (damaging) [(his)(her)] (dwelling) (occupied vehicle). Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

[Defendant is permitted to use deadly force to prevent another person from unlawfully (entering into) (remaining in) (damaging) [(his)(her)] (dwelling) (occupied vehicle) only when (he)(she) reasonably believes deadly force is necessary to prevent death or great bodily harm to (himself)(herself) (someone else). Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.]

When use of force is permitted as a lawful defense of [(his)(her)] (dwelling) (occupied vehicle), there is no requirement to retreat.

Notes on Use

For authority, see K.S.A. 21-3212 as amended July 1, 2006. The applicable parenthetical phrase or phrases should be selected. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

The instruction should not ordinarily be used where the defendant is not the occupant of the dwelling in question. *State v. Alexander*, 268 Kan. 610, 1 P.3d 875 (2000).

When there is evidence that an attacker initially used force against defendant, PIK 3d 54.17-A, No Duty To Retreat, should be given. When there is no evidence of an attack upon defendant, PIK 3d 54.18, Use of Force in Defense of a Dwelling or Occupied Vehicle, should be given. In appropriate cases, PIK 3d 54.17-A and this instruction both should be given.

The language in brackets should be given when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, the language in brackets should be used in lieu of the language in the second paragraph.

It may be helpful in some cases to insert the names of defendant and the other persons in place of the terms "defendant," "another person," and "someone else."

Comment

See *State v. Countryman*, 57 Kan. 815, 827, 48 Pac. 137 (1897); *State v. Farley*, 225 Kan. 127, 133-34, 587 P.2d 337 (1978). See also, Comment to PIK 3d 54.17, Use of Force in Defense of a Person, and cases cited.

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54.19 USE OF FORCE IN DEFENSE OF PROPERTY OTHER THAN A DWELLING OR OCCUPIED VEHICLE

The defendant claims (his)(her) conduct was justified as a lawful defense of (his)(her) property.

A person lawfully in possession of property, other than a dwelling or occupied vehicle, is justified in (threatening to use) (using) such force to stop an unlawful interference with such property as would appear necessary to a reasonable person under the circumstances then existing.

Notes on Use

For authority, see K.S.A. 21-3213. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

A person is not permitted to use force in defense of (himself)(herself)(someone else) ([his][her] dwelling) ([his][her] occupied vehicle) if (he)(she) is (attempting to commit) (committing) (escaping after the commission of) _____, a forcible felony.

Notes on Use

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

Comment

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

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

Attempted possession of marijuana with intent to sell may be a forcible felony where the circumstances lend themselves to danger and the threat of violence. *State v. Ackward*, 281 Kan. 2, 128 P.3d 382 (2006).

54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

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

Comment

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

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

54.22 INITIAL AGGRESSOR'S USE OF FORCE

A person who initially provokes the use of force against (himself)(herself)(someone else) is not permitted to use force to defend (himself)(herself)(someone else) unless:

(the person reasonably believes that [he][she] is in present danger of death or great bodily harm, and [he][she] has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person).

or

(the person has in good faith withdrawn and indicates clearly to the other person that [he][she] desires to withdraw and stop the use of force, but the other person continues or resumes the use of force).

Notes on Use

For authority, see K.S.A. 21-3214(3)(a) and (b).

Comment

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

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

54.23 LAW ENFORCEMENT OFFICER OR PRIVATE PERSON SUMMONED TO ASSIST - USE OF FORCE IN MAKING ARREST

The defendant claims (his)(her) conduct was permitted because (he)(she) was a (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him][her]).

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him][her]) need not retreat or cease the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is permitted to use any force which (he)(she) reasonably believes (to be necessary to effect the arrest) (to be necessary to defend [himself][herself][someone else] from bodily harm while making the arrest).

However, (he)(she) is permitted to use force likely to cause death or great bodily harm only when (he)(she) reasonably believes that such force:

(is necessary to prevent death or great bodily harm to [himself][herself][someone else]).

or

(is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit _____, a felony that involves great bodily harm or [is attempting to escape by use of a deadly weapon] [otherwise indicates (he)(she) will endanger human life or inflict great bodily harm unless arrested without delay]).

(A law enforcement officer making an arrest pursuant to an invalid warrant is permitted to use any force which (he)(she) would be permitted to use if the warrant were valid, unless (he)(she) knows that the warrant is invalid).

(A private person who is [summoned] [directed] by a law enforcement officer to assist in making an arrest which is unlawful is permitted to use any force which (he)(she) would be permitted to use if the arrest were lawful).

Reasonable belief requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority, see K.S.A. 21-3215.

The second paragraph should be used only if there is some evidence that the force was likely to cause death or great bodily harm.

The third paragraph should be used only where an invalid warrant is involved.

The fourth paragraph should be used only where an officer has requested assistance in making an arrest which proves to be unlawful. For authority, see K.S.A. 21-3216(2).

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 3d 54.17, Use of Force in Defense of a Person, and 54.18, Use of Force in Defense of a Dwelling, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

54.24 PRIVATE PERSON'S USE OF FORCE IN MAKING ARREST - NOT SUMMONED BY LAW ENFORCEMENT OFFICER

The defendant claims (his)(her) conduct was permitted because (he)(she) was a private person (making) (assisting another private person in making) a lawful arrest.

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or cease efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is permitted to use any force which (he)(she) reasonably believes to be necessary to:

(effect the arrest).

or

(defend [himself][herself][someone else] from bodily harm while making the arrest).

(However, [he][she] is permitted to use force likely to cause death or great bodily harm only when [he][she] reasonably believes that such force is necessary to prevent death or great bodily harm to [himself][herself][someone else]).

Reasonable belief requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

Notes on Use

For authority, see K.S.A. 21-3216(1). See also, PIK 3d 54.23, Law Enforcement Officer or Private Person Summoned to Assist - Use of Force in Making Arrest.

Comment

Whether the degree of force employed in making a citizen's arrest is "reasonable" is a jury question. *State v. Johnson*, 6 Kan. App. 2d 750, 752-53, 634 P.2d 1137 (1981), *rev. denied* 230 Kan. 819 (1981).

The final paragraph, defining "reasonable belief," appears as necessary here as in PIK 3d 54.17, Use of Force in Defense of a Person, and 54.18, Use of Force in Defense of a Dwelling, where it was required to be added to the earlier instructions in *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

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).

In *State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006), the Supreme Court found that all tests for multiplicity except the same elements test would no longer be recognized in Kansas. The Court found that the same elements test reflects the legislative intent as set forth in K.S.A. 21-3007, and held, "[T]he test to determine whether charges in a complaint or information under different statutes are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense; if so, the charges stemming from a single act are not multiplicitous. We further hold that this same-elements test will determine whether there is a violation of Sec. 10 of the Kansas Constitution Bill of Rights when a defendant is charged with violations of multiple statutes arising from the same course of conduct."

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.

55.07 CONSPIRACY - DECLARATIONS

Declarations of one conspirator may be considered by you as evidence against all co-conspirators if the declarations were made when:

1. **Two or more conspirators were participating in a plan to commit a crime; and**
2. **The plan to commit the crime was in existence; and**
3. **The plan to commit the crime had not been completed.**

Notes On Use

For authority, see K.S.A. 60-460(i)(2). The co-conspirator evidence rule is discussed in the Comment to PIK 3d 55.03, Conspiracy.

Comment

In *State v. Bird*, 238 Kan. 160, 176, 708 P.2d 946 (1985), the Supreme Court set forth the five prerequisites for utilizing K.S.A. 60-460(i)(2). See also, *State v. Shultz*, 252 Kan. 819, 850 P.2d 818 (1993). The co-conspirator's statement need not be "in furtherance" of the conspiracy but must be "relevant" to the conspiracy. See also *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 198-199, 577 P.2d 803 (1978).

The determination of whether a conspiracy exists for purpose of the hearsay exception [K.S.A. 60-460(i)(2)] rests with the judge not the jury. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995).

"In order to show a conspiracy, it is not necessary that there be any formal agreement manifested by formal words written or spoken; it is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances. *State v. Sherry*, 233 Kan. 920, 934, 667 P.2d 367 (1983)." *State v. Swafford*, 257 Kan. 1023, 897 P.2d 1027 (1995).

Under K.S.A. 60-460(i)(2), hearsay statements by a coparticipant that implicate the accused in a crime are admissible against the accused only if made "while the plan to commit the crime is in existence and 'before its complete execution or other termination.'" *State v. Myers*, 229 Kan. 168, 625 P.2d 1111 (1981). See also, *State v. Johnson-Howell*, 255 Kan. 928, 881 P.2d 1288 (1994).

Three cases decided in 2006 dealt with the question of the admission of the declarations of a coconspirator after *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004). In *State v. Jackson*, 280 Kan. 16, 118 P.3d 1238 (2006), the Supreme Court noted that the statements of a coconspirator are not testimonial, so *Crawford* does not preclude the admissibility of statements offered pursuant to K.S.A. 60-460(i)(2). However, in *State v. Nguyen*, 281 Kan. 702, 133 P.3d 1259 (2006), the Court clarified that even without *Crawford*, statements of coconspirators, made after the crime has been consummated (in this case, a statement made to an investigating police officer), are not admissible pursuant to K.S.A. 60-460(i)(2). Accord, *State v. Wilson*, 35 Kan. App. 2d 333, 130 P.3d 139 (2006).

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55.08 CONSPIRACY - SUBSEQUENT ENTRY

All of the conspirators need not enter into the agreement at the same time. If a person later joins an already formed conspiracy with knowledge of its unlawful purpose, that person may be found guilty as a conspirator.

Notes on Use

For authority, see *State v. Becknell*, 5 Kan. App. 2d 269, 272, 615 P.2d 795 (1980); and *State v. Johnson*, 253 Kan. 356, 856 P.2d 134 (1993).

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).

It is not error to instruct the jury to consider first-degree murder before considering imperfect self-defense. Premeditation and imperfect self-defense are distinguishable on the basis that premeditation requires one to have thought over, not just any matter, but the matter of an intentional killing beforehand and to have formed the design or intent to kill before the act, whereas a person asserting imperfect self-defense has thought over the matter of defense of one's self or another, whether reasonable or unreasonable. *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006).

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).

Comment

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

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

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

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

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

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

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

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

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

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

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

This instruction was cited with approval in *State v. Lamae*, 268 Kan. 544, 998 P.2d 106 (2000); *State v. Beach*, 275 Kan. 603, 67 P.3d 121 (2003); *State v. Jackson*, 280 Kan. 541, 124 P.3d 460 (2005).

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

56.07-B VEHICULAR BATTERY

The statute upon which this instruction was based (K.S.A. 21-3405b) has been repealed, effective July 1, 1993.

See PIK 3d 56.18, Aggravated Battery.

56.08 ASSISTING SUICIDE

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

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

1. **[That the defendant knowingly by force or duress caused another person to commit or attempt to commit suicide;]**

   or

   [That the defendant with the intent and purpose of assisting another person to commit or attempt to commit suicide knowingly

   a. **provided the means by which another person committed or attempted to commit suicide;**

      or

   b. **participated in a physical act by which another person committed or attempted to commit suicide; and]**

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

Notes on Use

For authority, see K.S.A. 21-3406 as amended in L. 1998, Ch. 142. Assisting suicide knowingly by force or duress is a severity level 3 person felony, and as otherwise described is a severity level 9 person felony.

Comment

This instruction was cited with approval in *State v. Baker*, 281 Kan. 997, 135 P.3d 1098 (2006).

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 (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 as described in subsection (a)(1) or (2) of K.S.A. 21-3502 is a severity level 1, person felony. Rape as described in subsection (a)(2) when the offender is 18 years of age or older is an off-grid, person felony. Rape as described in subsection (a)(3) or (4) 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 in a 4-3 decision considered whether the defendant's three attempted rape convictions and two aggravated sodomy convictions were multiplicitous. The Court found that the defendant's conduct constituted one continuous occurrence because the only difference in the allegations of each charge was a lapse of a few minutes between each offense and the facts necessary to prove the acts. *Dorsey* was later distinguished in *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984), where the Supreme Court held the trial court did not err in refusing to merge two counts of rape which occurred two or three hours apart. *Dorsey* was further distinguished in *State v. Howard*, 243 Kan. 699, 763 P.2d 607 (1988), which rejected a claim that multiple rape and sodomy convictions were multiplicitous because the acts occurred over a time span of 1 ½ to 3 hours and were separate and distinct, occurred at different times and locations, and were separated from each other by other sexual acts. In *State v. Richmond*, 250 Kan. 376, 827 P.2d 743 (1992), the defendant was convicted of two counts of rape which occurred within one hour and upon the same victim. The defendant's claim of multiplicity was rejected by the Supreme Court which held the two incidents to be clearly separate. The *Richmond* opinion further notes that "the propriety of the result reached in *Dorsey* is questionable." In accord see *State v. Long*, 26 Kan. App. 2d 644, 993 P.2d 1237 (1999), *rev. denied* 268 Kan. 852 (2000), which held that five separate rape convictions involving the same victim, in the same apartment, and within a period of 1 to 2 hours were not multiplicitous.

A person may be convicted of rape if consent is withdrawn after the initial consensual penetration but intercourse is continued by the use of force or fear. However, when consent is withdrawn after penetration the defendant is entitled to a reasonable time in which to act after the withdrawn consent is communicated to the defendant. Whether the termination of intercourse occurs within a reasonable time is

to be determined by the jury, taking into account the manner in which consent was withdrawn and the particular facts of each case. *State v. Bunyard*, 281 Kan. 392, 133 P.3d 14 (2006).

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).

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).

57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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

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

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

OR

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

or

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

or

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

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

OR

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

or

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

or

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

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

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

Notes on Use

For authority, see K.S.A. 21-3504. Aggravated indecent liberties as described in subsections (a)(1) and (3) of K.S.A. 21-3504 is a severity level 3, person felony. When the act is committed pursuant to subsection (a)(2), it is a severity level 4, person felony. When the offender is 18 years of age or older, aggravated indecent liberties with a child as described in subsection (a)(3) is an off-grid, person felony.

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

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

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

Comment

An instruction similar to PIK Crim. 3d 57.06 was approved by the Supreme Court in *State v. Isley*, 262 Kan. 281, 291, 936 P.2d 275 (1997). In *Isley* the court ruled that aggravated indecent liberties with a child as defined by K.S.A. 21-3504(a)(1) is a general intent crime. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor even though age is a material element of the 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).

57.08 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)(1) and (2). Aggravated criminal sodomy is a severity level 1, person felony. Aggravated criminal sodomy committed by an offender who is 18 years of age or older is an off-grid, 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.

57.12 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 6, 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 the child's 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 (employed) (used) (persuaded) (induced) (enticed) (coerced) insert name of child under the age of 14 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

OR

1. That the defendant promoted any performance that includes sexually explicit conduct by a child under 14 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. Sexual exploitation of a child is a severity level 5, person felony. Sexual exploitation of a child as described in K.S.A. 21-3516(a)(5) or (a)(6) when the offender is 18 years of age or older is an off-grid, person felony.

The bracketed alternatives of paragraph 1 should be used when the offender is 18 years of age or older and the child is less than 14 years of age.

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.

57.12-C ELECTRONIC SOLICITATION OF A CHILD

The defendant is charged with the crime of electronic 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 by means of communication conducted through the telephone, internet, or by other electronic means (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); and**
2. **That _____ was a person whom the defendant believed was child under (14) (16) years of age; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

As used in this instruction, "communication conducted through the internet or by other electronic means" includes but is not limited to e-mail, chatroom chats and text messaging.

The elements 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) are as follows: _____

Notes on Use

For authority, see K.S.A. 21-3523. Electronic solicitation is a level 1, person felony if the act is committed upon a person the offender believes is under 14 years of age. It is a severity level 3, person felony if the act is committed upon a person the offender believes is less than 16 years of age.

57.13 AGGRAVATED INDECENT SOLICITATION OF A CHILD

The defendant is charged with the crime of aggravated 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) 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);**

   or

   That the defendant (invited) (persuaded) (attempted to persuade) _____ to enter any (vehicle) (building) (room) (secluded place) with the intent to commit [(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 a child under the age of 14 years; 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. 21-3511. Aggravated indecent solicitation of a child is a severity level 5, 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. The only difference between the crimes of indecent solicitation of a child and aggravated indecent solicitation of a child is in the age of the child.

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 the child's age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).

57.14 PROSTITUTION

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

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

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

Notes on Use

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

Comment

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

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

57.15 PROMOTING PROSTITUTION

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

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

1. That the defendant:

(a) (established) (owned) (maintained) (managed) a house of prostitution; and

OR

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

OR

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

OR

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

OR

(e) induced another to become a prostitute; and

OR

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

OR

(g) procured a prostitute for a patron; and

OR

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

OR

(i) was employed to perform any act of [set out applicable section of (a) through (h)]; and

2. That the prostitute was 14 or more years of age but less than 16; and

OR

2. That the prostitute was less than 14 years of age; and

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

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution is a class A, nonperson misdemeanor when the prostitute is 16 or more years of age. Promoting prostitution when the prostitute is 16 or more years of age is a severity level 7, person felony if committed by a person who has prior to the commission of the crime been convicted of promoting prostitution. When the prostitute is under 16 years of age, promoting prostitution is a severity level 6, person felony. Promoting prostitution is an off-grid, person felony when the offender is 18 years of age or older and the prostitute is less than 14 years of age.

The first alternative of paragraph 2 should be given when the prostitute is 14 or more years of age but less than 16. The second alternative of paragraph 2 should be given when the prostitute is less than 14 years of age and the offender is 18 or more years of age.

The appropriate category of the offense should be selected.

Comment

In *State v. Dodson*, 222 Kan. 519, 565 P.2d 291 (1977), the Court stated that when the offer is implicit in the defendant's words and actions when taken in the context in which they occurred, no overt act is required to complete the offense of solicitation.

57.15-A PROMOTING PROSTITUTION - CHILD UNDER 16

The defendant is charged with the crime of promoting prostitution of a child under age 16. The defendant pleads not guilty.

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

1. **That the defendant (procured _____ as a prostitute for a house of prostitution) (induced _____ to become a prostitute) (solicited a patron for _____, a prostitute) (procured _____, a prostitute, for a patron) [(procured transportation for) (paid for the transportation of) (transported) _____ with the intent of assisting or promoting _____'s engaging in prostitution];**
2. **That _____ was then under 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. 21-3513. Promoting prostitution of a prostitute under 16 years of age is a severity level 6, person felony.

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.

In *State v. Stout*, 34 Kan. App. 2d 83, 114 P.3d 989 (2005), the Court of Appeals held that french kissing can constitute lewd touching in a prosecution under K.S.A. 21-3520. Whether such contact is lewd is a question for the jury by considering the totality of the circumstances. The opinion further held that a broad dictionary definition of the term "morals" is error because it is not required by the Kansas pattern instructions for prosecutions under K.S.A. 21-3520 and it invades the province of the jury.

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

Notes on Use

For authority, see K.S.A. 21-3522. 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.

Comment

K.S.A. 21-3522 provides that this charge applies only when the parties involved are members of the opposite sex. However, in *State v. Limon*, 280 Kan. 275, 122 P.3d 22 (2005), the Kansas Supreme Court determined that the statutory language "and are members of the opposite sex" violated the equal protection provisions of the United States and Kansas Constitutions. The opinion observes that teenagers of the same sex who engage in unlawful voluntary sexual relations are punished more harshly than teenagers of the opposite sex who engage in similar conduct. The opinion further held that the equal protection violation inherent in K.S.A. 21-3522 is cured by the severance of the words "and are members of the opposite sex" from the statute.

58.09 ENCOURAGING JUVENILE MISCONDUCT

The statute on which this instruction was based (K.S.A. 21-3607) was repealed effective July 1, 1978. L. 1978, ch. 123 § 3.

58.10 ENDANGERING A CHILD

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

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

1. **That the defendant intentionally and unreasonably caused or permitted _____ to be placed in a situation in which there was a reasonable probability that _____'s life, body or health would be injured or endangered;**
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 K.S.A. 21-3608(a). Endangering a child is a class A, person misdemeanor. See K.S.A. 21-3608(b) for exception based on good faith selection of spiritual means for treatment, cure or care of a child.

Comment

The constitutionality of K.S.A. 21-3608(1)(b), [now K.S.A. 21-3608(a)] was upheld upon the finding that the purpose of the statute is to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common-sense interpretation, is not vague. *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981).

In *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), the Supreme Court held that the State is not required to prove that the defendant had any independent legal duty to the child.

In *State v. Sharp*, 28 Kan. App. 2d 128, 13 P.3d 29 (2000), the Court of Appeals held that giving the prior version of this instruction was reversible error. The prior version of the instruction did not include the language requiring that the jury find there was a "reasonable probability" of injury to the child.

Endangering a child is not a lesser included offense of child abuse. The Supreme Court has held that other than the age of the victim and the fact that each crime involves endangering a child, there is no commonality of elements and the two crimes are not different degrees of the same crime. *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006).

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 caused or permitted _____ to be placed in a situation in which _____'s life, body or health was injured or endangered;**

   or

   (b) That the defendant recklessly caused or permitted _____ to be placed in a situation in which _____'s life, body or health was injured or endangered;

   or

   (c) That the defendant caused or 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

   (d) That the defendant caused or 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 K.S.A. 21-3608a. A violation of this statute is a severity level 9, person felony. It is defined as one of the "inherently dangerous" felonies by K.S.A. 21-3426.

For the definition of "methamphetamine" see K.S.A. 65-4107(d)(3) and (f)(1). For the definition of "manufacture" see K.S.A. 65-4101(n). For the definition of "drug paraphernalia" see (K.S.A. 65-4150(c).

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. *Bland v. Scott*, 279 Kan. 962, 972, 112 P.3d 941 (2005); *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.

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

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

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

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

Notes on Use

For authority, see K.S.A. 2003 Supp. 21-3610. Unlawfully hosting minors consuming alcohol or cereal malt beverages is a class B, person misdemeanor. The 2006 Legislature raised the minimum fine from $200 to $1,000.

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

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

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The optional words and phrases should be used as required in the particular case. If warranted, PIK 3d 59.64-A, Computer Crime - Defense, should be given.

Comment

The words "modifying," "altering," and "copying" as used in K.S.A. 21-3755(b)(1)(C), which defines computer crimes, do not make the statute unconstitutionally vague. *State v. Rupnick*, 280 Kan. 720, 125 P.3d 541 (2005).

59.64-A COMPUTER CRIME - DEFENSE

It is a defense if the defendant appropriated the property or services openly and under a claim of title made in good faith.

Notes on Use

For authority, see K.S.A. 21-3755(b)(3). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

59.69 TRAFFICKING IN COUNTERFEIT DRUGS

The defendant is charged with the crime of trafficking in counterfeit drugs. The defendant pleads not guilty.

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

1. **That the defendant intentionally (manufactured) (distributed) (dispensed) (sold or delivered for consumption purposes) (held or offered for sale) any counterfeit drug, knowing it to be counterfeit;**
2. **That the retail value of the counterfeit drug (manufactured) (distributed) (dispensed) (sold or delivered for consumption purposes) (held or offered for sale) was (less than $500) (at least $500 but less than $25,000) ($25,000 or more); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4167. Trafficking in counterfeit drugs with a retail value of less than $500 is a class A nonperson misdemeanor. Trafficking in counterfeit drugs with a retail value of at least $500 but less than $25,000 is a severity level 9, nonperson felony. Trafficking in counterfeit drugs with a retail value of $25,000 or more is a severity level 7, nonperson felony.

59.70 VALUE IN ISSUE

The State has the burden of proof as to the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) (which the defendant allegedly [obtained] [damaged] [impaired] [gave]) (over which the defendant allegedly [obtained] [exerted] unauthorized control).

The State claims that the (value of) (damage to) (amount of) the (property) (services) (money or its equivalent) (communication services) (check[s]) (order[s]) (draft[s]) involved herein was in the amount of _____.

It is for you to determine the amount and enter it on the verdict form furnished.

Notes on Use

It is necessary to use this instruction with PIK 3d 68.11, Verdict Form - Value in Issue, when an issue exists. The appropriate alternative should be used and dollar amount inserted in the blanks.

For authority, see *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975); *State v. Green*, 222 Kan. 729, 567 P.2d 893 (1977); *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974).

Comment

In *State v. Stephens*, 263 Kan. 658, 953 P.2d 1373 (1998), the court held that the degree of a theft crime is determined by the value of the property stolen. The value of what the victim received or the extent of the victim's loss is immaterial in making that determination. The value issue is discussed in great detail in the opinion. On this issue, see also *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985).

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

60.05 PERJURY

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

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

1. **That the defendant intentionally, knowingly and falsely (swore) (testified) (affirmed) (declared) (subscribed) to a material fact upon (his)(her) oath or affirmation legally administered by a person authorized to administer oaths; and**
   or
   That the defendant intentionally, knowingly and falsely subscribed as true and correct under penalty of perjury a material matter in a (declaration) (verification) (certificate) (statement); and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3805. Perjury is a severity level 7, nonperson felony if the false statement is made upon the trial of a felony charge. Perjury is a severity level 9, nonperson felony if the false statement is made in a cause, matter or proceeding other than the trial of a felony charge or is made under penalty of perjury in any declaration, verification, certificate or statement as provided in K.S.A. 53-601 and K.S.A. 75-5743.

Comment

In *State v. Bingham*, 124 Kan. 61, 257 Pac. 951 (1927), it was held that the question of whether false testimony is material in a perjury case is to be determined as a question of law by the trial court and not as a question of fact by the jury. In order to constitute perjury under the statute, it is essential that the false testimony be on a material matter. The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; it is sufficient if they relate to collateral matters upon which evidence would have been admissible. For cases related to this subject, see *State v. Elder*, 199 Kan.

607, 433 P.2d 462 (1967); *State v. Frames*, 213 Kan. 113, 119, 515 P.2d 751 (1973); *State v. Edgington*, 223 Kan. 413, 573 P.2d 1059 (1978).

However, in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), the Court held the element of materiality in a perjury prosecution under 18 U.S.C. § 1001 must be resolved by a jury and the trial judge's refusal to submit the question of materiality to the jury was violative of the defendant's Fifth and Sixth Amendment rights. It was also noted in *Gaudin* that the parties agreed upon the following definition of "materiality":

> "the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decision making body to which it was addressed."

In *State v. Rollins*, 264 Kan. 466, 957 P.2d 438 (1998), the court reiterated that the materiality of a false statement under K.S.A. 21-3805 is a question of law for the judge and not a question of fact for the jury. The court distinguished the holding in *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995), construing 18 U.S.C. § 1008 (1988).

The rule requiring two witnesses or one witness and corroborating circumstances to prove perjury is inapplicable to the crime of solicitation to commit perjury. *State v. Ellis*, 25 Kan. App. 2d 61, 957 P.2d 520 (1998).

60.37 to 60.39 RESERVED FOR FUTURE USE.

60.40 MAKING A FALSE CLAIM TO THE MEDICAID PROGRAM

The defendant is charged with the crime of making a false claim to the medicaid program. 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, engaged in a pattern of (making) (presenting) (submitting) (offering) or causing to be (made) (presented) (submitted) (offered);**

(a) **a (false) (fraudulent) claim for payment for any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;**

or

(b) **a [(false) (fraudulent)] [(statement) (representation)] for use in determining payments which may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;**

or

(c) **a [(false) (fraudulent)] [(report) (filing)] which (was) (may be) used in (computing) (determining) a rate of payment for any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;**

or

(d) **a [(false) (fraudulent)] [(statement) (representation)] made in connection with any (report) (filing) which (was) (may be) used in (computing) (determining) a rate of payment for any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in**

whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;

or

(e) **a (statement) (representation) for use by another in obtaining any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program, knowing the (statement) (representation) to be false in whole or in part by (commission) (omission) whether or not the claim is allowed or allowable;**

or

(f) **a claim for payment for any (goods) (service) (item) (facility) (accommodation) which is not medically necessary in accordance with professionally recognized parameters or as other wise required by law for which payment may be made, in whole or in part, under the medicaid program, whether or not the claim is allowed or allowable;**

or

(g) **a [(wholly) (partially)] [(false) (fraudulent)] [(book) (record) (document) (data) (instrument)] [(required to be kept) (kept)] as documentation for any (goods) (service) (item) (facility) (accommodation) or of any cost or expense claimed for reimbursement for any (goods) (service) (item) (facility) (accommodation) for which payment (is) (has been) (can be) sought in whole or in part under the medicaid program, whether or not the claim is allowed or allowable;**

or

(h) **a [(wholly) (partially)] [(false) (fraudulent)] [(book) (record) (document) (data) (instrument)] to any properly identified (law enforcement officer) (employee or authorized representative of the attorney general) (employee or agent of the department of social and rehabilitation services, or its fiscal agent) in connection with any audit or investigation involving any (claim for**

payment) (rate of payment) for any (goods) (service) (item) (facility) (accommodation);

or

(i) a [(false) (fraudulent)] [(statement) (representation)] made with the intent to influence any acts or decision of any (official) (employee) (agent) of any (state) (federal) agency having (regulatory) (administrative) authority over the Kansas medicaid program;

2. That the total amount of payments illegally claimed is ($25,000 or more) (at least $500 but less than $25,000) (less than $500); and

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

Notes on Use

For authority, see K.S.A. 2005 Supp. 21-3846. Where the aggregate amount of payments illegally claimed is $25,000 or more, and the acts complained about are found in paragraphs (a) through (g) above, this is a severity level 7, nonperson felony. If the amount is at least $500 but less than $25, 000 and the acts complained about are found in paragraphs (a) through (g), this is a severity level 9, nonperson felony. If the amount is less than $500 and the acts complained about are found in paragraphs (a) through (g), this is a class A misdemeanor. If the acts complained about are found in paragraphs (h) or (i), then this is a severity level 9, nonperson felony.

Useful definitions for this crime can be found in K.S.A. 2005 Supp. 21-3845.

If the amount claimed is disputed, a special question should be submitted to the jury, such as: "The amount illegally obtained from the medicaid program equals _____."

60.41 UNLAWFUL ACTS RELATED TO MEDICAID PROGRAM

The defendant is charged with the crime of (soliciting) (receiving) (offering to make) (making) illegal payments in connection with the medicaid program. The defendant pleads not guilty.

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

1. **That the defendant (on [his] [her] own behalf) (on behalf of someone in [his] [her] family) knowingly and intentionally (solicited) (received) a (remuneration) (kickback) (bribe) (rebate) [(directly) (indirectly) (overtly) (covertly)] in cash or in kind in return for:**

(a) **(referring) (refraining from referring) an individual to a person for (the furnishing) (arranging for the furnishing) of any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program; and**
or

(b) **(purchasing) (leasing) (ordering) (arranging for [purchasing] [leasing] [ordering]) (recommending [purchasing] [leasing] [ordering]) of any (goods) (service) (item) (facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program; and**

OR

1. **That the defendant (on [his] [her] own behalf) (on behalf of someone in [his] [her] family) knowingly and intentionally (offered) (paid) any (remuneration) (kickback) (bribe) (rebate) [(directly) (indirectly) (overtly) (covertly)] in cash or in kind to any person in order to:**

(a) **induce them (to refer) (to refrain from referring) an individual to a person for (the furnishing) (arranging for the furnishing) of any (goods) (service) (item)**

(facility) (accommodation) for which payment may be made, in whole or in part, under the medicaid program; and

or

(b) (purchase) (lease) (order) (arrange for [purchasing] [leasing] [ordering]) (recommend [purchasing] [leasing] [ordering]) any (goods) (service) (item) (facility) (accommodation) for which payment may be made in whole or in part under the medicaid program; and

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

Notes on Use

For authority, see K.S.A. 2005 Supp. 21-3847. This is a severity level 7, nonperson felony.

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

62.01 EAVESDROPPING

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

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

1. That the defendant knowingly and without lawful authority:

(a) entered into a private place with intent to listen secretly to private conversations or to observe the personal conduct of any other person or persons therein; and

or

(b) installed or used, outside a private place, any device for hearing, recording, amplifying or broadcasting sounds originating in such place which sounds would not ordinarily be audible or comprehensible outside, without the consent of the person entitled to privacy therein; and

or

(c) installed or used a device for the interception of a (telephone) (telegraph) (other wire) communication without the consent of the person in possession or control of the facilities for such communication; or

(d) installed or used a (concealed camcorder) (motion picture camera) (photographic camera of any type)

(1) to secretly (videotape) (film) (photograph) (record by electronic means) under or through the clothing being worn by _____;

or

(2) to secretly (videotape) (film) (photograph) (record by electronic means) _____, who is nude or in a state

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 any 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 or banking instrument including, but not limited to, credit or debit card, 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, certified copies of birth, death, marriage and divorce certificates, social security cards and employee identification cards.

Notes on Use

For authority, see K.S.A. 21-4018(a). Identity theft is a severity level 8, nonperson felony. If the monetary loss to the victim or victims is more than $100,000, identity theft is a severity level 5, nonperson 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." Since *Vargas*, these issues have been addressed by the legislature in K.S.A. 21-4018(d). See PIK 3d 62-13-A, Identity Fraud.

62.13-A IDENTITY FRAUD

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

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

1. **That the defendant willfully and knowingly supplied false information intending that the information be used to obtain an identification document;**
   or
   That the defendant (made) (counterfeited) (altered) (amended) (mutilated) any identification document without lawful authority and with the intent to deceive;
   or
   That the defendant willfully and knowingly (obtained) (possessed) (used) (sold) (attempted to obtain, possess, or furnish to another) for any purpose of deception an identification document; and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4018(d). Identity fraud is a severity level 8, nonperson felony.

62.14 UNLAWFULLY PROVIDING INFORMATION ON AN INDIVIDUAL CONSUMER

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

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

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

As used in this instruction:

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

The term "consumer" means an individual.

Notes on Use

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

62.15 OBTAINING CONSUMER INFORMATION

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

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

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

As used in this instruction:

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

The term "consumer" means an individual.

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

Notes on Use

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

64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

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

Notes on Use

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

Comment

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

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

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

64.05 CRIMINAL DISPOSAL OF FIREARMS

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

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

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

2. That the defendant knew _____ had been convicted of a felony and had been found to be in possession of a firearm at the time of the commission of the offense; and

OR

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

2. That the defendant knew _____ was or had been (a mentally ill person) (a person with an alcohol or substance abuse problem) involuntarily committed for care and treatment;

3. That the person involuntarily committed had not received a certificate of restoration from the court that ordered the commitment; and

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

Notes on Use

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

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

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

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

Alternative F involves people who are or have been committed for mental illness, alcohol abuse or substance abuse and who have not received a certificate of restoration.

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

Alternative	Status of Transferee	Barrel Length	Prior Crime	Prior Crime Time Limit
A.	Less than 18 Years	Less than 12"	N/A	N/A
B.	Addict and User	N/A	N/A	N/A
C.	Felon	N/A	Specified felony without firearm	Five years
D.	Felon	N/A	Specified felony without firearm	Ten years
E.	Felon	N/A	Any felony with firearm	No time limit
F.	Commitment	None	None	No time limit

Comment

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

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

64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY

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

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

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

2. That the defendant had been (convicted of _____, [a person felony] [a violation of the Uniform Controlled Substances Act]) (adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]);

3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (person felony) (violation of the Uniform Controlled Substances Act) (act which if done by an adult would constitute the commission of a [person felony] [violation of the Uniform Controlled Substances Act]); and

OR

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

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

OR

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

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

OR

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

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

3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior (nonperson felony) (act which if done by an adult would constitute the commission of a nonperson felony); and

OR

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

2. That the defendant was or had been (a mentally ill person) (a person with an alcohol or substance abuse problem) involuntarily committed for care and treatment;

3. That the person involuntarily committed had not received a certificate of restoration from the court that ordered the commitment; and

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

Notes on Use

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

Alternatives A and D are to be used when the defendant was found to have been in possession of a firearm at the time of the commission of the prior felony. The Committee believes that while such a prior finding may not have been specifically made by the court it may be implied from the elements of the charge upon which the defendant was convicted. Alternatives B and C, however, have the negative statutory requirement that the defendant was found not to have been in possession of a firearm at the time of the commission of the offense. The negative requirements of alternatives B and C are not required to be proved by the prosecution and have not been included as part of the elements of those alternatives. See *State v. Johnson*, 25 Kan. App. 2d 105, 959 P.2d 476, *rev. denied* 265 Kan. 888 (1998). Likewise, the negative statutory requirement of alternative C, that the defendant did not have the conviction expunged or had not been pardoned for the crime, does not need to be proven as part of the state's case. See *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994).

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

Alternative E involves people who are or have been committed for mental illness, alcohol abuse or substance abuse and who have not received a certificate of restoration.

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

Comment

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

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

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

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

In *State v. Pollard*, 273 Kan. 706, 44 P.3d 1261 (2002), the court held that Kansas law will apply in determining whether or not a defendant's out-of-state criminal proceeding constitutes a conviction as a predicate to prosecution for the Kansas crime of felony criminal possession of a firearm under K.S.A. 21-4204. In *Pollard*, the defendant had plead guilty to a prior act of felony first-degree burglary in Missouri, was found guilty by the Missouri trial court, and was given a "suspended imposition of sentence" with two years of probation. The terms of his probation included prohibitions against the possession or control of firearms. Under Missouri law, however, a "suspended imposition of sentence" is not a conviction as Missouri does

not consider such to be a final judgment. The *Pollard* court held that, despite the peculiarities of Missouri law, the question is whether or not the Missouri matter constituted the equivalent of a conviction in Kansas. The *Pollard* court concluded, after examining (1) the legal definition of conviction under statute and case law; (2) the procedural posture of Pollard's predicate felony; and (3) the construction of the term "conviction" for criminal history scoring purposes, that the Missouri court had actually established the defendant's factual guilt, and the Missouri matter was the equivalent of a conviction in Kansas which could be used as a predicate conviction for K.S.A. 21-4204.

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

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

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

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

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

Notes on Use

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

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

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

Comment

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

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

the cases.

A jury may not understand the meaning of the term "prurient interest." The definition of prurient interest is adopted from *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980).

In *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the Kansas Supreme Court held that the provisions of K.S.A. 21-4301(1), (2) and (3)(c) were unconstitutionally overbroad. The Court did not apply the standard set out in *Miller*, stating that *Miller* did not apply to devices. Instead, the Court found that the phrase "sexually provocative aspect" found in the *per se* definition of obscene devices in K.S.A. 21-4301(2), impermissibly equated sexuality with obscenity. The Court found that the legislation did not take into account the dissemination and promotion of sexual devices for medical and psychological therapy purposes. Therefore, the Court held that the statute impermissibly infringed on the constitutional right to privacy in one's home and in one's doctor's or therapist's office.

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

65.04 PROMOTING OBSCENITY - PRESUMPTION OF KNOWLEDGE AND RECKLESSNESS FROM PROMOTION

If you find that defendant promoted obscene materials or devices by emphasizing their prurient appeal or if you find the defendant is not a wholesaler, and promoted the materials or devices in the course of (his)(her) business, there is a presumption that the defendant did so knowingly or recklessly. This 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 of proving the required criminal intent of the defendant. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 21-4301(b) and 21-4301a.

The term "prurient appeal" is used in the statute. See *State v. Great American Theatre*, 227 Kan. 633, 608 P.2d 951 (1980), where the use of the word "prurient" is discussed.

65.10-A DEALING IN GAMBLING DEVICES - DEFENSE

It is a defense to this charge that:

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

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

Notes on Use

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

65.11 DEALING IN GAMBLING DEVICES - PRESUMPTION FROM POSSESSION

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

Notes on Use

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

65.15 CRUELTY TO ANIMALS

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

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

1. That the defendant:

(a) intentionally and maliciously (killed) (injured) (maimed) (tortured) (burned) (mutilated) (_the animal_); and

or

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

or

(c) had physical custody of _____ and intentionally failed to provide (food) (potable water) (protection from the elements) (opportunity for exercise) (_other care_) as needed for the health or well-being of that kind of animal; and

or

(d) intentionally used a (wire) (pole) (stick) (rope) (other object) to cause an equine to lose its balance or fall, for the purpose of sport or entertainment; and

or

(e) intentionally caused any physical injury to _____ _____; and

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

As used in these instructions, the term "equine" means a horse, pony, mule, jenny, donkey or hinny.

As used in these instructions, the term "maliciously" means a state of mind characterized by actual evil-mindedness or specific intent to do a harmful act without a reasonable justification or excuse.

Notes on Use

For authority, see K.S.A. 21-4310. Cruelty to animals as described in instruction 1(a) is a nongrid, nonperson felony. The first conviction for 1(b), 1(c), 1(d) and 1(e) is a class A, nonperson misdemeanor. A second or subsequent conviction is a nongrid, nonperson felony. The appropriate act(s) of cruelty specified in (1)(a), (b), (c), (d), or (e) should be used in the instruction.

Comment

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

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

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65.16 CRUELTY TO ANIMALS - DEFENSE

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

Notes on Use

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

65.19 ATTENDING AN UNLAWFUL DOG FIGHT

The defendant is charged with the crime of attending an unlawful dog fight. The defendant pleads not guilty.

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

1. **That the defendant knowingly attended a dog fight; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Dog fight means an event, conducted for gain or amusement, at which a dog fights with or injures another dog.

Notes on Use

For authority, see K.S.A. 21-4315. Attending an unlawful dog fight is a class B, nonperson misdemeanor.

Comment

For a definition of dog, see K.S.A. 47-1701(g).

65.20 ILLEGAL OWNERSHIP OR KEEPING OF AN ANIMAL

The defendant is charged with the crime of illegal ownership or keeping of an animal. The defendant pleads not guilty.

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

1. **That the defendant (owned) (kept) on defendant's premises an animal; and**
2. **That the defendant has been convicted of (the unlawful conduct of dog fighting under K.S.A. 21-4315 and amendments thereto) (cruelty to animals as defined in subsection (a)(1) of K.S.A. 21-4310) within the last five 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. 21-4317. Illegal ownership or keeping of an animal is a class B nonperson misdemeanor. K.S.A. 21-4313 defines "animal."

65.21 HARMING OR KILLING CERTAIN DOGS

The defendant is charged with the crime of harming or killing a[n] (police dog) (arson dog) (assistance dog) (game warden dog) (search and rescue dog). The defendant pleads not guilty.

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

1. **That the defendant knowingly and intentionally without lawful cause or justification (poisoned) (inflicted [great bodily harm] [permanent disability] [death]) upon a[n] (police dog) (arson dog) (assistance dog) (game warden dog) (search and rescue dog); and**
2. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4318. Inflicting harm, disability or death to a police dog, arson dog, assistance dog, game warden dog or search and rescue dog is a nongrid, nonperson felony. For definitions of the types of dogs referenced above, see K.S.A. 21-4318.

65.22 to 65.29 RESERVED FOR FUTURE USE.

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65.30 CONFLICTS OF INTEREST - COMMISSION MEMBER OR EMPLOYEE

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

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

1. **That the defendant was (the executive director) (a member of the commission) (an employee) (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery;**
2. **That the defendant had either directly or indirectly an interest in a business knowing that such business contracts with the Kansas Lottery for a major procurement, whether such interest is as (a natural person) (partner) (member of an association) (a stockholder or director or officer of the corporation); and**

   or

   That the defendant (accepted) (agreed to accept) any (economic opportunity) (gift) (loan) (gratuity) (special discount) (favor or service) (hospitality other than food and beverages) having an aggregate value of $20 or more in any calendar year from a person knowing that such person contracts or seeks to contract with the State to supply (gaming equipment) (materials) (tickets) (consulting services) for use in the lottery or is a lottery retailer or an applicant for lottery retailer; and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 74-8716(a). Conflicts of interest is a class A, nonperson misdemeanor.

65.32 FORGERY OF A LOTTERY TICKET

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

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

1. **That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a lottery ticket issued or purported to have been issued by the Kansas Lottery; or**

   That the defendant falsely (made) (altered) (forged) (passed) (counterfeited) a share or receipt for the purchase of a lottery ticket issued or purported to have been issued by the Kansas Lottery;
2. **That the defendant did this act with the intent to defraud; and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 74-8717. Forgery of a lottery ticket is a severity level 8, nonperson felony.

65.33 UNLAWFUL SALE OF A LOTTERY TICKET

The defendant is charged with the crime of unlawful sale of a lottery ticket. The defendant pleads not guilty.

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

1. **That the defendant sold a lottery ticket or share at a price other than the price fixed by the rules and regulations adopted pursuant to the Kansas Lottery Act; and**

   or

   That the defendant (sold) (resold) a lottery ticket or share and was not a lottery retailer as authorized by the Kansas Lottery Act; and

   or

   That the defendant sold a lottery ticket or share to _____ knowing that _____ was a person under 18 years of age; and

   or

   That the defendant sold a lottery ticket at retail by (electronic mail) (the internet) (telephone); and

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

Notes on Use

For authority, see K.S.A. 74-8718. Unlawful sale of a lottery ticket is a class A, nonperson misdemeanor upon conviction for a first offense, and a severity level 9, nonperson felony upon conviction for a second or subsequent offense.

66.02 DEBT ADJUSTING

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

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

1. **That the defendant engaged in the business of making express or implied contracts with a debtor whereby said debtor agreed to pay defendant a certain amount of money periodically; and**
2. **That the defendant agreed for a consideration to distribute such money among certain creditors of the debtor; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4402. Debt adjusting is a class B, nonperson misdemeanor.

The statute does not apply to debt adjusting incidental to the practice of law in the State of Kansas or to any person registered as a credit service organization under the Kansas Credit Services Organization Act. K.S.A. 50-116 *et seq.*

Comment

Constitutionality of statute upheld in *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); cf. *Blue v. McBride*, 252 Kan. 894, 850 P.2d 852 (1993); *State ex rel. v. Koscot Interplanetary, Inc.*, 212 Kan. 668, 512 P.2d 416 (1973).

Enforcement of K.S.A. 21-4402 does not violate the commerce clause of the United States Constitution. *Cambridge Credit Counseling Corp. v. Foulston*, 303 F.Supp.2d 1188, 1192 (D.Kan 2003).

66.03 DECEPTIVE COMMERCIAL PRACTICES

The defendant is charged with the crime of deceptive commercial practices. The defendant pleads not guilty.

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

1. **That the defendant (used deception) (knowingly misrepresented a material fact) in connection with the sale of merchandise as follows: _____ _____;**
2. **That the defendant intended that _____ _____ should rely on such false representations whether or not such person was misled, deceived or damaged thereby; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Merchandise means any object, wares, goods, commodities, intangibles, real estate or services.

Sale means any sale, offer for sale, or attempt to sell any merchandise for any consideration.

Notes on Use

For authority, see K.S.A. 21-4403. Deceptive commercial practices is a class B nonperson misdemeanor.

The term "person" is defined in section (b)(2) of the statute and has not been included in the instruction since the status of the person deceived would normally be a question of law. The section excludes application of the act to owners or publishers of newspapers, magazines, or other printed matter or owners or operators of radio or television stations where they had no knowledge of the intent, design or purpose of the advertisement.

In paragraph (1), the deceptive commercial practice should be described with particularity.

In paragraph (2), the name of the victim should be placed in the blank space.

67.18-B SIMULATED CONTROLLED SUBSTANCE AND DRUG PARAPHERNALIA DEFINED

A. Simulated Controlled Substance

"Simulated controlled substance" means any product which identifies itself by a common name or slang term associated with a controlled substance and which indicates on its label or accompanying promotional material that the product simulates the effect of a controlled substance.

B. Drug Paraphernalia

"Drug paraphernalia" means all equipment, and materials of any kind which are used or intended for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (injecting) (ingesting) (inhaling) (or otherwise introducing into the human body) a controlled substance in violation of the uniform controlled substances act. "Drug paraphernalia" shall include, but is not limited to:

(1) [insert specific item of paraphernalia],

(2) [insert specific item of paraphernalia], or

(3) [insert specific item of paraphernalia].

Notes on Use

For authority, see K.S.A. 65-4150(c) and (e). The specific items of paraphernalia listed in the statute and that are applicable to the case should be inserted into the instruction. This instruction should include only those items supported by the evidence. Inapplicable words should be stricken. See PIK 3d 67.17 regarding misdemeanor and felony drug paraphernalia possession.

Comment

Trial courts must carefully tailor the above definition of "drug paraphernalia" by differentiating between those terms which apply to felony possession of "drug paraphernalia" and those terms which apply to misdemeanor possession of "drug paraphernalia." *State v. Unruh*, 281 Kan. 520, 532, 133 P.3d 35 (2006).

67.18-C DRUG PARAPHERNALIA – FACTORS TO BE CONSIDERED

In determining whether an object is drug paraphernalia, you shall consider, in addition to all other logically relevant factors, the following:

[Statements by (an owner) (a person in control) of the object concerning its use.]

[Prior convictions, if any, of (an owner) (a person in control) of the object, under any (state) (federal) law relating to any controlled substance.]

[The proximity of the object, in time and space, to a direct violation of the uniform controlled substances act.]

[The proximity of the object to controlled substances.]

[The existence of any residue of controlled substances on the object.]

[(Direct) (circumstantial) evidence of the intent of (an owner) (a person in control) of the object, to deliver it to a person (the owner) (the person in control) of the object knows, or should reasonably know, intends to use the object to facilitate a violation of the uniform controlled substances act. The innocence of (an owner) (a person in control) of the object as to a direct violation of the uniform controlled substances act shall not prevent a finding that the object is intended for use as drug paraphernalia.]

[(Oral) (written) instructions provided with the object concerning its use.]

[Descriptive materials accompanying the object which explain or depict its use.]

[National and local advertising concerning the object's use.]

[The manner in which the object is displayed for sale.]

[Whether (the owner) (the person in control) of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products.]

[(Direct) (circumstantial) evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.]

[The existence and scope of legitimate uses for the object in the community.]

[Expert testimony concerning the object's use.]

[Any evidence that alleged paraphernalia can be or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia.]

Notes on Use

For authority, see K.S.A. 65-4151. This instruction should include only those factors in K.S.A. 65-4151 which are supported by evidence.

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67.24 POSSESSION BY DEALER - NO TAX STAMP AFFIXED

The defendant is charged with the crime of possession of (insert name of controlled substance) (marijuana), without Kansas tax stamps affixed. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed more than _____ (grams) (dosage units) of (insert name of controlled substance) (marijuana) without affixing official Kansas tax stamps or other labels showing that the tax has been paid; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 79-5201 *et seq.* Pursuant to K.S.A. 79-5208, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, label or other indicia is guilty of a severity level 10 felony.

Under K.S.A. 79-5204(c) and (d), the drug tax is due and payable, and drug tax stamps must be affixed immediately upon receipt, acquisition or possession of the controlled substance. *State v. Schoonover*, 281 Kan. 453, 511, 133 P.3d 48 (2006).

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

Comment

In order to sustain a conviction for possession of a controlled substance that is sold by weight without a tax stamp, the accused must have more than 1 gram of the controlled substance in his or her possession. *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997).

In *State v. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), a defendant found to be in possession of nine rocks of crack cocaine was not considered a dealer, the court holding that evidence showed crack cocaine is sold by dosage although powder cocaine may be sold by weight. However, a defendant in possession of three rocks of crack cocaine was found to be a dealer where one rock weighed more than seven grams and the charge referred to weight rather than dosage. *State v. Edwards*, supra.

Where defendant had possession of two packages, neither of which was weighed separately but when weighed together weighed 1.4 grams, and neither package was tested separately but were mixed together before testing, the defendant's conviction for no tax stamp was reversed. *State v. Beal*, 26 Kan. App. 2d 837, 994 P.2d 669 (2000).

The Kansas drug tax does not impose a criminal penalty for double jeopardy purposes. *State v. Jensen*, 259 Kan. 781, 915 P.2d 109 (1996); *State v. Yeoman*, 24 Kan. App. 2d 639, 951 P.2d 964 (1997).

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

_____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 65-4159(a) and (b), 65-4101(bb), 65-4160(e), 65-4161(f), 65-4162(c) and 65-4163(d). These subsections state that the prohibitions contained in their respective sections apply to controlled substance analogs as defined in K.S.A. 65-4101(bb). To be a controlled substance analog, a substance must have a chemical structure and an effect, or intended effect, on the central nervous system substantially similar to a controlled substance contained in the schedules in K.S.A. 65-4105 or 65-4107. The name of the controlled substance to be inserted in the appropriate blanks in element nos. 1 and 2 must be a substance contained in K.S.A. 65-4105 or 65-4107.

Depending on the prohibited act involved, the appropriate elements from PIK 3d 67.13, 67.13-B, 67.14, 67.15, 67.16 or 67.21 should be added following Element No. 2 of this instruction.

67.27 METHAMPHETAMINE COMPONENTS - POSSESSION WITH INTENT TO MANUFACTURE

The defendant is charged with the crime of possession of (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above) with intent to use the product to manufacture a controlled substance. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above) with intent to use the product to manufacture a controlled substance; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-7006. As of May 25, 2006, a violation of this statute is a drug severity level 2 felony. For crimes committed prior to May 25, 2006, see *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied* 274 Kan. 1115 (2002), which holds that a violation of K.S.A. 2001 Supp. 65-7006(a) is a drug severity level 4 felony because the elements thereof are identical to K.S.A. 65-4152, a drug severity level 4 felony. For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D.

Comment

K.S.A. 65-7006(a) is a general statute that addresses not only pure ephedrine or pseudoephedrine, but also drug products containing ephedrine or pseudoephedrine. *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied* 274 Kan. 1115 (2002).

67.28 METHAMPHETAMINE COMPONENTS - MARKETING, SALE, ETC.

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

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

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

Notes on Use

For authority, see K.S.A. 65-7006. As of May 25, 2006, a violation of this statute is a drug severity level 2 felony.

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68.01-A CONCLUDING INSTRUCTION - CAPITAL MURDER - SENTENCING PROCEEDING

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

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

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

_____

District Judge

_____, _____

Notes on Use

For authority, see K.S.A. 21-4624(b) which provides in part that ". . . The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable." See also *State v. Kleypas*, 272 Kan. 894, 1060-64, 40 P.3d 139 (2001).

68.02 GUILTY VERDICT - GENERAL FORM

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

_____
Presiding Juror

Notes on Use

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

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

Comment

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

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

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

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

4. **Sexual Exploitation of a Child** - Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).
5. **Battery or Aggravated Battery** - A severity level 7 aggravated battery charge that a defendant intentionally caused bodily harm to another person in any manner whereby great bodily harm, disfigurement, or death could be inflicted is a lesser included offense of a severity level 4 aggravated battery charge that the defendant intentionally caused great bodily harm to another person because all elements of the level 7 aggravated battery are identical to some of the elements of the level 4 aggravated battery. K.S.A. 21-3107(2)(b). *State v. Winters*, 276 Kan. 34, 72 P.3d 564 (2003).
6. **Child Abuse** - Endangering a child is not a lesser included offense of child abuse. *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006).

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

(PIK 3d 56.03)

Instruction No. 5.

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

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

(PIK 3d 56.05)

Instruction No. 6.

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

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

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

(PIK 3d 56.06)

Instruction No. 7.

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

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

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

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

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

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

Instruction No. 8.

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

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

Instruction No. 9.

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

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

Instruction No. 10.

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

Instruction No. 11.

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

Instruction No. 12.

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

Instruction No. 13.

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

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

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

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

_____
District Judge

_____, _____.

Instruction No. 3.

The State has the burden of proof as to the value of the property over which the defendant allegedly exerted unauthorized control.

The State claims that the value of the property involved herein was in an amount of at least $1,000 but less than $25,000.

It is for you to determine the amount and enter it on the verdict form furnished.

(PIK 3d 59.70)

Instruction No. 4.

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

(PIK 3d 54.05)

Instruction No. 5.

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

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

(PIK 3d 52.02)

Instruction No. 6.

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

Instruction No. 7.

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

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.
Your agreement upon a verdict must be unanimous.
(PIK 3d 68.01)

_____
District Judge

_____, _____

VERDICT FORMS

We, the jury, find the defendant guilty of theft and find the value of the property over which the defendant exerted unauthorized control to be:

At least one thousand dollars ($1,000) but less than twenty-five thousand dollars ($25,000) ☐

Less than One thousand dollars ($1,000) ☐

(Place an X in the appropriate square.)

_____

Presiding Juror

(PIK 3d 68.11)

OR

We, the jury find the defendant not guilty of _____.

_____

Presiding Juror

(PIK 3d 68.03)

69.03 POSSESSION OF MARIJUANA WITH INTENT TO SELL - ENTRAPMENT AS AN AFFIRMATIVE DEFENSE

Summary of the Facts and Issues

On July 3, 1996, Detective James Ware was told by a confidential informant that John Spencer was selling marijuana. Ware contacted Spencer in a bar in Wichita, Kansas, where Spencer was employed as a bartender. Ware talked with Spencer on numerous occasions.

On each of those occasions, Ware told Spencer that he was interested in buying five to ten pounds of marijuana. Ware said he was nervous but he had been told Spencer could be trusted on October 4, 1996. A price was negotiated and a meeting was set up for October 5, 1996, to complete the transaction.

When Spencer showed up for the meeting, Ware showed him the agreed amount of cash. Spencer then opened the trunk of his car to show Ware the marijuana. When Ware saw the marijuana in the trunk of the car, Spencer was arrested.

Spencer testified at trial that he had had many conversations with Ware but that he would not have agreed to sell the marijuana if Ware had not kept pressuring him.

In rebuttal testimony the confidential informant, Tyler Johnson, testified that he had been present on three occasions when Spencer had sold marijuana.

An Outline of Suggested Instructions in Sequence Follows:

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

PIK 3d 51.05, Rulings of the Court.

VERDICT FORMS

We, the jury, find the defendant guilty of possession of marijuana with intent to sell.

_____
Presiding Juror

(PIK 3d 68.02)

OR

We, the jury, find the defendant not guilty of possession of marijuana with intent to sell.

_____
Presiding Juror

_____, _____

(PIK 3d 68.03)

69.04 CAPITAL MURDER--GUILT AND PENALTY PHASES

Summary of the Facts and Issues

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

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

Suggested Instruction to be Given Before Voir Dire:

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

Outline of Suggested Instructions in Sequence - Guilt Phase:

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

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

PIK 3d 52.09, Credibility of Witnesses.

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

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

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

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

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

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

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

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

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

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

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

Instruction 13. PIK 3d 68.01, Concluding Instructions.

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

TEXT OF SUGGESTED INSTRUCTION TO BE GIVEN BEFORE VOIR DIRE

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

TEXT OF SUGGESTED INSTRUCTIONS - GUILT PHASE

Instruction No. 1.

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

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

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

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

Instruction No. 2.

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

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

1. That the defendant intentionally killed Joe Jones.

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

(PIK 3d 56.00-A)

Instruction No. 3.

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

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

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

Your Presiding Juror should mark the appropriate verdict.

(PIK 3d 68.09)

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 permitted as self-defense.

A person is permitted to use deadly force against another person only when and to the extent that it appears to him and he reasonably believes deadly force is necessary to prevent death or great bodily harm to himself from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

When use of force is permitted as self-defense, there is no requirement to retreat.
(PIK 3d 54.17)

Instruction No. 9.

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

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

Instruction No. 10.

The defendant raises self-defense as a defense. Evidence in support of this defense should be considered by you in

determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.
(PIK 3d 52.08)

Instruction No. 11.

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

Instruction No. 12.

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.
(PIK 3d 51.10-A)

Instruction No. 13.

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

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

Your agreement upon a verdict must be unanimous.

_____
District Judge

_____, _____
(PIK 3d 68.01)

VERDICT FORMS

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

We, the jury, find the defendant not guilty.

_____
Presiding Juror

(PIK 3d 68.10)

Outline of Suggested Instructions in Sequence - Penalty Phase:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TEXT OF SUGGESTED INSTRUCTIONS - PENALTY PHASE

Instruction No. 1.

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

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

Instruction No. 2.

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

Instruction No. 3

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

Instruction No. 4

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

Instruction No. 5

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

Instruction No. 6

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

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

1. That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another; and
2. That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

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

Instruction No. 7

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

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

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

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

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

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

Instruction No. 8

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

Instruction No. 9

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

Instruction No. 10

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

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

Instruction No. 11

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

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

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

OR

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

(PIK 3d 56.00-H)

Instruction No. 12

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

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

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

_____

District Judge

_____, _____

(PIK 3d 68.01-A)

VERDICT FORMS

SENTENCING VERDICT

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

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

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

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

_____
Presiding Juror

_____, _____.

(PIK 3d 68.14-B-1)

OR

SENTENCING VERDICT

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

_____
Presiding Juror

_____, _____.

(PIK 3d 68.17)

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

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

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

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

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

Notes on Use

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

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

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

Comment

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

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

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

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

Proof of erratic driving is unnecessary for a conviction of driving while under the influence of alcohol. Evidence of incapacity to drive safely can be established through sobriety tests and other means. *State v. Blair*, 26 Kan. App. 2d 7, 974 P.2d 121 (1999).

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

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

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

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

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

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

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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).

70.01-B B.A.T. .08 OR MORE OR DUI CHARGED IN THE ALTERNATIVE

The defendant is charged in the alternative with (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more or (operating) (attempting to operate) a vehicle while under the influence of alcohol. You are instructed that the alternative charges constitute one crime.

You should consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while having a blood alcohol concentration of .08 or more and sign the verdict upon which you agree.

You should further consider if the defendant is guilty of (operating) (attempting to operate) a vehicle while under the influence of alcohol and sign the verdict upon which you agree.

Notes on Use

The Committee believes that K.S.A. 8-1567 defines a single offense. The State may, however, charge the offense in the alternative. See PIK 3d 70.01, Traffic Offense - Driving Under the Influence of Alcohol or Drugs, and PIK 3d 70.01-A, Traffic Offense - Alcohol Concentration .08 or more.

Authority for instructions in the alternative are found in *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978), and *State v. McCowan*, 226 Kan. 752, 764, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844 (1980).

70.02 DRIVING UNDER THE INFLUENCE - IF CHEMICAL TEST USED

The law of the State of Kansas provides that a chemical analysis of the defendant's (blood) (breath) (urine) (other body substance) may be taken in order to determine the amount of the alcohol in the defendant's blood at the time the alleged offense occurred. [If a test shows there was .08 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that (he)(she) was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case.] [If a test shows there was less than .08 percent by weight of alcohol in the defendant's blood, that fact may be considered with other competent evidence to determine if the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).]

You are further instructed that evidence derived from a (blood) (breath) (urine) (other body substance) test does not reduce the weight of any other evidence on the question of whether the defendant was under the influence of (alcohol) (drugs) (a combination of alcohol and drugs).

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. This instruction is to be used in conjunction with PIK 3d 70.01 when chemical tests have been administered. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used. This instruction is not applicable to a charge or alternative charge of a per se violation of K.S.A. 8-1567(a)(1).

Comment

The constitutionality of a presumption is described in the Comment to PIK 3d 54.01 and 54.01-B.

The Committee believes that "prima facie" evidence as used in K.S.A. 8-1005 creates a presumption, and the suggested instruction is worded accordingly. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973).

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

70.03 TRANSPORTING AN ALCOHOLIC BEVERAGE IN AN OPENED CONTAINER

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

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

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

Notes on Use

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

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

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

Comment

In *State v. Erbacher*, 8 Kan. App. 2d 169, 651 P.2d 973 (1982), the Court of Appeals held that former K.S.A. 41-2719, which prohibits transportation of an open container of cereal malt beverage in a vehicle, applied to passengers as well as to the driver of the vehicle. The Court of Appeals reached a similar conclusion in *State v.*

Bishop, 14 Kan. App. 2d 223, 786 P.2d 1152 (1990), holding that former K.S.A. 41-804, that prohibited the transportation of open containers of alcoholic liquor, also applied to passengers as well as the driver of the vehicle. *Bishop* further holds that the State must prove the defendant knew or had reasonable cause to know that open containers of alcoholic liquor were present and being transported, and that the doctrine of constructive possession does not extend to unknowing passengers.

Both K.S.A. 41-2719 and K.S.A. 41-804 have been repeaed and are now recodified in K.S.A. 8-1599.

K.S.A. 8-1599(h) provides it shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic liquor.

70.04 RECKLESS DRIVING

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

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

1. **That the defendant was driving a vehicle;**
2. **That the defendant was driving in a reckless manner; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Reckless means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger.

Notes on Use

For authority, see K.S.A. 8-1566. A first conviction of reckless driving shall be punishable by imprisonment for not less than five days nor more than 90 days, or by a fine of not less than $25 nor more than $500, or by both such fine and imprisonment. Second and subsequent convictions of reckless driving shall be punishable by imprisonment for not less than 10 days nor more than six months, or by a fine of not less than $50 nor more than $500, or by both such fine and imprisonment.

Comment

Reckless driving is not a lesser included offense of driving under the influence of alcohol or drugs. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983); *State v. Brueninger*, 238 Kan. 429, 434-435, 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 requires 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.

Ignition interlock device means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such a person has consumed an alcoholic beverage.

Notes on Use

For authority, see K.S.A. 8-1017. Violation of this section is a class A, nonperson misdemeanor.

Ignition interlock device is defined in K.S.A. 8-1013(d). See also, K.S.A. 8-1015 which sets forth the authorized restrictions of driving privileges and how they are imposed.

70.09 FLEEING OR ATTEMPTING TO ELUDE A POLICE OFFICER

The defendant is charged with the crime of fleeing or attempting to elude a police officer. The defendant pleads not guilty.

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

1. **That the defendant was driving a motor vehicle; and**
2. **That the defendant was given a visual or audible signal by a police officer to bring the motor vehicle to a stop; and**
3. **That the defendant intentionally failed or refused to bring the motor vehicle to a stop, or otherwise fled or attempted to elude a pursuing police (vehicle) (bicycle); and**
4. **That the police officer giving such a signal was in uniform, prominently displaying such officer's badge of office; and**
5. **That the police officer's (vehicle) (bicycle) was appropriately marked showing it to be an official police (vehicle) (bicycle); and**

[6. That the defendant (failed to stop at a police road block) (drove around a tire deflating device placed by a police officer) (engaged in reckless driving) (was involved in a motor vehicle accident) (intentionally caused damage to property) (committed five or more moving violations) (attempted to elude capture for any felony)]

[6.] or [7.] That this act occurred on or about the _____ day of _____, in _____ County, Kansas.

[The elements of _____ are (set forth in instruction no. ___) (as follows: _____ _____).]

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.

Comment

Disobeying a command to stop given by a uniformed law enforcement officer who is on foot does not constitute the crime of fleeing or attempting to elude. An essential element of the crime requires that the uniformed law enforcement officer must be occupying an appropriately marked police vehicle or police bicycle when the visual or audible signal to stop is given to the defendant. *State v. Beeney*, 34 Kan. App. 2d 77, 114 P.3d 996 (2005).

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 _____ _____.

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