Pattern Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

KANSAS JUDICIAL COUNCIL

Robert E. Davis, Chair ..... Leavenworth
Justice of the Supreme Court
Jerry G. Elliott ..... Wichita
Judge of the Court of Appeals
Robert J. Fleming ..... Parsons
Judge, Eleventh Judicial District
Jean F. Shepherd ..... Lawrence
Judge, Seventh Judicial District
Senator John Vratil ..... Leawood
Chair, Senate Judiciary Committee
Representative Michael R. O'Neal ..... Hutchinson
Chair, House Judiciary Committee
J. Nick Badgerow ..... Overland Park
Gerald L. Goodell ..... Topeka
Joseph W. Jeter ..... Hays
Stephen E. Robison ..... Wichita

KANSAS JUDICIAL COUNCIL ADVISORY COMMITTEE ON CRIMINAL JURY INSTRUCTIONS

Hon. Stephen D. Hill, Chair ..... Paola
Hon. David W. Boal ..... Kansas City
Hon. Thomas H. Bornholdt ..... Olathe
Prof. James Concannon ..... Topeka
Hon. David W. Kennedy ..... Wichita
Hon. Thomas E. Malone ..... Wichita
Hon. Donald R. Noland ..... Girard
Hon. Nancy E. Parrish ..... Topeka
Hon. Janice D. Russell ..... Olathe
Hon. Philip C. Vieux ..... Garden City
Hon. Mike E. Ward ..... El Dorado

Subscription Information

PIK-Criminal 3d **is updated yearly with supplements that reflect important changes in both statutory law and case law. Your subscription is automatic with the purchase of this publication. Yearly supplements will be sent to you and billed the then-current prices.**

If you do not wish to receive the supplements, you must inform the Judicial Council. You may contact the Judicial Council by e-mail at judicial.council@ksjc.state.ks.us, by fax at (785) 296-1035, by telephone at (785) 296-2498 or by mail at:

Kansas Judicial Council
301 SW 10th, Suite 140
Topeka, KS 66612

Detailed Table of Contents

CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS CONSIDERATION

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

CHAPTER 55.00

ANTICIPATORY CRIMES

CHAPTER 56.00

CRIMES AGAINST PERSONS

CHAPTER 57.00

SEX OFFENSES

CHAPTER 58.00

CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

CHAPTER 59.00

CRIMES AGAINST PROPERTY

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

CHAPTER 61.00

CRIMES AFFECTING PUBLIC TRUSTS

CHAPTER 62.00

CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

CHAPTER 65.00

CRIMES AGAINST THE PUBLIC MORALS

CHAPTER 66.00

CRIMES AFFECTING BUSINESS

CHAPTER 67.00

CONTROLLED SUBSTANCES

CHAPTER 68.00

CONCLUDING INSTRUCTIONS AND VERDICT FORMS

CHAPTER 69.00

ILLUSTRATIVE SETS OF INSTRUCTIONS

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

CHAPTER 71.00

UPWARD DURATIONAL DEPARTURE

Cross Reference Table - Statutes To Instructions

Statutory Section	PIK 3d Number
3-1001	70.06
3-1002	70.06
3-1004	70.07
3-1005	70.07
8-262	70.10, 70.10-A, 70.11
8-285 *et seq.*	70.11
8-1005	70.01, 70.01-A, 70.02
8-1006	70.02
8-1017	70.08
8-1543	63.09
8-1566	70.04
8-1567	70.01, 70.01-B
8-1567(a)(1)	70.01-A
8-1568	70.09
8-1599	70.03
21-3106(2)	57.12-A
21-3107	56.05, 68.09,
21-3109	52.02, 52.03, 52.04,
21-3110(8)	53.00
21-3110(24)	53.00
21-3201(a), (b)	54.01-A
21-3201(b), (c)	56.04
21-3202	54.02
21-3203(1)	54.03
21-3203(2)	54.04
21-3204	54.01
21-3205(1)	54.05
21-3205(2)	54.06
21-3205(3)	54.07
21-3206(1), (2)	54.08
21-3207(1)	54.09
21-3208(1)	54.11
21-3208(2)	54.12, 54.12-A, 54.12-A-1
21-3209	54.13
21-3210	54.14
21-3211	54.17
21-3212	54.18
21-3213	54.19
21-3214(1)	54.20
21-3214(2)	54.21
21-3214(3)(a), (b)	54.22
21-3215	54.23
21-3216(1)	54.24
21-3217	54.25
21-3218	54.17-A
21-3301	55.01
21-3301(b)	55.02
21-3302	55.03
21-3302(a)	55.05, 55.06
21-3302(b)	55.04
21-3303	55.09
21-3303(c)	55.10
21-3401	56.01, 56.02, 56.02-A
21-3402	56.03, 56.03-A
21-3403	56.05
21-3404	56.06
21-3405	56.07
21-3405a	56.07-A
21-3405b	56.07-B
21-3406	56.08
21-3407(1)	56.10
21-3408	56.12
21-3409	56.13
21-3410	56.14
21-3411	56.15
21-3412	56.16, 56.16-A
21-3413	56.17
21-3414	56.18
21-3415	56.19
21-3416	56.20
21-3417	56.21
21-3418	56.22
21-3419a	56.23-B
21-3419	56.23, 56.23-A
21-3420	56.24
21-3421	56.25
21-3422	56.26
21-3422a	56.26-A, 56.26-B, 56.26-C
21-3423	56.27

Statutory Section	PIK 3d Number
21-3424	56.28
21-3425	56.29
21-3426	56.30
21-3427	56.31
21-3428	56.32
21-3430	56.33, 56.34
21-3431	56.18-A
21-3433	56.35
21-3434	56.36
21-3435	56.40
21-3436	56.37
21-3436(b)	56.38
21-3437	56.37
21-3437(b)	56.38
21-3438	56.39
21-3439	56.00-A
21-3442	56.06-A
21-3443	56.16-B
21-3501	57.02
21-3501(2)	57.18
21-3502	57.01
21-3502(b)	57.01-A
21-3503	57.05, 57.18
21-3503(b)	57.05-B
21-3504	57.06, 57.18
21-3504(b)	57.06-A
21-3505	57.07, 57.18
21-3505(b)	57.07-A
21-3506	57.08, 57.08-A
21-3506(a)(3)	57.08-B
21-3506(b)	57.08-C
21-3507	57.09
21-3508	57.10, 57.18
21-3509	57.11
21-3510	57.12
21-3511	57.13
21-3512	57.14
21-3513	57.15, 57.15-A
21-3514	57.16
21-3515	57.17
21-3516	57.12-A
21-3517	57.18, 57.19
21-3518	57.18
21-3518(a)(1)	57.20
21-3518(a)(2)	57.23
21-3518(a)(3)	57.24, 57.25
21-3518(b)	57.21
21-3518(c)	57.22
21-3519	57.12-B
21-3520	57.26
21-3522	57.27
21-3523	57.12-C
21-3601(a)	58.01
21-3601(b)	58.02
21-3602	58.03
21-3603	58.04
21-3604	58.05
21-3604a	58.05-A
21-3605(a)(1)	58.06
21-3605(b)(1)	58.07
21-3606	58.08
21-3607	58.09
21-3608(a)	58.10
21-3608(b)	58.10-A
21-3608a	58.10-B
21-3609	58.11
21-3610	58.12
21-3610(d)	58.12-C
21-3610b	58.12-B
21-3610c	58.12-E
21-3612	58.14
21-3701	59.01, 59.01-B, 59.01-C, 59.01-D
21-3701(a)(4)	59.01-A
21-3702	54.01-B
21-3703	59.02
21-3704	59.03
21-3705	59.04
21-3706	59.05
21-3707	59.06
21-3707(b)	59.06-A, 59.06-B
21-3707(c)	59.07
21-3708	59.08, 59.09
21-3709	59.10
21-3710(a)(1), (2)	59.11
21-3710(a)(3)	59.12
21-3711	59.13
21-3712	59.14
21-3713	59.15
21-3714	59.16

Statutory Section	PIK 3d Number
21-3715	59.17
21-3716	59.18
21-3717	59.19
21-3718	59.20-A, 59.21-A
21-3718(a)(1)	59.20
21-3718(a)(2)	59.21
21-3719	59.22
21-3720(a)(1)	59.23
21-3720(a)(2)	59.24
21-3721	59.25, 59.33-B
21-3721(a)(2)	59.25-A
21-3722(a)(1)	59.26
21-3722(a)(2)	59.27
21-3724(a), (b), (c), (f)	59.28
21-3724(d), (e)	59.29
21-3725	59.30
21-3726	59.31
21-3727	59.32
21-3728	59.33, 59.33-B
21-3729(a)(1)	59.34
21-3729(a)(2)	59.35
21-3729(a)(3)	59.36
21-3730	59.37
21-3731(a)	59.38
21-3731(a)(2)	59.38-A
21-3732	59.39
21-3733	59.40
21-3734(a)(1)	59.41
21-3734(a)(2)	59.42
21-3734(a)(3)	59.43
21-3735	59.44
21-3736(a)(1), (2)	59.45
21-3736(a)(3)	59.46
21-3737	59.47
21-3738	59.48
21-3739	59.49
21-3740	59.50
21-3741	59.51
21-3742(a)	59.55
21-3742(b)	59.54
21-3742(c)	59.53
21-3742(d)	59.52
21-3743	59.56
21-3744	59.56
21-3748	59.58
21-3748(c)	59.59
21-3749	59.58-A
21-3750	59.60
21-3752	59.57
21-3753	59.62
21-3754(a)	59.63
21-3754(b)	59.63-A
21-3755(b)(1)(B)	59.64
21-3755(b)(3)	59.64-A
21-3755(d)	59.64-B
21-3756	59.63-B
21-3757(b)	59.65-A
21-3757(c)	59.65-B
21-3757(d)	59.65-C
21-3757(e)	59.65-D
21-3757(f)	59.65-E
21-3757(g)	59.65-F
21-3761	59.25-B
21-3762	59.66
21-3763	59.68, 68.11-A
21-3764	59.67, 59.67-A, 59.67-B
21-3801(a)	60.01
21-3802	60.02
21-3803	60.03
21-3804	60.04
21-3805	60.05
21-3806	60.06
21-3807	60.07
21-3808	60.08, 60.09
21-3809	60.10, 60.11, 60.12
21-3810	60.11
21-3811	60.12
21-3812(a), (b)	60.13
21-3812(c)	60.14
21-3812(d)	60.14-A
21-3813	60.15
21-3814	60.15
21-3815	60.16
21-3816	60.17
21-3817	60.18
21-3818	60.19
21-3819	60.20
21-3820	60.21
21-3821	60.22
21-3822	60.23

Statutory Section	PIK 3d Number
21-3823	60.24
21-3824	60.25
21-3825	60.26
21-3826	60.27
21-3827	60.28
21-3828	60.29
21-3830	60.30, 60.30-A
21-3832	60.06-A
21-3833	60.06-B
21-3838	60.06-C
21-3839	60.31
21-3840	60.32
21-3841	60.33, 60.34
21-3842	60.35
21-3843	60.36
21-3846	60.40
21-3847	60.41
21-3901	61.01
21-3902	61.02
21-3903	61.03, 61.04
21-3904	61.05
21-3905	61.06
21-3906	61.07
21-3907	61.08
21-3908	61.09
21-3909	61.10
21-3910	61.11
21-3911	61.12
21-4001	62.01
21-4001(c)	62.02
21-4002	62.03, 62.04
21-4003	62.05
21-4004	62.06, 62.07
21-4005	62.08
21-4006	62.09
21-4007	62.10
21-4009	62.11, 62.11-A
21-4010	62.11, 62.11-A, 62.12
21-4011	62.11, 62.11-A
21-4012	62.11, 62.11-A
21-4018(a)	62.13
21-4018(d)	62.13-A
21-4101	63.01
21-4102	63.02
21-4103	63.03
21-4104	63.04
21-4105	63.05
21-4106	63.06, 63.07
21-4107	63.07
21-4108	63.08
21-4109	63.09
21-4110	63.10
21-4111	63.11, 63.12, 63.13
21-4113	63.14
21-4114	63.15
21-4201(a)(1) through (5)	64.02
21-4201(a)(6), (7), (8)	64.01
21-4201(b) through (h)	64.04
21-4202	64.03
21-4203	64.05
21-4204(a)(1), (5), (6)	64.07
21-4204(a)(2), (3), (4), (A), (B)	64.06
21-4204a	64.07-B, 64.07-C
21-4205	64.08
21-4207	64.09
21-4208	64.10
21-4209	64.11
21-4209a	64.11-A
21-4209a(b)	64.11-B
21-4209b	64.10-A
21-4210	64.12
21-4211	64.13
21-4212	64.14
21-4213	64.15
21-4214	64.16
21-4215	64.17
21-4216	64.18
21-4217	64.02-A
21-4218	64.07-A
21-4219	64.02-B
21-4301	65.01, 65.05,
21-4301(b)	65.04
21-4301a	65.02, 65.04, 65.05-A
21-4302	65.07
21-4303	65.06
21-4303a	65.06-A
21-4304	65.08
21-4305	65.09

Statutory Section	PIK 3d Number
21-4306	65.10
21-4306(b)	65.11
21-4306(d), (e)	65.10-A
21-4307	65.12
21-4308	65.13
21-4309	65.14
21-4310	65.15
21-4310(b)	65.16
21-4312	65.17
21-4315	65.18, 65.19
21-4317	65.20
21-4318	65.21
21-4401	66.01
21-4402	66.02
21-4403	66.03
21-4404	66.04
21-4405	66.05
21-4406	66.06
21-4407	66.07
21-4408	66.08
21-4409	66.09
21-4410	66.10
21-4619(c)	57.12-A
21-4624(a), (b), (c)	56.00-B, 56.01-A
21-4624(b)	56.01-A, 68.01-A
21-4624(c)	56.00-D, 56.01-C
21-4624(e)	56.00-G, 56.00-H, 56.01-F, 56.01-G, 68.14, 68.14-A, 68.14-A-1, 68.14-B, 68.14-B-1, 68.17
21-4625	56.00-C, 56.00-E 56.01-B, 56.01-D
21-4626	56.00-D, 56.01-C
21-4628	68.14-A, 68.14-B
21-4716	71.01
21-4717	71.01
21-4718	71.01 et. seq.
22-3204	52.07
22-3211	52.05, 52.12
22-3212	52.05
22-3213	52.05
22-3217	52.05
22-3218	52.19
22-3220	54.10
22-3221	68.06
22-3403(3)	51.02
22-3414(3)	51.01, 52.01
22-3415	52.09
22-3421	68.01, 68.02, 68.09-B
22-3428	54.10-A
22-4901	64.19
32-1013(a)	59.33-A
36-206	59.61
39-702(d)	59.01-B
39-720	59.01-B
50-718	62.15
50-719	62.14
59-29a01	57.40
59-29a02	57.41
59-29a07	57.42
60-401(d)	52.02
60-439	52.13
60-455	52.06
60-460(i)(2)	55.07
60-460(dd)	52.21
65-4101(bb)	67.26
65-4113	67.23
65-4141	67.22
65-4142	67.25
65-4150(c)	67.18-B
65-4150(e)	67.18, 67.18-B
65-4151	67.18-C
65-4152	67.17
65-4153	67.18, 67.18-A
65-4154	67.19
65-4155	67.20
65-4155(b)	67.20-A
65-4159	67.21, 67.21-A
65-4159(a), (b)	67.26
65-4160	67.13
65-4160(e)	67.26
65-4161	67.13, 67.13-B, 67.13-C
65-4161(f)	67.26
65-4162	67.16
65-4162(c)	67.26
65-4163	67.14, 67.15
65-4163(d)	67.26
65-4164	67.23
65-4167	59.69

Statutory Section	PIK 3d Number
65-7006(a)	67.27
65-7006(b)	67.28
65-7006(c)	67.29
65-7006(d)	67.30
74-8702	65.35
74-8716(a), (f), (g)	65.30
74-8716(b)	65.31
74-8717	65.32
74-8718	65.33
74-8719	65.19, 65.34
74-8802	65.52
74-8810	65.51
74-9801 *et seq.*	65.36
79-5201 *et seq.*	67.24
79-5208	67.24

CHAPTER 52.00

EVIDENCE AND GUIDES FOR ITS CONSIDERATION

52.01 INFORMATION - INDICTMENT

The Committee recommends that there be no separate instruction given.

Comment

K.S.A. 22-3414(3) provides in part, ". . . and the judge may, in his discretion, *after the opening statements*, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented."

Instruction on the elements for the crime charged, the Burden of Proof, Presumption of Innocence, Reasonable Doubt (PIK 3d 52.02) and Credibility of Witnesses (PIK 3d 52.09) could be given following opening statements.

K.S.A. 22-3414 does not require that the instructions be in writing.

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." *State v. Dayhuff*, 37 Kan. App. 2d 779, 158 P.3d 330 (2007), concluded that the appropriate test requires the acts to be "strikingly similar" or to involve a "signature act." The

approach in *Dayhuff* was to compare the similarities of the incidents of indecent liberties with children with the dissimilarities and to determine whether the similarities exist in many scenarios in which the crime is committed. The opinion held that there must be a "unique mode of operation" such that "the conduct could be recognized as the work of the defendant when it happened again in a later case."

(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*, 547 U.S. 319, 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.

52.17 CONFESSION

The Committee recommends that there be no separate instruction given as to confession.

Comment

State v. Stephenson, 217 Kan. 169, 535 P.2d 940 (1975); *State v. Hardwick*, 220 Kan. 572, 552 P.2d 987 (1976), held that it was not necessary to give an instruction relating to a confession. The Committee's recommendation is noted with apparent approval in *State v. Shaffer*, 229 Kan. 310, 316, 624 P.2d 440 (1981), and with specific approval in *State v. Mason*, 238 Kan. 129, 133, 708 P.2d 963 (1985).

See also, Comment to PIK 3d 52.10, Defendant as a Witness.

52.18 TESTIMONY OF AN ACCOMPLICE

An accomplice witness is one who testifies that (he)(she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice.

Notes on Use

This instruction was approved in *State v. Schlicher*, 230 Kan. 482, 494, 639 P.2d 467 (1982). Whether or not an accomplice's testimony is corroborated, the better practice is for the trial court to give a cautionary instruction. This instruction should not be given when the accomplice is also a co-defendant.

Comment

Whether a cautionary instruction relating to the testimony of an accomplice is required depends upon several factors including whether the testimony is corroborated and whether such an instruction is requested by the defendant.

Older case law indicated that there was no duty to give a cautionary instruction if there was no request for such an instruction, even though the testimony of the accomplice was uncorroborated and was sufficient to convict. *State v. Stiff*, 148 Kan. 224, 80 P.2d 1089 (1938). However, in *State v. Moore*, 229 Kan. 73, 80, 622 P.2d 631 (1981), the Court concluded: "When an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give a cautionary instruction. If the instruction is requested and is not given, the result may be in error. Whether the error is prejudicial and reversible, however, must be determined upon the facts of the individual case."

Where a defendant does not request a cautionary instruction on accomplice testimony, the failure of the court to give such an instruction will not be disturbed unless it is clearly erroneous. *State v. Thomas*, 252 Kan. 564, 847 P.2d 1219 (1993). A jury instruction is clearly erroneous only if there is a real possibility that the jury would have reached a different verdict absent the error. *State v. Deavers*, 252 Kan. 149, 164-65, 843 P.2d 695 (1992).

If the accomplice testimony is fully corroborated, and there is a request for a cautionary instruction, the failure to give such an instruction is not reversible error. *State v. Wood*, 196 Kan. 599, 413 P.2d 90 (1966).

If the accomplice testimony is partially corroborated, and there is a request for a cautionary instruction, failure to give such an instruction is error, but may or may not be reversible error depending upon what other cautionary instructions were given.

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

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

"A party may not assign as error the giving or failure to give an instruction unless he objects to the instruction stating the specific grounds for the objection. Absent such objection, an appellate court may reverse only if the trial court's failure to give [or the giving of] the instruction was clearly erroneous. The failure to give [or the giving of] an instruction is clearly erroneous only if the reviewing court reaches a firm conviction that if the trial error had not occurred there was a real possibility the jury would have returned a different verdict." *State v. DeMoss*, 244 Kan. 387, 391-92, 770 P.2d 441 (1989).

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

In *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006), the court held that a witness is not an accomplice within the meaning of PIK 3d 52.18 merely because the witness was present during the crime and failed either to stop the crime or to report it to the police. Likewise, a witness who is only an accessory after the fact and who is not involved in the actual commission of the crime is not an accomplice. Under these facts, the trial court did not err in failing to instruct the jury on the testimony of an accomplice.

52.18-A TESTIMONY OF AN INFORMANT - FOR BENEFITS

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

Notes on Use

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

See Comments below for the definition of "informant."

Comment

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

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

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

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

52.21 HEARSAY EVIDENCE OF CHILD VICTIM OR CHILD IN NEED OF CARE WHO IS UNAVAILABLE OR DISQUALIFIED

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

Notes on Use

By statute, this instruction must be given when hearsay evidence is admitted solely under K.S.A. 60-460(dd). If the evidence is admitted under another hearsay exception, the statute does not require this instruction to be given.

K.S.A. 60-460(dd) applies only in (a) a criminal or juvenile offender proceeding if the declarant is a child who is alleged to be a victim of the crime or offense charged or (b) a proceeding to determine if the declarant is a "child in need of care."

Before admitting evidence under K.S.A. 60-460(dd), the judge must hold a hearing and determine that (a) the child is disqualified or unavailable as a witness, (b) the statement is apparently reliable, and (c) the child was not induced to make the statement(s) falsely by use of threats or promises.

Comment

State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985) lists the factors a court should consider in evaluating the credibility and trustworthiness of a child witness. In accord, see *State v. Clark*, 11 Kan. App. 2d 586, 730 P.2d 1104 (1986), which provides that PIK 52.21 should be given when a child hearsay statement is admitted pursuant to K.S.A. 60-460(dd) because a general witness instruction does not adequately focus the jury upon a child's hearsay testimony and is inadequate to advise a jury of the factors to be considered in assessing child hearsay testimony.

The Sixth Amendment may bar the admission of "testimonial" hearsay against a criminal defendant or juvenile offender even if the prerequisites in K.S.A. 60-460(dd) are met. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), held the right of confrontation is violated by the admission of a "testimonial" hearsay statement made by a declarant who cannot be, or has not been, cross-examined about the statement, even if it has particularized guarantees of

trustworthiness. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), adopted an objective test to determine whether statements made in response to questions by police are testimonial. They are nontestimonial when circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.

State v. Brown, 285 Kan. 261, 173 P.3d 612 (2007), describes many of the uncertainties that remain after *Crawford* and *Davis* in defining what statements are testimonial and thus subject to confrontation clause analysis. *Brown* recognizes that language in those two opinions could support the categorical exclusion from confrontation analysis of all private or casual conversations not involving government officials. However, the court declined to determine at this time whether there is such a categorical exclusion since, even if some statements to non-officials may be testimonial, the hearsay at issue in *Brown* was not testimonial. The court identified these factors to be considered: (1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime? (2) Was the statement made to a law enforcement officer or to another government official? (3) Was obtaining proof of facts potentially relevant to a later prosecution the primary purpose of the interview? This determination is made objectively from the totality of the circumstances, including: (a) whether the declarant was speaking about events as they were actually happening, instead of describing past events; (b) whether the statement was made while the declarant was in immediate danger, i.e., during an ongoing emergency; (c) was the statement made to resolve an emergency or simply to learn what had happened in the past; and (d) was the interview part of a governmental investigation; and (4) was the level of formality of the statement sufficient to make it inherently testimonial; e.g., was the statement made in response to questions, was the statement recorded, was the declarant removed from third parties, or was the interview conducted in a formal setting such as in a governmental building? *Brown* declined to adopt a categorical rule that excited utterances are not testimonial and recognizes that excited utterances in response to police interrogation could be testimonial.

State v. Henderson, 284 Kan. 267, 160 P.3d 776 (2007), applied an objective, totality of the circumstances test to find that a videotaped interview of a three-year-old purported victim of child abuse was testimonial. The interview was conducted by an SRS social worker and a police detective after the child was diagnosed with gonorrhea. The child-declarant's lack of awareness that her statement could be used to prosecute is not dispositive and protection of the child may have been one purpose of the interview. However, various factors led the court to reject the argument that was its primary purpose; there was no ongoing emergency since the alleged perpetrator had not been in the victim's home for more than two weeks; the interview was conducted in a formal setting and in a government building; the information the interviewers had

before the interview began caused them to focus their questions upon defendant and this focus was confirmed by the lack of questions on other matters; the presence of the victim's mother, from whom gonorrhea could have been transmitted, suggested the interviewers were not considering other sources; the actions of the interviewers after the interview suggested their focus was upon prosecution. The focus upon defendant is not conclusive but it is an important factor. The opinion does not definitively resolve whether the interview would have been deemed testimonial if the police officer had not been present but the court does observe that "While...the main interviewer was an SRS employee, she could be considered an agent of law enforcement."

Davis v. Washington, supra, acknowledges that the doctrine of forfeiture by wrongdoing may apply to admit testimonial hearsay in domestic violence cases when defendant procures or coerces the victim's silence. *State v. Henderson, supra*, rejected the argument that assaulting a child who is so young that defendant knows the child will be incapable of testifying should trigger forfeiture. Defendant's actions did not result in the child's unavailability.

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

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

(THIS PAGE BLANK)

CHAPTER 53.00

DEFINITIONS AND EXPLANATIONS OF TERMS

INTRODUCTION

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

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

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

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

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

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

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

Aiding and Abetting: See Accessory above.

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

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

Believes: See Reasonable Belief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Drug Paraphernalia: See PIK 3d 67.18-B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

94, 98, 573 P.2d 580 (1977). Definition approved and further held that lewd fondling or touching is not the equivalent of rude or insulting touching as found in K.S.A. 21-3412, battery. *State v. Banks*, 273 Kan. 738, 46 P.3d 546, 553 (2002).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Kan. App. 2d 54, 63, 817 P.2d 1124 (1991). See Comment to PIK 3d 64.06, Criminal Possession of a Firearm - Felony. See also PIK 3d 67.13-D, Possession of a Controlled Substance Defined.

Premeditation: See PIK 3d 56.04, Homicide Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State: K.S.A. 21-3110 (23).
Stolen Property: K.S.A. 21-3110 (24).
Temporarily Deprive: To take from the owner the possession, use, or benefit of his or her property with intent to deprive the owner of the temporary use thereof. See PIK 3d 59.04, Criminal Deprivation of Property.
Terror and Terrorize: The word "terror" means an extreme fear or fear that agitates body and mind; and "terrorize" means to reduce to terror by violence or threats. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
Threat: K.S.A. 21-3110 (25). See *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994), regarding differences between threat in robbery and threat in theft by threat; and *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998) (utterance must be more than mere political statement or idle talk; proper test to determine whether a statement is a threat is objective, not subjective, i.e., that of a reasonable person). See also *State v. Moore*, 269 Kan. 27, 4 P.3d 1141 (2000), for the proposition and discussion that in a robbery case actual fear generally need not be strictly proven, but that the law will presume fear if there are adequate indications of the victim's state of mind.
Unlawful Sexual Act: K.S.A. 21-3501 (4).
Wanton or Wantonness: K.S.A. 21-3201 (c).
Wanton Negligence: K.S.A. 21-3201 (c).
Wholesaler: K.S.A. 21-4404 (b)(2) for tie-in magazine sales.
Willful or Willfully: K.S.A. 21-3201 (b).
Written Instrument: K.S.A. 21-3110 (26).

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*, 282 Kan. 666, 148 P.3d 510 (2006) refused to reconsider 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).

Failing to stop or report a crime is not a basis for liability under an aider or abettor theory. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006). However, 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).

54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER - CRIME NOT INTENDED

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

Notes on Use

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

Comment

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

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

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 evidence supported the conclusion that defendant was culpable as an aider and abettor by commanding a companion to "go ahead" and break down an apartment door and to commit simple battery upon the occupant, it was foreseeable that the altercation could escalate to an aggravated battery and thus that the crime of aggravated burglary would be committed as a probable consequence of committing the battery initially intended. *State v. Stout*, 37 Kan. App. 2d 510, 154 P.3d 1176 (2007).

(THIS PAGE BLANK)

54.07 RESPONSIBILITY FOR CRIME OF ANOTHER - ACTOR NOT PROSECUTED

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

Notes On Use

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

Comment

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

54.12-A VOLUNTARY INTOXICATION - SPECIFIC INTENT CRIME

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

Notes on Use

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

Comment

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

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

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

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

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

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

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

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

Even when it is appropriate to give this instruction in a prosecution for premeditated first-degree murder or intentional second-degree murder, evidence of voluntary intoxication *alone* will not justify an instruction on unintentional but reckless second-degree murder as a lesser included offense. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004); *State v. Cavaness*, 278 Kan. 469, 101 P.3d 717 (2004); *State v. Jones*, 283 Kan. 186, 207-210, 151 P.3d 22 (2007).

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

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

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

54.16 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 May 25, 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).

There must be an imminently dangerous situation "near at hand" before a defense-of-another instruction should be given. *State v. Hernandez*, 253 Kan. 705, 861 P.2d 814 (1993) (victim's sister was inside place of employment when defendant talked with victim outside); see also *State v. White*, 284 Kan. 333, 161 P.3d 208 (2007).

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). The voluntary manslaughter analysis is identical to the first, subjective prong required to justify a self-defense

instruction. Even though the court gives an instruction on voluntary manslaughter, it may refuse a self-defense instruction if the evidence does not support a finding of the second, objective prong, that a reasonable person would have perceived the need for the use of force in self-defense. *State v. Gonzalez*, 282 Kan. 73, 106-113, 145 P.3d 18 (2006). *Gonzalez* cited with approval *Tyler v. Nelson*, 163 F.3d 1222 (10th Cir. 1999), which concluded that fulfilling the objective prong requires more than defendant's stated belief and requires evaluation of the evidence in light of the totality of the circumstances.

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 May 25, 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.

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

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

A person lawfully in possession of property, other than a dwelling or occupied vehicle, is permitted to (threaten to use) (use) such force to stop an unlawful interference with (his)(her) 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 from physical contact with the other person 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).

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

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

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

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

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

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

Comment

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

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

An attempted crime requires specific intent as opposed to general intent. The requisite specific intent necessary for attempted murder is not satisfied by trying to prove attempted felony murder. Kansas does not recognize the crime of attempted felony murder. *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994). Since it is logically impossible to specifically intend to commit an unintentional crime, Kansas does not recognize the crime of attempted second-degree murder [unintentional, as defined in K.S.A. 21-3402(b)] or the crime of attempted involuntary manslaughter. *State v. Shannon*, 258 Kan. 425, 905 P.2d 649 (1995); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996); *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995).

K.S.A. 21-3402 was amended in 1993 to include two alternative definitions of second-degree murder. Under subsection (a) it is defined as the intentional killing of a human being. Under subsection (b) it is defined as a killing committed "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 1999 Supp. 21-3402. The Supreme Court has held that attempted second-degree murder charged under subsection (b) cannot be

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

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

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

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

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

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

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

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

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

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

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

The crime of aggravated battery was held not to be a lesser included offense of attempted murder in *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007).

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.

(THIS PAGE BLANK)

55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

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

Comment

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

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

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

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

55.03 CONSPIRACY

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

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

1. **That the defendant agreed with (another person) (others) to (commit)(assist in the commission of) the crime of _____;**
2. **That the defendant did so agree with the intent that the crime of _____ be committed;**
3. **That the defendant or any party to the agreement acted in furtherance of the agreement by _____; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The definition of _____, the crime charged to be the subject of the conspiracy, is as (follows:_____) (set forth in Instruction No. _____).

Notes on Use

For authority, see K.S.A. 21-3302. K.S.A. 21-3302(c) provides that conspiracy to commit an off-grid felony (murder in the first degree, treason) is a severity level 2 crime. A conspiracy to commit any other nondrug felony offense is ranked two crime severity levels below the severity level for the completed crime. The lowest level for a conspiracy to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3302(d) provides that conviction for conspiracy to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months.

A conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 21-3302(e).

This instruction should be given in all crimes of conspiracy along with PIK 3d 55.05, Conspiracy - Defined, and PIK 3d 55.06, Conspiracy - Act In Furtherance Defined. When the evidence warrants its submission, PIK 3d 55.04, Conspiracy -Withdrawal as a Defense, should be given.

The name of the applicable crime should be set forth in the first sentence of the instruction and the statutory definition of that crime should be set forth in the concluding portion of the instruction.

Comment

Conspiracy consists of two essential elements: (1) an agreement between two or more persons to commit or assist in committing a crime; and (2) the commission by one or more of the conspirators of an overt act in furtherance of the object of the conspiracy. Where the State failed to prove commission of an overt act the charge was properly dismissed. *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977). Failure of the state to show the existence of an agreement between the defendants resulted in dismissal of conspiracy charges. *State v. Harris*, 266 Kan. 610, 975 P.2d 227 (1999).

In the trial of a conspiracy case, a court may become involved with the conspiracy evidence rule. Under this rule, statements and acts of a co-conspirator said or done outside the presence of the other are admissible in evidence as an exception against the defendant to the hearsay rule. The rule is based on the concept that a party to an agreement to commit a crime is an agent or partner of the other. Therefore the statement of one conspirator is admissible against another conspirator. Because the rule is founded on the existence of an agreement, the prosecution must make a prima facie showing that an agreement exists before the hearsay statement of a co-conspirator may properly be admitted into evidence. *State v. Butler*, 257 Kan. 1043, 897 P.2d 1007 (1995). In *State v. Borserine*, 184 Kan. 405, 337 P.2d 697 (1959), the conspiracy evidence rule is discussed in depth. Several cases have been decided since *Borserine* and the conspiracy evidence rule has been recognized by statutory enactment. K.S.A. 60-460(i). See *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998); *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d 182, 577 P.2d 803 (1978), *rev. denied* 224 Kan. clxxxviii. (1978); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21 (1972); *State v. Nirschl*, 208 Kan. 111, 490 P.2d 917 (1971); *State v. Trotter*, 203 Kan. 31, 453 P.2d 93 (1969); *State v. Paxton*, 201 Kan. 353, 440 P.2d 650 (1968); *State v. Adamson*, 197 Kan. 486, 419 P.2d 860 (1966); *State v. Shaw*, 195 Kan. 677, 408 P.2d 650 (1965); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); and K.S.A. 60-460(i).

In *Borserine*, the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. "A conspiracy may be established by direct proof, or circumstantial evidence, or both. Ordinarily when acts and declarations of one or more co-conspirators are offered in evidence against another co-conspirator by a third party witness or witnesses, the conspiracy should first be established prima facie, and to the satisfaction of the trial judge. But this cannot always be required. Where proof of the conspiracy depends on a vast amount of circumstantial evidence-a vast number of isolated and independent facts-it cannot be required. In any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced at the trial taken together shows that a conspiracy actually exists,

it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. (*State v. Winner*, 17 Kan. 298.)" (Syl.4) *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

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

For a full discussion of the difference between conspiracy and other kinds of liability for the crimes of another, see *State v. Simmons*, 282 Kan. 728, 735-737, 148 P.3d 525 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56.00 CAPITAL MURDER - PRE-VOIR DIRE INSTRUCTION

NOTICE

The Committee has not altered the proposed Capital Murder instructions since 2004. Since then, several appellate court rulings have been made. The Kansas Supreme Court ruled the death penalty unconstitutional. The court said the section of the statute mandating the death penalty when the jury found aggravating and mitigating circumstances weighed equally, the equipoise provision, violated the Eighth and Fourteenth Amendments to the United States Constitution in *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *cert. granted Kansas v. Marsh*, 544 U.S. 1060, 161 L. Ed. 2d 1109, 125 S. Ct. 2517 (2005). This ruling was reversed by the United States Supreme Court in *Kansas v. Marsh*, ___ U.S. ____, 165 L. Ed. 2d 429,126 S.Ct. 2516 (2006). The United States Supreme Court held the Kansas equipoise section of the death penalty did not violate the Eighth and Fourteenth Amendments and remanded the case. On remand, the Kansas Supreme Court in *State v. Marsh*, 282 Kan. 38, 144 P.3d 48 (2006), vacated that portion of their prior opinion finding the equipoise provision violated the Eighth and Fourteenth Amendments. At the time this is written, December 2007, there are seven capital cases pending in the Kansas Supreme Court.

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

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. [Each of you have received questionnaires concerning your respective views regarding capital punishment.] I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the

jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time concerning the sentence that will be imposed if a sentence of death is not imposed. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty.

OR

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

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. [Each of you have received questionnaires concerning your respective views regarding capital punishment.] I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether or not the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the jury decides whether or not the defendant should be sentenced to death. The jury will be separately instructed concerning the claims which must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time that the defendant will be

sentenced to imprisonment for life with no possibility of parole if a sentence of death is not imposed. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating factors present and that such factors outweigh any mitigating factors. Only those aggravating factors provided for by statute may be considered in deciding whether to impose the death penalty.

Notes on Use

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

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

(THIS PAGE BLANK)

56.00-A CAPITAL MURDER

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

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

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

OR

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

OR

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

OR

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

OR

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

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

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

Comment

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

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

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

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

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

In rejecting the defendant's complaint to the words, "if you do not agree," when used to preface an instruction to a lesser charge, the court held the words are not coercive and no inference arises with the jury that an acquittal of the greater charge is required before considering the lesser. *State v. Roberson*, 272 Kan. 1143, 38 P.3d 715 (2002).

56.06-A INVOLUNTARY MANSLAUGHTER - DRIVING UNDER THE influence

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

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

1. **That the defendant unintentionally killed _____;**
2. **That it was done (in the commission of) (while attempting to commit) (while in flight from [committing][attempting to commit]) the act of operating any vehicle in this state**
   (a) **While under the influence of (alcohol)(a drug)(a combination of drugs)(a combination of alcohol and any drug[s]) to a degree that rendered (him)(her) incapable of safely driving a vehicle;**
   and/or
   (b) **While having an alcohol concentration in (his)(her) blood of .08 or more [as measured within two hours of the time of operating or attempting to operate the vehicle];**
   and/or
   (c) **By a person who is a habitual user of any (narcotic) (hypnotic)(somnifacient)(stimulating) drug; and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

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. 21-3442. Involuntary manslaughter while driving under the influence is a severity level 4, person felony. See also PIK 3d 70.01, Traffic Offense - Driving Under the Influence of Alcohol or Drugs, and 70.01-A, Traffic Offense - Alcohol Concentration .08 or More.

The bracketed clause in Claim 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).

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act and the act pertaining to Hypnotic, Somnifacient or Stimulating Drugs, defines the term "narcotic drug" in K.S.A. 65-4101(p). The definition includes the term "opium and opiate," and a detailed definition of "opiate" is provided in K.S.A. 65-4101(q). The terms "hypnotic drug," "somnifacient drug," and "stimulating drug" are not expressly defined in the statutes.

Comment

A conviction of the crime of involuntary manslaughter while driving under the influence of alcohol requires evidence that the conduct of the defendant was the cause of the victim's death. If causation is an issue in the case, the jury should be instructed: "The fault or lack of fault of [decedent] is a circumstance to be considered along with all the other evidence to determine whether the defendant's conduct was or was not the direct cause of [decedent's] death." *State v. Collins*, 36 Kan. App. 2d 367, 138 P.3d 1262 (2006).

56.07 VEHICULAR HOMICIDE

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

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

1. **That the defendant unintentionally killed _____ by the operation of (an automobile) (an airplane) (a motorboat) (other motor vehicle);**
2. **That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and**
3. **That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3405. Vehicular homicide is a class A, person misdemeanor.

Comment

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the Court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

Where the homicide is unintentional and caused by the operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter, K.S.A. 21-3404. But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary

56.17 BATTERY AGAINST A LAW ENFORCEMENT OFFICER

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

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

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

   or

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

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

   or

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

   or

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

   or

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

   or

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

   and

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

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

Notes on Use

For authority, see K.S.A. 21-3413. Battery as defined in K.S.A. 21-3412(a)(2) against a state, county or city law enforcement officer is a class A, person misdemeanor. Battery as defined in K.S.A. 21-3412(a)(1) against a state, county or city law enforcement officer is a severity level 7, person felony. Battery against a state, city or county correctional officer or employee, a juvenile correctional facility officer or employee, or a juvenile detention facility officer or employee is a severity level 5, person felony. Battery as defined by K.S.A. 21-3412 is a lesser included offense and where the evidence warrants it, PIK 3d 56.16, Battery, should be given.

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

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

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

56.37 MISTREATMENT OF A DEPENDENT ADULT

The defendant is charged with the crime of mistreatment of a dependent adult. The defendant pleads not guilty.

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

1. **That the defendant knowingly and intentionally inflicted (physical injury) (unreasonable confinement) (cruel punishment) upon _____;**

   or

   That the defendant knowingly and intentionally took unfair advantage of _____'s (physical) (financial) resources for another individual's (personal) (financial) advantage by the use of (undue influence) (coercion) (harassment) (duress) (deception) (false pretense);

   or

   That the defendant knowingly and intentionally (omitted) (deprived) _____ of (treatment) (goods) (services) necessary to maintain the (physical) (mental) health of _____;

2. **That _____ was a dependent adult; and**

[3.] That the value of the financial resources was ($100,000 or more) (at least $25,000, but less than $100,000) (at least $1,000, but less than $25,000); and

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

As used in this instruction:

Dependent adult means an individual 18 years of age or older who is unable to protect (his)(her) own interest.

[(Physical injury means any touching of _____ against [his][her] will, with physical force, in an intentional, hostile and aggravated manner or the projecting of such force against [him][her]. Physical harm requires a finding of substantial physical pain or an impairment of physical condition.)

(Cruel punishment means such punishment as would amount to torture or barbarity, and any cruel and degrading punishment.

Cruel means disposed to inflict pain or suffering which causes or is conducive to injury, grief or pain.

Punishment means severe, rough or disastrous treatment.

Consideration must be given to the age and physical and mental condition of _____.)]

Notes on Use

For authority, see K.S.A. 21-3437. Mistreatment of a dependent adult as defined in subsection (a)(2) is: a severity level 6, person felony if the aggregate amount of the value of the resources is $100,000 or more; a severity level 7, person felony if the aggregate amount of the value of the resources is at least $25,000, but less than $100,000; a severity level 9, person felony if the aggregate amount of the value of the resources is at least $1,000, but less than $25,000; and a class A, person misdemeanor if the aggregate amount of the value of the resources is less than $1,000.

Mistreatment of a dependent adult as defined in subsection (a)(3) is a class A, person misdemeanor.

Mistreatment of dependent adult as defined in subsection (a)(2) is a severity level 9, nonperson felony if the aggregate amount of the value of the resources is less than $1,000 and committed by a person who has, within five years immediately preceding commission of the crime, been convicted of mistreatment of a dependent adult two or more times.

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

K.S.A. 21-3437(c) sets forth several factual situations where an individual shall be considered a "dependent adult."

Authority for the definitions is found in *State v. Bennett*, 26 Kan. App. 2d 157, 980 P.2d 597 (1999).

56.41 INJURING A PREGNANT WOMAN

The statute on which this instruction was based (K.S.A. 21-3440) was repealed effective May 17, 2007. L. 2007, ch. 169 § 15.

56.42 INJURY TO A PREGNANT WOMAN BY VEHICLE

The statute on which this instruction was based (K.S.A. 21-3441) was repealed effective May 17, 2007. L. 2007, ch. 169 § 15.

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

For cases dealing with the rape shield statute (K.S.A. 21-3525), see the Comment to PIK 3d 57.03, Sex Offenses—Victim Credibility; Rape Shield Statute.

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

57.03 SEX OFFENSES—VICTIM CREDIBILITY; RAPE SHIELD STATUTE

The Committee recommends that there be no separate instruction given.

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

The phrase "person of another" as used in K.S.A. 21-3504(a)(3)(B) refers to a person other than the victim or the defendant. *State v. Johnson*, 283 Kan. 649, 156 P.3d 596 (2007). Under the facts of *Johnson*, the court held that aggravated indecent solicitation of a child (K.S.A. 21-3511(a)) is not a lesser included offense of aggravated indecent liberties with a child as charged under K.S.A. 21-3504(a)(3)(B).

The holding in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004), is not violated where a child-victim testifies at trial via closed-circuit television, pursuant to K.S.A. 22-3434, provided the trial court (1) hears evidence and determines the procedure is necessary to protect the welfare of the child; (2) finds the child would be traumatized by the presence of the defendant; and (3) finds that the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. *State v. Blanchette*, 35 Kan. App. 2d 686, 134 P.3d 19, *rev. denied* 282 Kan. 792 (2006), *cert. denied* 127 S. Ct. 1302, 167 L. Ed. 2d 115 (2007).

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. Aggravated criminal sodomy is a severity level 1, person felony. But, aggravated criminal sodomy as described in K.S.A. 21-3506(a)(1) or (a)(2) and 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.

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

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

57.08-B AGGRAVATED CRIMINAL SODOMY - NO CONSENT

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

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

1. That the defendant engaged in sodomy with _____;

or

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

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

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

or

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

or

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

or

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

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

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

Notes on Use

For authority, see K.S.A. 21-3506(a)(3). The crime of aggravated criminal sodomy is a severity level 1, person felony.

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

Comment

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

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

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

57.08-C AFFIRMATIVE DEFENSE TO AGGRAVATED CRIMINAL SODOMY

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

Notes on Use

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

Comment

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

57.13 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).

The phrase "person of another" as used in K.S.A. 21-3504(a)(3)(B) refers to a person other than the victim or the defendant. *State v. Johnson*, 283 Kan. 649, 156 P.3d 596 (2007). Under the facts of *Johnson*, the court held that aggravated indecent solicitation of a child (K.S.A. 21-3511(a)) is not a lesser included offense of aggravated indecent liberties with a child as charged under K.S.A. 21-3504(a)(3)(B).

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

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

Notes on Use

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

Comment

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

57.26 UNLAWFUL SEXUAL RELATIONS

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

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

1. The defendant engaged in consensual (sexual intercourse) (lewd fondling or touching) (sodomy) with _____;

2. That the defendant and _____ were not married;

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

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

OR

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

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

OR

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

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

OR

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

contract to provide services in a juvenile detention facility or sanctions house);

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

OR

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

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

OR

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

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

OR

[3. That the defendant was (an employee of the department of social and rehabilitation services) (an employee of a contractor who was under contract to provide services in a social and rehabilitation services institution);

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

OR

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

4. That _____ was a student enrolled at the school where the defendant was employed;] and

OR

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

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

OR

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

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

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

The person subject to commitment, the attorney general, or the court has a right to demand a jury trial comprised of twelve jurors, unless the parties agree in writing, with the approval of the court, to a lesser number. K.S.A. 59-29a06.

The jury shall be instructed in the concluding instruction that the verdict must be unanimous. See PIK-Civil 3d 181.08.

Comment

Although the Kansas Sexually Violent Predator Act (KSVPA) is considered a civil proceeding, it contains many similarities with a criminal prosecution. The KSVPA involves the attorney general as the state's attorney, the respondent has a right of jury trial, the verdict must be unanimous, and the evidentiary burden is beyond a reasonable doubt. Further, the respondent is entitled to a probable cause hearing, is entitled to appointed counsel, and risks confinement in the custody of the Secretary of Social and Rehabilitation Services. *In re Care & Treatment of Foster*, 280 Kan. 845, 853-54, 127 P.3d 277 (2006).

The *Foster* decision found reversible error when the state's attorney, in the opening statement, advised the jury that a multidisciplinary team of professionals, a team of prosecutors, and the judge had previously reviewed the case and determined that it should proceed to trial. The Court held that telling the jury this information was attorney misconduct, extremely prejudicial, and denied the respondent his right to fair trial. *Id.*, 280 Kan. at 857-58. In accord see *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 131 P.3d 540 (2006) (finding reversible error when the state's attorney in a KSVPA commitment proceeding appealed to juror's personal fears for the safety of their own children and the community's children).

Foster further held that, absent a stipulation by the parties, direct or indirect evidence concerning any polygraph examination performed upon the respondent, and any opinions based upon those results, are inadmissible. *Foster*, 280 Kan. at 862-63.

In the case of *In re Care & Treatment of Searcy*, 274 Kan. 130, 49 P.3d 1 (2002), the Kansas Supreme Court reversed the respondent's commitment as a sexually violent predator by finding that the respondent was not brought to trial within 60 days after the K.S.A. 59–29a05 probable cause determination. The decision held that the 60 day time limit was jurisdictional, mandatory, and analogous to the statutory right to speedy trial in criminal cases. In 2003, the Legislature amended the Sexually Violent Predator Act to provide that none of the time limits in the Act are intended now or ever were intended to be mandatory or to otherwise affect the district court's subject matter jurisdiction over commitment proceedings.

The 2003 amendments to the Act were considered by the Kansas Court of Appeals in *In re Care & Treatment of Hunt*, 32 Kan.App.2d 344, 82 P.3d 861, *rev. denied* 278 Kan. 844 (2004), which found no due process violation in the retroactive application of the amendments. The decision further held that because the 60 day time limit of K.S.A. 59–29a06 is now directory and not mandatory, the failure to bring a respondent to trial within 60 days of the determination of probable cause does not

divest the district court of subject matter jurisdiction in any properly commenced proceedings.

The privilege against self-incrimination does not apply to civil commitment proceedings under the Sexually Violent Predator Act, K.S.A. 59–29a01 et seq. See *In re Care & Treatment of Hay*, 263 Kan. 822, 953 P.2d 666 (1998).

The use of the word "likely" in the KSVPA's definition of "sexually violent predator" does not establish a lesser burden of proof in civil commitment cases than is required under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 131 P.3d 540 (2006).

57.41 SEXUAL PREDATOR/CIVIL COMMITMENT—DEFINITIONS

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

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

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

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

Notes on Use

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

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

57.42 SEXUAL PREDATOR/CIVIL COMMITMENT—BURDEN OF PROOF

The State has the burden to prove its claim in this proceeding. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims made by the State, you must find for the respondent. If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find for the State.

Notes on Use

For authority, see K.S.A. 59-29a07.

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

Notes on Use

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

In 2007, the legislature amended K.S.A. 21-3610c to change the prohibited conduct from hosting persons less than 18 to hosting a "minor." The statute incorporates the definitions contained in K.S.A. 41-102, which defines "minor" as a person under 21 years of age. K.S.A. 41-102(q).

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.

(THIS PAGE BLANK)

CHAPTER 59.00

CRIMES AGAINST PROPERTY

(THIS PAGE BLANK)

59.01 THEFT

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

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

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

   OR

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

   OR

   That the defendant obtained by threat control over property;

   OR

   That the defendant obtained control over property knowing the property to have been stolen by another;
3. **That the defendant intended to deprive _____ permanently of the use or benefit of the property;**
4. **That the value of the property was ($100,000 or more) (at least $25,000 but less than $100,000) (at least $1,000 but less than $25,000) (less than $1,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59.01-A THEFT—KNOWLEDGE PROPERTY STOLEN

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

Notes on Use

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

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

Comment

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

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

59.34 CRIMINAL USE OF FINANCIAL CARD OF ANOTHER

The defendant is charged with criminal use of a financial card of another. The defendant pleads not guilty.

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

1. **That the defendant used a _____ financial card;**
2. **That the cardholder, _____, had not consented to the use of the financial card by the defendant;**
3. **That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);**
4. **That the defendant did so with the intent to defraud;**
5. **That the financial card was unlawfully used in the total amount of ($25,000 or more) (at least $1,000 but less than $25,000) (less than $1,000) between _____, _____, and _____, _____; and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3729(a)(1). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of $25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least $1,000 but less than $25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than $1,000.

If value is in issue, use PIK 3d 68.11, Verdict Forms - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

Comment

Using the number taken off a stolen financial card constitutes criminal use of a financial card as prohibited by K.S.A. 21-3729(a)(1). PIK 59.34 cited *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976).

59.35 CRIMINAL USE OF FINANCIAL CARD—CANCELLED

The defendant is charged with criminal use of a financial card which had been revoked or cancelled. The defendant pleads not guilty.

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

1. **That the defendant knowingly used _____, a financial card or number which had been revoked or cancelled;**
2. **That the defendant had received written notice that the financial card was revoked or cancelled;**
3. **That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);**
4. **That the defendant did so with the intent to defraud;**
5. **That the financial card was unlawfully used in the total amount of ($25,000 or more) (at least $1,000 but less than $25,000) (less than $1,000) between _____, _____, and _____, _____; and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3729(a)(2). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of $25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least $1,000 but less than $25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than $1,000.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

59.36 CRIMINAL USE OF FINANCIAL CARD—ALTERED OR NONEXISTENT

The defendant is charged with criminal use of a financial card which had been (altered) (nonexistent). The defendant pleads not guilty.

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

1. **That the defendant used a _____ financial card that had been (falsified) (mutilated) (altered);**
   or
   That the defendant used a nonexistent financial card number as if the same were a valid financial card number;
2. **That the defendant used the financial card for the purpose of obtaining (money) (goods) (property) (services) (communication services);**
3. **That the defendant did so with the intent to defraud;**
4. **That the financial card was unlawfully used in the total amount of ($25,000 or more) (at least $1,000 but less than $25,000) (less than $1,000) between _____, _____, and _____, _____; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3729(a)(3). Criminal use of a financial card is a severity level 7, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of $25,000 or more. Criminal use of a financial card is a severity level 9, nonperson felony if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of at least $1,000 but less than $25,000. Criminal use of a financial card is a class A, nonperson misdemeanor if the money, goods, property, services, or communication services obtained *within a 7-day period* are of the value of less than $1,000.

If value is in issue, use PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue.

For definitions of "financial card" and "cardholder," see K.S.A. 21-3729(b)(1) and (2), respectively.

59.37 UNLAWFUL MANUFACTURE OR DISPOSAL OF FALSE TOKENS

The defendant is charged with the crime of unlawful manufacture or disposal of false tokens. The defendant pleads not guilty.

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

1. **That the defendant (manufactured for sale) (offered for sale) (gave away) false _____ calculated to be used in a coin-operated machine or equipment;**
2. **That the defendant did so with the intent to cheat the operator of a coin-operated machine or equipment; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3730. Unlawful manufacture or disposal of false tokens is a class B, nonperson misdemeanor.

The use of a false token to obtain goods or services is theft, PIK 3d 59.01, and does not fall within the purview of this section.

59.38 CRIMINAL USE OF EXPLOSIVES

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

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

1. **That the defendant (possessed) (manufactured) (transported) _____;**
2. **That _____ is an explosive;**
3. **That defendant was not licensed to (possess) (manufacture) (transport) _____; and**

   or

   That defendant intended to use _____ to commit a crime; and

   or

   That the defendant delivered _____ to _____ knowing that _____ intended to use it to commit a crime; and

   or

   That a public safety officer was placed at risk to defuse _____; and

   or

   That _____ was introduced into a building where a human being was present; and
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority and types of explosives, see K.S.A. 21-3731(a) which was amended in 1999 to add as an additional explosive any completed explosive devices commonly known as pipe bombs or molotov cocktails, and again in 2007 to add as an explosive any material placed in a closed container which generates a gas and causes the container to explode. Criminal use of explosive is a severity level 6, person felony, except that it is a severity level 5, person felony if: (a) the possession, manufacture or transportation is intended to be used to commit a crime or is delivered to another with knowledge that it is intended to be used by the deliveree to commit a crime, (b) a

public safety officer is placed at risk to defuse the explosive, or (c) the explosive is placed in a building in which there is another human being.

Note that PIK Chapter 64.00, Crimes Against the Public Safety, contains instructions relating to several crimes dealing with explosives.

59.38-A CRIMINAL USE OF EXPLOSIVES—SIMULATED

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

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

1. **That the defendant (possessed) (created) (constructed) a simulated (explosive) (incendiary) (radiological) (biological) device;**
2. **That defendant did so with intent to intimidate or cause alarm to another person; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3731(a)(2). Possession of a simulated device of the type described in the statute is a severity level 8, person felony.

59.39 POSSESSION OR TRANSPORTATION OF INCENDIARY OR EXPLOSIVE DEVICE

The statute on which this instruction was based (K.S.A. 21-3732) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97. The substance of the repealed statute now appears in K.S.A. 21-4201(a)(9).

59.40 CRIMINAL USE OF NOXIOUS MATTER

The statute on which this instruction was based (K.S.A. 21-3733) was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

59.41 IMPAIRING A SECURITY INTEREST—CONCEALMENT OR DESTRUCTION

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. **That the defendant (damaged) (destroyed) (concealed) _____;**
2. **That _____ was security for a debt owed to _____;**
3. **That the defendant did so with the intent to defraud the secured party;**
4. **That the property subject to the security interest (is of the value of $25,000 or more and is subject to a security interest of $25,000 or more) (is of the value of at least $1,000 and either the value of the property or the security interest is less than $25,000) (is of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3734(a)(1). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of $25,000 or more and is subject to a security interest of $25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least $1,000 and is subject to a security interest of at least $1,000 and either the value of the property or the security interest is less than $25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(2) or (3).

In the prosecution for impairing a security interest by concealment or destruction, it is necessary to provide the jury with the alternative of finding misdemeanor impairing security interest by concealment or destruction if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

Comment

For a discussion of the history and purpose of K.S.A. 21-3734, see *State v. Ferguson*, 221 Kan. 103, 558 P.2d 1092 (1976).

59.42 IMPAIRING A SECURITY INTEREST—SALE OR EXCHANGE

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. **That the defendant (sold) (exchanged) (disposed of) _____;**
2. **That the defendant knew _____ was security for a debt owed to _____;**
3. **That the security agreement did not authorize the (sale) (exchange) (disposal) of _____;**
4. **That _____ did not consent in writing to the (sale) (exchange) (disposal) of _____;**
5. **That the property subject to the security interest (was of the value of $25,000 or more and was subject to a security interest of $25,000 or more) (was of the value of at least $1,000 and either the value of the property or the security interest was less than $25,000) (was of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000); and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3734(a)(2). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of $25,000 or more and is subject to a security interest of $25,000 or more. Impairing a security interest is a severity level 9, nonperson felony when the personal property subject to the security interest is of the value of at least $1,000 and is subject to a security interest of at least $1,000 and either the value of the property or the security interest is less than $25,000. Impairing a security interest is a class A, nonperson misdemeanor when the personal property subject to the security interest is of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (3).

In the prosecution for impairing a security interest by sale or exchange, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by sale or exchange if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly.

The Committee believes that the value of the security interest should be determined by the balance due under the security agreement.

Also, see Comment to PIK 3d 59.41, Impairing a Security Interest—Concealment or Destruction.

Prior to its amendment July 1, 1987, K.S.A. 21-3734 did not require proof of an intent to defraud. In *State v. Jones*, 11 Kan. App. 2d 612, 731 P.2d 881 (1987), the Court held that absent an intent to defraud, the statute violated the prohibition against imprisonment for a debt under Section 16 of the Bill of Rights of the Kansas Constitution. The Court also noted that this element was absent from the corresponding PIK 2d instructions 59.42 and 59.43. The Supreme Court reversed the Court of Appeals in *State v. Jones*, 242 Kan. 385, 748 P.2d 839 (1988). The Supreme Court held that an agreement which creates a security interest under the Uniform Commercial Code does not create a debt within the prohibition of Section 16 and that the creditor retains title to the property and in its proceeds until payment is made. The Court then discussed the statutory distinction between general intent crimes and specific intent crimes. The Court held that violations of K.S.A. 21-3734 are general intent crimes. The Court concluded K.S.A. 21-3734 "does not punish for a *debt* in the form of a theft -- it punishes for a *willful act to deprive a secured party of its property* and, thus, is not unconstitutional imprisonment for debt." 242 Kan. at 392. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

59.43 IMPAIRING A SECURITY INTEREST—FAILURE TO ACCOUNT

The defendant is charged with the crime of impairing a security interest. The defendant pleads not guilty.

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

1. **That _____ had a security interest in _____;**
2. **That the defendant (sold) (exchanged) (disposed of) _____ and received _____;**
3. **That the security agreement required that in the event of the (sale) (exchange) (disposal) of _____, the proceeds were to be given to _____;**
4. **That the defendant intentionally failed to account for the ([proceeds] [collateral]) ([within a reasonable time] [as specified in the security agreement]);**
5. **That the property subject to the security interest (was of the value of $25,000 or more and was subject to a security interest of $25,000 or more) (was of the value of at least $1,000 and either the value of the property or the security interest was less than $25,000) (was of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000); and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3734(a)(3). Impairing a security interest is a severity level 7, nonperson felony when the personal property subject to the security interest is of the value of $25,000 or more and is subject to a security interest of $25,000 or more. Impairment of a security interest is a severity level 9, nonperson felony when the property subject to the security interest is of the value of at least $1,000 and is subject to a security interest of at least $1,000 and either the value of the property or the security interest is less than $25,000. Impairing a security interest is a class A,

nonperson misdemeanor if the property subject to a security interest is of the value of less than $1,000, or of the value of $1,000 or more but subject to a security interest of less than $1,000.

K.S.A. 21-3734 is concerned only with personal property.

This instruction does not apply to K.S.A. 21-3734(a)(1) or (2).

See K.S.A. 84-1-204 which allows a reasonable time to account if no specific time is fixed in the security agreement.

In the prosecution for impairing a security interest by failure to account, it is necessary to provide the jury with the alternative of finding misdemeanor impairing a security interest by failure to account if value of the amount of the security interest is in issue. PIK 3d 68.11, Verdict Form - Value in Issue and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. K.S.A. 21-3734(a)(2) was amended in 1995 to eliminate the intent to defraud as an element of the offense.

Comment

See Comment to PIK 3d 59.42, Impairing a Security Interest—Sale or Exchange.

PATTERN INSTRUCTIONS FOR KANSAS 3d

The Secretary has provided a definition for dockage or foreign material for each of several types of grain. See 7 C.F.R. § 810 *et seq.* Official United States Standards for Grain (1988).

Subpart B barley	dockage	7 C.F.R. § 810.202(e)
	foreign material	7 C.F.R. § 810.202(f)
Subpart C corn	dockage	none
	foreign material	7 C.F.R. § 810.402(e)
Subpart D flaxseed	dockage	7 C.F.R. § 810.602(b)
	foreign material	none
Subpart F oats	dockage	none
	foreign material	7 C.F.R. § 810.1002(b)
Subpart G rye	dockage	7 C.F.R. § 810.1202(b)
	foreign material	7 C.F.R. § 810.1202(c)
Subpart H sorghum	dockage	7 C.F.R. § 810.1402(e)
	foreign material	7 C.F.R. § 810.1402(f)
Subpart I soybeans	dockage	none
	foreign material	7 C.F.R. § 810.1602(c)
Subpart J sunflower seed	dockage	none
	foreign material	7 C.F.R. § 810.1802(d)
Subpart K triticale	dockage	7 C.F.R. § 810.2002(c)
	foreign material	7 C.F.R. § 810.2002(d)
Subpart L wheat	dockage	7 C.F.R. § 810.2202(e)
	foreign material	7 C.F.R. § 810.2202(f)

59.64 COMPUTER CRIME

The defendant is charged with computer crime. The defendant pleads not guilty.

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

1. **That the defendant intentionally and without authority gained access to and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (_____, which is computer related property);**

   or

1. **That the defendant used a (computer) (computer system) (computer network) (_____, which is computer related property) for the purpose of (devising) (executing) a (scheme) (artifice) with the intent to defraud or for the purpose of obtaining (money) (property) (services) or any other thing of value by means of false or fraudulent pretense or representation;**

   or

1. **That defendant intentionally exceeded the limits of authorization and (damaged) (modified) (altered) (destroyed) (copied) (disclosed) (took possession of) a (computer) (computer system) (computer network) (_____, which is computer related property);**

   and

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

Notes on Use

For authority, see K.S.A. 21-3755(b)(1)(B). Computer crime is now a severity level 8, nonperson felony, without regard to the amount of loss suffered by the victim.

59.67-B REMOVAL OF A THEFT DETECTION DEVICE

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

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

Notes on Use

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

Comment

In *State v. Armstrong*, 276 Kan. 819, 825-828, 80 P.3d 378 (2003), the court upheld the constitutionality of K.S.A. 21-3764(d) by adding a specific intent element.

59.68 COUNTERFEITING MERCHANDISE OR SERVICES

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

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

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

   or

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

   and

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

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

Notes on Use

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

(THIS PAGE BLANK)

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 [in a (cause) (matter) (proceeding) before a (court) (tribunal) (public body)] [before an officer 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).

60.06 CORRUPTLY INFLUENCING A WITNESS

Prior editions of PIK Criminal contained instruction 60.06. The statute on which such instruction was based (K.S.A. 21-3806) was repealed effective July 1, 1983. The crime of corruptly influencing a witness has been replaced with the crimes of intimidation of a witness or a victim and aggravated intimidation of a witness or victim. See PIK 3d 60.06-A and 60.06-B for instructions on these offenses.

60.06-A INTIMIDATION OF A WITNESS OR VICTIM

The defendant is charged with the crime of intimidation of a (witness) (victim). The defendant pleads not guilty.

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

1. **That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) (person acting on behalf of a victim) _____, from attending or giving testimony at a (trial) (preliminary hearing) (other proceeding or inquiry authorized by law);**

OR

1. **That the defendant prevented or dissuaded, or attempted to prevent or dissuade _____, from:**
   - (a) **making a report of a (crime) (attempted crime) or (civil injury or loss) against an individual, _____, to any prosecutor, law enforcement, probation, parole, correctional, community correction services or judicial officer;**
     or
   - (b) **causing a complaint, indictment or information to be sought and prosecuted and assisting in its prosecution;**
     or
   - (c) **causing a probation or parole violation to be reported and prosecuted and assisting in its prosecution;**
     or
   - (d) **causing a civil action to be filed and prosecuted and assisting in its prosecution;**
     or
   - (e) **arresting or causing or seeking the arrest of any person in connection with a (crime) (attempted crime) or (civil injury or loss) against an individual, _____;**

2. That the defendant did so knowingly and maliciously; and

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

Maliciously means the defendant acted with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

Notes On Use

For authority, see K.S.A. 21-3832. Intimidation of a witness or victim is a class B, person misdemeanor.

Insert name of witness, victim or person acting on behalf of a victim in blank space in Element No. 1.

Insert type of "other proceeding or inquiry" in blank space in Element No. 1.

Insert name of individual in blank spaces.

Comment

It was held in *State v. Reed*, 213 Kan. 557, 559-562, 516 P.2d 913 (1973) that it is not necessary that an action or proceeding be pending at the time an attempt is made to deter a witness from giving evidence in order for a person to be guilty of corruptly influencing a witness under K.S.A. 21-3806 (repealed L. 1983). The expressed reasoning would appear applicable in prosecutions under K.S.A. 21-3832 and K.S.A. 21-3833.

In *State v. Phelps*, 266 Kan. 185, 967 P.2d 304 (1998), the court notes that the proper test to determine the reaction of an alleged victim in an intimidation or aggravated intimidation charge is objective, not subjective, i.e., that of a reasonable person. There are exceptions to this rule, such as where the perpetrator has knowledge of a particular vulnerability of the victim and then acts with full knowledge of the victim's vulnerability.

60.06-B AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM

The defendant is charged with the crime of aggravated intimidation of a (witness) (victim) (person acting on behalf of a victim). The defendant pleads not guilty.

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

1. **That the defendant prevented or dissuaded, or attempted to prevent or dissuade, a (witness) (victim) (person acting on behalf of a victim), _____, from (_cite appropriate violation listed in PIK 3d 60.06-A_); and**
2. **That the act was accompanied by an expressed or implied threat of force or violence against the (person) (property) of a (witness) (victim) (other person);**
   or
   That the act was in furtherance of a conspiracy;
   or
   That the defendant had been previously convicted of _____;
   or
   That the (witness) (victim), _____, was under 18 years of age;
   or
   That the act was committed for (pecuniary gain) (other consideration) by the defendant acting upon the request of another person;
3. **That the defendant did so knowingly and maliciously; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Maliciously means the defendant acted with an intent to vex, annoy, harm or injure in any way another person, or with an intent to thwart or interfere in any manner with the orderly administration of justice.

Notes On Use

For authority, see K.S.A. 21-3833. Aggravated intimidation of a witness or victim is a severity level 6, person felony.

Conspiracy should be defined when the State alleges the act was committed in furtherance of a conspiracy. See PIK 3d 55.05, Conspiracy - Defined, for definition.

Whether a prior conviction of defendant was for a crime included within the provision of subsection (a)(3) of K.S.A. 21-3833 is a question of law for the Court. Where found to be included, insert the crime in the blank space. Insert name of witness, victim or person acting on behalf of a victim in blank space. The Committee recommends that PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, be given.

Comment

See Comment to PIK 3d 60.06-A.

PIK 3d 60.06-B was followed in *State v. Moody*, 35 Kan. App. 2d 547, 555, 132 P.3d 985 (2006).

60.06-C UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS

The defendant is charged with the crime of unlawful disclosure of authorized interception of (wire) (oral) (electronic) communications. The defendant pleads not guilty.

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

1. **That the defendant communicated to a person or made public in any way the existence of an application or order for the interception of (wire) (oral) (electronic) communications;**
2. **That the act was done with the intent to obstruct, impede or prevent an authorized interception; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Intercept means the hearing or otherwise learning of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.

Notes On Use

For authority, see K.S.A. 21-3838. Unlawful disclosure of an authorized interception of communications is a severity level 10, nonperson felony.

Definitions of wire communication, oral communication and electronic communication are found in K.S.A. 22-2514.

60.07 COMPOUNDING A CRIME

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

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

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

Notes On Use

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

60.08 OBSTRUCTING LEGAL PROCESS

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

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

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

Notes On Use

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

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

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

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

Comment

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

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

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

In a case where a defendant asked the court to use an instruction that mixed elements from PIK 3d 60.08 and 60.09, the Court of Appeals held that such an instruction was invited error that could not be the subject of an appeal. *State v. McCoy*, 34 Kan. App. 2d 185, 189, 116 P.3d 48 (2005).

60.09 OBSTRUCTING OFFICIAL DUTY

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

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

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

Notes On Use

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

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

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

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

Comment

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

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

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

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

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

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

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

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

In a case where a defendant asked the court to use an instruction that mixed elements from PIK 3d 60.08 and 60.09, the Court of Appeals held that such an instruction was invited error that could not be the subject of an appeal. *State v. McCoy*, 34 Kan. App. 2d 185, 189, 116 P.3d 48 (2005).

60.10 ESCAPE FROM CUSTODY

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

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

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

   OR

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

Custody includes: arrest; detention in a facility for holding persons charged with or convicted of crimes; detention for extradition or deportation; detention in a hospital or other facility pursuant to court order or imposed as a specific condition of probation, parole, or a community correctional services program; commitment to the state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect for a misdemeanor offense; and here insert any other detention for law enforcement purposes. Custody does not include general supervision of a person on probation or parole or constraint incidental to release on bail.

Notes On Use

For authority, see K.S.A. 21-3809. Escape from custody is a class A, nonperson misdemeanor.

The statute defining escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. "Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-3809(b)(1).

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

In *State v. Carreiro*, 203 Kan. 875, 878, 457 P.2d 123 (1969), the Court discusses and defines "escape" and states what constitutes "escape." The Court, in this case, also stated when a person is in "lawful custody."

In *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973), the Court held that in view of the specific statutory definition of the word "charge" in K.S.A. 22-2205(5), that escape statutes K.S.A. 21-3809 and 21-3810, are applicable only where a defendant escapes from lawful custody while being held on a written charge contained in a complaint, information, or indictment. This does not mean that the State is without a remedy where the defendant escapes custody prior to the filing of a formal written complaint. The Court also held that K.S.A. 21-3803, which provides for the offense of obstructing legal process or official duty, is broad enough to cover cases where the defendant escapes from custody prior to the filing of a formal written complaint, information, or indictment.

60.11 AGGRAVATED ESCAPE FROM CUSTODY

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

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

A. 1. That the defendant was being held in custody

[(a) on a written charge or conviction of a felony]

[(b) upon a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony]

[(c) prior to or upon a finding of probable cause for evaluation as a sexually violent predator]

[(d) upon commitment to a treatment facility as a sexually violent predator]

[(e) upon commitment to a state security hospital upon a finding of not guilty by reason of insanity or mental disease or defect of a felony]

[(f) on an adjudication of a felony and is 18 years of age or over] or

[(g) upon incarceration at a state correctional institution while in the custody of the secretary of corrections]

2. That the defendant intentionally departed from custody without lawful authority from _____; and

or

That the defendant intentionally failed to return to custody following (temporary leave authorized by law) (temporary leave granted by a court order); and

OR

B. 1. That the defendant was being held in custody

[(a) on a charge or conviction of any crime]

[(b) on a charge or adjudication as a juvenile offender, where the act, if committed by an adult, would constitute a felony]

[(c) prior to or upon a finding of probable cause for evaluation as a sexually violent predator]

[(d) upon commitment to a treatment facility as a sexually violent predator]

[(e) upon commitment to the state security hospital upon a finding of not guilty of a crime by reason of insanity or mental disease or defect]

[(f) on an adjudication of a felony and is 18 years of age or over] or

[(g) upon incarceration at a state correctional institution while in the custody of the secretary of corrections]

2. That the defendant intentionally departed from custody by use of violence or the threat of violence against any person; and

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

Custody as used in this instruction means (_here insert legal basis for custody_).

Notes on Use

For authority, see K.S.A. 21-3810 and 21-3809. The legal basis for custody to be inserted in the body of the instruction may come from the list provided in K.S.A. 21-3809 or from the circumstances delineated in K.S.A. 21-3810. Aggravated escape from custody as described in subsection A.1.(a), A.1.(c), A.1.(d), A.1.(e) or A.1.(f) is a severity level 8, nonperson felony. Aggravated escape from custody as described in subsection A.1.(b) or A.1.(g) is a severity level 5, nonperson felony. Aggravated escape from custody as described in subsection B.1.(a), B.1.(c), B.1.(d), B.1.(e) or B.1.(f) is a severity level 6, person felony. Aggravated escape from custody as described in subsection B.1.(b) or B.1.(g) is a severity level 5, person felony.

The statute defining aggravated escape from custody requires that the defendant be in lawful custody. Lawful custody is initially a question of law for the court to determine and not a question of fact for the jury to decide. Custody does not include general supervision of a person on probation or parole or constraint incidental to release on bail. K.S.A. 21-3809(b)(1).

For definition of "juvenile offender" and "juvenile detention center," see K.S.A. 38-1601 *et seq.* and amendments thereto.

K.S.A. 22-3220 was amended to reflect that the term "insanity" has been replaced by "mental disease or defect," for crimes committed January 1, 1996, or thereafter.

Comment

Lawful custody is initially a question of law for the Court to determine and not a question of fact for the jury to decide. *State v. Mixon*, 27 Kan. App. 2d 49, 998 P.2d 519 (2000).

The Kansas Court of Appeals approved PIK 3d 60.11 as a correct statement of the law in *State v. Mixon*, supra.

See also Comment to PIK 3d 60.10, Escape from Custody.

60.14 AIDING A PERSON CONVICTED OF OR CHARGED WITH COMMITTING A MISDEMEANOR

The defendant is charged with the crime of aiding a person (convicted of committing a misdemeanor) (charged with committing a misdemeanor). The defendant pleads not guilty.

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

1. **That the defendant knew _____ (had been convicted of committing a misdemeanor) (had been charged with committing _____, a misdemeanor);**
2. **That the defendant knowingly harbored, concealed, or aided _____;**
3. **That the defendant did so with intent that _____ would avoid or escape from (arrest) (trial) (conviction) (punishment); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3812(c). Aiding a person convicted of or charged with committing a misdemeanor is a class C misdemeanor.

If an issue arises in the case being tried as to whether or not the particular misdemeanor has been committed by the person allegedly aided, an instruction should be given setting forth the elements of that offense. If the person allegedly aided has been convicted, such an instruction is not necessary.

60.14-A AIDING A PERSON REQUIRED TO REGISTER UNDER THE OFFENDER REGISTRATION ACT

The defendant is charged with the crime of aiding a person who is required by Kansas law to register as an offender. The defendant pleads not guilty.

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

1. **That the defendant knew _____ was required to register as an offender;**
2. **That the defendant knowingly harbored, concealed, or aided _____;**
3. **That the defendant did so with intent that _____ would avoid or escape from [registration] [(arrest) (trial) (conviction) (punishment) (criminal charges) for failing to register]; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3812(d). Aiding a person required to register is a severity level 5, person felony.

(THIS PAGE BLANK)

60.15 FAILURE TO APPEAR OR AGGRAVATED FAILURE TO APPEAR

The defendant is charged with the crime of (failure to appear) (aggravated failure to appear). The defendant pleads not guilty.

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

1. **That the defendant had been charged with a (misdemeanor) (felony) and released on an appearance bond to appear before a court;**
2. **That the defendant intentionally failed to appear before the court at the time requested;**
3. **That the defendant's appearance bond was forfeited;**
4. **That the defendant intentionally (failed to surrender within 30 days following the forfeiture of appearance bond) (failed to surrender within 30 days after conviction of a [misdemeanor] [felony] had become final); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3813 and 21-3814. Failure to appear is a class B, nonperson misdemeanor. Aggravated failure to appear is a severity level 10, nonperson felony.

The provisions of K.S.A. 21-3813(a) do not apply to any person who forfeits a cash bond supplied pursuant to law upon an arrest for a traffic offense.

For venue, see K.S.A. 22-2615.

The 30-day period following forfeiture is a question of law.

It is the opinion of the Committee that all the elements essential to an instruction for K.S.A. 21-3813, Failure to appear, and K.S.A. 21-3814, Aggravated failure to appear, are contained in this instruction.

official engaged in the performance of duties at such meeting or session;

or

That the defendant intentionally impeded, disrupted or hindered by any act of intrusion into the chamber or other areas designated for the use of any executive body or official, the normal proceedings of such body or official;

2. **That the defendant did so when in possession of (a firearm) (_____, a weapon); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3828.

For authority in the case of aggravated interference with the conduct of public business in a public building, see K.S.A. 21-3829.

Interference with the conduct of public business in a public building is a class A, nonperson misdemeanor. Aggravated interference with the conduct of public business in a public building when in possession of any firearm or weapon is a severity level 6, person felony. The element of the instruction designated (2) should be deleted or included depending upon whether or not the State charges defendant with a misdemeanor or felony offense.

Weapons are restricted to those described in K.S.A. 21-4201.

60.30 DEALING IN FALSE IDENTIFICATION DOCUMENTS

The defendant is charged with the crime of dealing in false identification documents. The defendant pleads not guilty.

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

1. **That the defendant intentionally (reproduced) (manufactured) (sold) (offered for sale) a _____ which (simulated) (purported to be) (was designed to cause others reasonably to believe it to be) an identification document; and**
2. **That such _____ bore a fictitious name or other false information; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The term identification document as used in this instruction means any card, certificate, document or banking instrument including a credit or debit card that identifies or purports to identify the bearer of such document, whether or not it was intended for use as identification. The term also includes documents purporting to be drivers' licenses, nondrivers' 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. 21-3830. Dealing in false identification documents is a severity level 8, nonperson felony. The instructing court should be aware of the inapplicability of the dealing in false identification section of the statute to certain circumstances that are described in subsections (f)(1) and (2).

The document which the defendant is charged with manufacturing, selling or offering for sale should be described with particularity in the blank spaces.

For unlawful use of fictitious or fraudulently altered driver's license, see K.S.A. 8-260.

Comment

The 1986 Legislature amended K.S.A. 21-3830 by expanding the definition of "identification documents" beyond those issued by a governmental agency.

60.30-A VITAL RECORDS IDENTITY FRAUD RELATED TO BIRTH, DEATH, MARRIAGE AND DIVORCE CERTIFICATES

The defendant is charged with the crime of vital records identity fraud related to (birth) (death) (marriage) (divorce) certificates. The defendant pleads not guilty.

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

1. **That the defendant wilfully and knowingly, without authority, and with the intent to deceive, supplied false information in order to obtain a certified copy of a vital record; and**

   OR

1. **That the defendant willfully and knowingly (obtained possession of) (used) (furnished to another) (attempted to [obtain] [possess] [furnish to another]) a certified copy of a vital record for the purpose of deception; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3830. Vital records identity fraud related to birth, death, marriage and divorce certificates is a severity level 8, nonperson felony.

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 $1,000 but less than $25,000) (less than $1,000); and

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

Notes on Use

For authority, see K.S.A. 21-3846. 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 $1,000 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 $1,000 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. 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 _____."

(destroyed) (tampered with) (concealed) evidence of a crime; and

OR

That the defendant knowingly and willfully submitted to a governmental entity a claim for expenses which (was false) (duplicated expenses for which a claim was submitted to [such governmental entity] [another governmental entity] [a private entity]); and

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

As used in this instruction, knowingly and willfully means acting purposefully and intentionally and not accidentally.

Notes on Use

For authority, see K.S.A. 21-3902. For definitions of an aircraft, a vehicle and a vessel, see respectively K.S.A. 3-102, 8-1485 and 32-1102. Definitions of Public Employees and Public Officers are found in K.S.A. 2006 Supp. 21-3110(18) and (19), respectively. For purposes of 21-3902, vehicle does not mean only a motor vehicle but it also does not mean a human-powered vehicle or railroad train.

Confidential information is defined for purposes of K.S.A. 21-3902 as any information not subject to mandatory disclosure pursuant to K.S.A. 45-221. The latter statute sets forth at length (in 38 paragraphs, many with subparagraphs) the records which a public agency is not required to disclose to the public. Whether a particular record falls within the definitions of that statute is a question of law.

K.S.A. 21-3902 also provides that respecting the use of aircraft, vehicles and vessels, defined in paragraph (a)(1) as a crime if unauthorized, the statue does not apply to use authorized by law or by formal government policy, in which case it would not be for the private benefit or gain of defendant or another. Such authorization would be a legal issue if the question were whether the law or policy authorized the particular use. Also respecting paragraph (a)(1), it does not apply if the use constitutes misuse of public funds as defined in K.S.A. 21-3910. That is a third question of law under the statutes involved.

The definition of "knowingly and willfully" is adapted from K.S.A. 21-3201(b).

Official misconduct committed by the acts defined in the first four alternatives of Element No. 2 of the instruction is a class B, nonperson misdemeanor. If the crime is committed by destroying, tampering with or concealing evidence of a crime, it is a severity level 8, nonperson felony if the evidence is of a felony, and a class B misdemeanor if the evidence is of a misdemeanor. If the crime is committed by submitting a false or duplicate claim, it is a severity level 7, nonperson felony if the

claim is for $25,000 or more; a level 9, nonperson felony if the claim is for at least $1,000 but less than $25,000; and a class A, nonperson misdemeanor if the claim is for less than $25,000.

Upon conviction of official misconduct, a public officer or employee shall forfeit his or her office or employment.

Comment

State v. Adams, 254 Kan. 436, 866 P.2d 1017 (1994), held K.S.A. 21-3902 unconstitutional as vague and a violation of due process. The statute was amended in 1995 to state the specific acts forbidden.

(THIS PAGE BLANK)

61.03 COMPENSATION FOR PAST OFFICIAL ACTS

The defendant is charged with the crime of compensation for past official acts. The defendant pleads not guilty.

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

1. **That _____ was a public (officer) (employee);**
2. **That _____ gave a (decision) (opinion) (recommendation) (vote) favorable to defendant;**

   OR

   That _____ performed an act of official misconduct, as follows: _____ _____;
3. **That the defendant (gave) (offered to give) to _____ any benefit, reward or consideration intending it to be compensation for the act; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3903. Compensation for past official acts is a class B, nonperson misdemeanor. See PIK 3d 61.04, Compensation for Past Official Acts - Defense.

In Element No. 2, designate the act alleged to constitute "official misconduct."

61.04 COMPENSATION FOR PAST OFFICIAL ACTS - DEFENSE

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were conferred on account of kinship or other personal, professional or business relationships independent of the official status of the receiver.

OR

It is a defense to the charge of compensation for past official acts that any gifts or other benefits to a public (officer) (employee) were trivial benefits incidental to personal, professional, or business contacts and involved no substantial risk of undermining official impartiality.

Notes on Use

For authority, see K.S.A. 21-3903. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

61.05 PRESENTING A FALSE CLAIM

The defendant is charged with the crime of presenting a false claim. The defendant pleads not guilty.

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

1. **That _____ was a (public officer) (public body) authorized to allow or pay a claim;**
2. **That the defendant knowingly presented to _____ a claim which was false in whole or in part;**
3. **That the defendant did so with intent to defraud;**
4. **That the amount of the false claim presented was (less than $1,000) (more than $1,000 but less than $25,000) (more than $25,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Intent to defraud means an intention to induce another by deception to assume, create, transfer, alter, or terminate a right or obligation with reference to property.

Notes on Use

For authority, see K.S.A. 21-3904. Presenting a false claim for $25,000 or more is a severity level 7, nonperson felony. Presenting a false claim for at least $1,000 but less than $25,000 is a severity level 9, nonperson felony. Presenting a false claim for less than $1,000 is a class A, nonperson misdemeanor.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim and PIK 3d 59.70, Value In Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value In Issue.

Where a claim is presented, part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

Intent to defraud is defined in K.S.A. 21-3110(9).

Comment

In *State v. Wilson*, 11 Kan. App. 2d 504, 728 P.2d 1332 (1986), defendant was convicted of presenting a false claim by a state employee in violation of K.S.A. 75-3202 and presenting a false claim in violation of K.S.A. 21-3904 based upon the same transaction. The conviction under K.S.A. 21-3904 was reversed on the ground that K.S.A. 75-3202 is a specific statute controlling over K.S.A. 21-3904, a general statute.

In *State v. Fritz*, 261 Kan. 294, 302, 933 P.2d 126 (1997), the court held that the test to determine whether the charges in a complaint or information are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges are not multiplicitous.

61.06 PERMITTING A FALSE CLAIM

The defendant is charged with the crime of permitting a false claim. The defendant pleads not guilty.

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

1. **That the defendant was a public (officer) (employee);**
2. **That the defendant (approved by audit) (allowed or paid) a claim made upon _____;**
3. **That the defendant knew such claim was false or fraudulent in whole or in part;**
4. **That the amount of the false claim presented was (less than $1,000) (more than $1,000 but less than $25,000) ($25,000 or more); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3905. Permitting a false claim for $25,000 or more is a severity level 7, nonperson felony. Permitting a false claim for at least $1,000 but less than $25,000 is a severity level 9, nonperson felony. Permitting a false claim for less than $1,000 is a class A, nonperson misdemeanor. Upon conviction of permitting a false claim, defendant forfeits his or her public office or employment.

If there is a question of fact as to the amount of the alleged false claim, the jury must make a finding of the amount of the claim, and PIK 3d 59.70, Value in Issue, should be given. The verdict form to be used is PIK 3d 68.11, Verdict Form - Value in Issue.

In Element No. 2, designate the state, subdivision, or governmental instrumentality against whom the claim is made.

Where a claim is permitted part of which is valid and part of which is false, the false part of the claim governs as to whether the offense is a felony or misdemeanor.

61.11 MISUSE OF PUBLIC FUNDS

The defendant is charged with the crime of misuse of public funds. The defendant pleads not guilty.

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

1. **That the defendant was a (custodian) (person having control) of public money by virtue of (his)(her) official position;**
2. **That the defendant (used) (lent) (permitted another to use) public money in a manner (he)(she) knew was not authorized by law;**
3. **That the total amount of public money defendant (used) (lent) (permitted another to use) was (less than $1,000) (less than $25,000 but greater than $1,000) (less than $100,000 but greater than $25,000) (greater than $100,000); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Public money means money or a negotiable instrument which belongs to the state of Kansas or any public subdivision thereof.

Notes on Use

For authority, see K.S.A. 21-3910. The severity level of this offense is based on the aggregate amount of public funds misused: greater than $100,000 is a severity level 5, nonperson felony; less than $100,000 but greater than $25,000 is a severity level 7, nonperson felony; less than $25,000 but greater than $1,000 is a severity level 9, nonperson felony; and less than $1,000 is a class A misdemeanor.

In addition, upon conviction of misuse of public funds, the convicted person shall forfeit the person's official position.

61.12 UNLAWFUL USE OF STATE POSTAGE

The defendant is charged with the crime of unlawful use of State postage. The defendant pleads not guilty.

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

1. **That the defendant intentionally used United States postage for (his)(her) personal benefit;**
   or
   That the defendant intentionally permitted _____ to use United States postage for the personal benefit of _____;
2. **That the postage was paid for with funds of the State of 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. 21-3911. Unlawful use of State postage is a class C misdemeanor.

Although some shared intent would be intrinsic in the element of acting in a group comprising the riot, the statute does not require the State to prove an agreement among the group members to riot. See *State v. Stewart*, 281 Kan. 594, 598-599, 133 P.3d 11 (2006), wherein the court also approved the substance of PIK 3d 63.04.

(THIS PAGE BLANK)

63.11 CRIMINAL DESECRATION - FLAGS

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

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

1. **That the defendant, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) the (flag) (ensign) (_____, a symbol) of (the United States) (Kansas) in which another, _____, had a property interest without the consent of such other 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. 21-4111. Criminal desecration as used herein is a class A nonperson misdemeanor. The Committee ventures no opinion as to the significance of "ensign" or "symbol." For other kinds of criminal desecration, see PIK 3d 63.12, Criminal Desecration - Monuments/Cemeteries/Places of Worship, and 63.13, Criminal Desecration - Dead Bodies.

63.12 CRIMINAL DESECRATION - MONUMENTS/ CEMETERIES/PLACES OF WORSHIP

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

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

1. **That the defendant intentionally (damaged) (defaced) (destroyed) a (public monument or structure) [(tomb) (monument) (memorial) (marker) (grave) (vault) (crypt gate) (tree) (shrub) (plant) (other property) in a cemetery] (_____, a place of worship);**
2. **That the property was damaged to the extent of (less than $1,000) (at least $1,000 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. 21-4111. Desecrating public monuments, property in a cemetery, and places of worship is a class A nonperson misdemeanor if damage is less than $1,000; if at least $1,000 but less than $25,000 it is a severity level 9, nonperson felony; and if $25,000 or more, a severity level 7, nonperson felony. Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration - Flags, and 63.13, Criminal Desecration - Dead Bodies.

CHAPTER 64.00

CRIMES AGAINST THE PUBLIC SAFETY

64.01 CRIMINAL USE OF WEAPONS - FELONY

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

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

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

   or

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

   or

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

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

Notes on Use

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

Comment

K.S.A. 21-4201(a)(7) applies to machine guns and also to a shotgun with a barrel less than 18 inches long. It should be noted that the offense under K.S.A. 21-4201(a)(8) does not apply to a governmental laboratory or to solid plastic bullets. The

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

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

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

64.02 CRIMINAL USE OF WEAPONS - MISDEMEANOR

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

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

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

   or

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

   or

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

   or

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

   or

   That the defendant knowingly set a spring gun; and

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

Notes on Use

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

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

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

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

Comment

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

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

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

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

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

Convictions for aggravated assault and criminal discharge of a firearm at an occupied vehicle involving one victim were not multiplicitous. *State v. Gomez*, 36 Kan. App. 2d 664, 143 P.3d 92 (2006).

64.02-B CRIMINAL DISCHARGE OF A FIREARM - AFFIRMATIVE DEFENSE

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

Notes on Use

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

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

64.18 SELLING BEVERAGE CONTAINERS WITH DETACHABLE TABS

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

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

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

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

Notes on Use

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

Comment

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

64.19 FAILURE TO REGISTER AS AN OFFENDER

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

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

1. **That the defendant had been (convicted of _____ _____)(adjudicated as a juvenile offender because of the commission of _____);**

2. **That the defendant failed to (insert here the appropriate violation as set out in K.S.A. 22-4904 through K.S.A. 22-4907); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 22-4901 et seq. and amendments thereto. K.S.A. 22-4902 lists the offenses subject to registration pursuant to the Kansas Offender Registration Act. Failure to register is a severity level 5, person felony.

Comment

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

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

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

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

(THIS PAGE BLANK)

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;

   or

   That the defendant accepted any (compensation) (gift) (loan) (entertainment) (favor) (service) from any (lottery gaming facility manager) (manufacturer or vendor of electronic gaming machines) (central computer system provider) (licensee pursuant to the Kansas parimutuel racing act); and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 74-8716(a), (f), and (g). Under K.S.A. 74-8716(f) and (g), unlike K.S.A. 74-8716(a), persons residing in the household of an executive director, member of the commission, or employee are not included under the conflict of interest provisions.

Also, under K.S.A. 74-8716(g), there is an exception for accepting suitable facilities or services within a racetrack facility that may be required to do one's official duties. Conflicts of interest is a class A, nonperson misdemeanor.

Comment

In addition to the provisions of K.S.A. 74-8716(a), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas lottery. K.S.A. 74-8716(e).

65.31 CONFLICTS OF INTEREST - RETAILER OR CONTRACTOR

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 is (a lottery retailer) (an applicant for lottery retailer) (a person who contracts or seeks to contract with the State to supply [gaming equipment] [materials] [tickets] [consulting services] for use in the lottery);**
2. **That the defendant (offered) (paid) (gave) (made) 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 to a person knowing such person is (the executive director) (a member of the commission) (an employee) of the Kansas Lottery (a person residing in the household of [the executive director] [a member of the commission] [an employee]) of the Kansas Lottery; 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(b). Conflicts of interest is a class A, nonperson misdemeanor.

Comment

In addition to the provisions of K.S.A. 74-8716(b), all other provisions of law relating to conflicts of interest of state employees apply to the members of the commission and employees of the Kansas lottery. K.S.A. 74-8716(e).

65.35 LOTTERY DEFINITIONS

"Commission" means the Kansas Lottery Commission.

"Executive director" means the executive director of the Kansas Lottery.

"Gaming Equipment" means any electric, electronic, computerized or electromechanical machine, mechanism, supply or device or any other equipment, which is: (1) Unique to the Kansas Lottery Act; and (2) integral to the operation of an electronic gaming machine or lottery facility game; and (3) affects the results of an electronic gaming machine or lottery facility game by determining win or loss.

"Kansas Lottery" means the state agency created by the Kansas Lottery Act to operate a lottery or lotteries pursuant to the Kansas Lottery Act.

"Lottery" or "state lottery" means the lottery or lotteries operated pursuant to the Kansas Lottery Act.

"Lottery Retailer" means any person with whom the Kansas Lottery has contracted to sell lottery tickets or shares, or both, to the public.

"Major Procurement" means any gaming product or service including, but not limited to, facilities, advertising and promotional services, annuity contracts, prize payment agreements, consulting services, equipment, tickets and other products and services unique to the Kansas Lottery, but not including materials, supplies, equipment and services common to the ordinary operations of state agencies.

"Person" means any natural person, association, limited liability company, corporation or partnership.

"Prize" means any prize paid directly by the Kansas Lottery pursuant to the Kansas Lottery Act or the Kansas Expanded Lottery Act or any rules and regulations adopted pursuant to either act.

"Progressive electronic game" means a game played on an electronic gaming machine for which the payoff increases uniformly as the game is played and for which the jackpot, determined by application of a formula to the income of

independent, local or interlinked electronic gaming machines, may be won.

"Returned ticket" means any ticket which was transferred to a lottery retailer, which was not sold by the lottery retailer and which was returned to the Kansas Lottery for refund by issuance of a credit or otherwise.

"Share" means any intangible manifestation authorized by the Kansas Lottery to prove participation in a lottery game, except as provided by the Kansas Expanded Lottery Act.

"Ticket" means any tangible evidence issued by the Kansas Lottery to prove participation in a lottery game, other than a lottery facility game.

"Vendor" means any person who has entered into a major procurement contract with the Kansas Lottery.

Notes on Use

For authority, see K.S.A. 74-8702.

Comment

For a discussion of the definition of lottery and state-owned lottery as used in Article 15, § 3 of the Kansas Constitution, see *State v. Finney*, 254 Kan. 632, 644-55, 867 P.2d 1034 (1994).

65.36 VIOLATIONS OF THE TRIBAL GAMING LAW

The defendant is charged with the crime of violation of the Tribal Gaming Act. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

[1.] That the defendant (status of the defendant, if applicable);

[1.] or [2.] That the defendant (describe the prohibited act);

[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. 74-9801 et seq., which covers a multitude of violations which involve the Tribal Gaming Oversight Act.

K.S.A. 74-9809(a), (b) and (c) describe conflicts of interest violations pertaining to the executive director or an employee or relative of an employee of the state gaming agency. These offenses are class A, nonperson misdemeanors. Subsections (b)(3) and (c)(2) provide for certain affirmative defenses to these violations.

K.S.A. 74-9809(d) prohibits the holder of a license issued pursuant to a tribal-state gaming compact from allowing persons between the ages of 18 and 21 to participate in tribal gaming. This offense is a class A, nonperson misdemeanor. Subsection (g) forbids a person between 18 and 21 from tribal gaming. This is a class A, nonperson misdemeanor. Persons under 18 are adjudicated as juvenile offenders. Subsection (f).

K.S.A. 74-9809 (e), (h), (j), (k), (l) and (m) describe various felony crimes connected with tribal gaming. These crimes are all level 8, nonperson felonies. However, the act described in subsection (h)(3) is a class A, nonperson misdemeanor if the value involved is less than $100.

65.37 - 65.50 RESERVED FOR FUTURE USE

65.51 VIOLATION OF THE KANSAS PARIMUTUEL RACING ACT

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

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

1. That the defendant (__status of the defendant, if applicable__);

[1.] or [2.] That the defendant (__describe the prohibited act__); 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. 74-8810 which covers a multitude of prohibited acts involving persons having varying status under the provisions of the Kansas Parimutuel Racing Act.

K.S.A. 74-8810(a) applies to members of the Racing Commission, certain directors and members of an organization licensee. Violation of 74-8810(a) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(b) applies to members of the legislature and certain relatives of a legislator. Violation of 74-8810(b) is a class A nonperson misdemeanor.

K.S.A. 74-8810(c) applies to any member, employee or appointee of the Racing Commission, including stewards and racing judges. Violation of 74-8810(c) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(d) applies to any members, employees or appointees of the Racing Commission, and certain of their relatives. Violation of 74-8810(d) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(e) applies to any officers, directors and members of organizational licensees. Violation of 74-8810(e) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(f) applies to facility owners or manager licensees. Violation of 74-8810(f) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(g) applies to licensees and officers, directors, members or employees of licensees. Violation of 74-8810(g) is a class A, nonperson misdemeanor.

K.S.A. 74-8810(h), (i) and (j) apply to any person. Violation of 74-8810(h) is a class B, nonperson misdemeanor. Violation of 74-8810(i) is a class A, nonperson misdemeanor. Violation of 74-8810(j) is a severity level 8, nonperson felony.

K.S.A. 74-8810(k) applies to any person less than 21 years of age. Violation of 74-8810(k) by a person less than 18 years of age makes the person subject to adjudication as a juvenile offender pursuant to the Kansas Juvenile Offenders Code. Violation by a person 18 or more years of age is a class A misdemeanor upon conviction of a first offense and a severity level 8, nonperson felony for a second or subsequent conviction.

The suggested pattern instruction should be completed to show the status of the defendant, if applicable, and the particular act which is prohibited by the statute as set forth in the complaint or information. Element No. 1 is not applicable and need not be used when the prohibited act can be committed by any person under subsections (h), (i) and (j) of K.S.A. 74-8810.

The following is a sample instruction which assumes a member of the Racing Commission is charged with placing a wager on an entry in a horse race conducted by an organization licensee:

The defendant is charged with the crime of violation of the Kansas Parimutuel Racing Act. The defendant pleads not guilty.

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

1. That the defendant was a member of the Kansas Racing Commission;
2. That the defendant knowingly placed a wager on an entry in a horse race conducted by an organization licensee; and
3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

For applicable definitions, see PIK 3d 65.52, Parimutuel Racing Act - Definitions.

CHAPTER 67.00

CONTROLLED SUBSTANCES

7. proximity of defendant's possession(s) to the controlled substance.]

Notes on Use

For authority, see *State v. Cruz*, 15 Kan. App. 2d 476, 809 P.2d 1233, *rev. denied* 249 Kan. 777 (1991); *State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976); and *State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208 (1983).

The first paragraph of this instruction should be given in every case where possession of a controlled substance is charged. The optional second paragraph should be given when joint or constructive possession is an issue. The optional third paragraph should be given when defendant does not have exclusive possession of the premises or automobile where a controlled substance is found. The court should instruct the jury regarding only those factors in optional paragraph three which are supported by evidence.

Comment

Possession of a controlled substance is having control over the controlled substance with knowledge of, and intent to have, such control. Possession and intent, like any element of a crime, may be proved by circumstantial evidence. Possession may be immediate and exclusive, jointly held with another, or constructive as where the drug is kept by the accused in a place to which he has some measure of access and right of control. *State v. Cruz*, 15 Kan. App. 2d 476; *State v. Rose*, 8 Kan. App. 2d 659, 664, 665 P.2d 1111, *rev. denied* 234 Kan. 1077 (1983); *State v. Bullocks*, 2 Kan. App. 2d 48, 49-50, 574 P.2d 243 (1978).

"'When a defendant is in nonexclusive possession of premises on which drugs are found, the better view is that it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. [Citation omitted.] Such parallels the rule in Kansas as to a defendant charged with possession of drugs in an automobile of which he was not the sole occupant. [*State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976).] Incriminating factors noted in *Faulkner* are a defendant's previous participation in the sale of drugs, his use of narcotics, his proximity to the area where the drugs are found, and the fact that the drugs are found in plain view. Other factors noted in cases involving nonexclusive possession include incriminating statements of the defendant, suspicious behavior, and proximity of defendant's possessions to the drugs.' *Bullocks*, 2 Kan. App. 2d at 50, 574 P.2d 243." *State v. Cruz*, 15 Kan. App. 2d 476. See also *State v. Marion*, 29 Kan. App. 2d 287, 27 P.3d 924, *rev. denied* 272 Kan. 1422 (2001); *State v. Alvarez*, 29 Kan. App. 2d 368, 28 P.3d 404, *rev. denied* 272 Kan. 1419 (2001); *State v. Fortune*, 28 Kan. App. 2d 559, 20 P.3d 74, *rev. denied* 271

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

In a constructive possession case, where the State argued that defendant was guilty simply because she lived in the place where drugs and paraphernalia were found, court erred in not giving possession instruction and instruction on nonexclusive possession. *State v. Hazley*, 28 Kan. App. 2d 664, 19 P.3d 800 (2001).

Where the only controlled substance found is residue on paraphernalia, defendant's convictions of possession of cocaine and possession of drug paraphernalia were not multiplicitous. *State v. Hill*, 16 Kan. App. 2d 280, 823 P.2d 201 (1991). The court held that "[p]roof of the possession of any amount of a controlled substance is sufficient to sustain a conviction even though such amount may not be measurable or useable."

(THIS PAGE BLANK)

67.14 STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS - POSSESSION OR OFFER TO SELL WITH INTENT TO SELL

The defendant is charged with the crime of unlawfully (possessing) (offering to sell) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid] with intent to (sell) (sell, deliver or distribute) it. The defendant pleads not guilty.

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

1. That the defendant (possessed) (offered to sell) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];

2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;

[3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

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

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

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

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

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

     OR

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

     OR

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

     OR

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

Notes on Use

For authority, see K.S.A. 65-4152. A violation based on option 1(a) or 1(b) is a class A nonperson misdemeanor. K.S.A. 65-4152(b). A violation based on option

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

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

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

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

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

As of July, 2007, the statute was amended to provide that "the fact that an item has not been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia." K.S.A. 65-4152(f). The trial court should be aware of this provision and may need to separately instruct the jury on what appears to be a statutory non-defense.

Comment

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

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

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

67.18 POSSESSION OR MANUFACTURE OF SIMULATED CONTROLLED SUBSTANCE

The defendant is charged with the crime of unlawfully (selling) (offering for sale) (possessing with intent to sell) (delivering a simulated controlled substance) (possessing a simulated controlled substance with intent to deliver) (manufacturing a simulated controlled substance with the intent to deliver) (causing a simulated controlled substance to be delivered) within the State of Kansas. The defendant pleads not guilty.

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

1. That the defendant knowingly (sold) (offered for sale) (possessed with intent to sell) (delivered a simulated controlled substance) (possessed a simulated controlled substance with the intent to deliver it) (manufactured a simulated controlled substance with the intent to deliver it) (caused a simulated controlled substance to be delivered) within the State of Kansas; and

[2. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;

3. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4153(a)(1) and 65-4150(e). A violation of K.S.A. 65-4153(a)(1) is a nondrug severity level 9, nonperson felony. The defendant is guilty of a nondrug severity level 7, nonperson felony if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is

charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

PIK 3d 67.18-B defining "simulated controlled substance" should be given.

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

67.18-A DISTRIBUTION OF DRUG PARAPHERNALIA

The defendant is charged with the crime of unlawfully (selling) (offering for sale) (possessing with intent to sell) (delivering) (possessing with the intent to deliver) (manufacturing with the intent to deliver) (causing to be delivered) drug paraphernalia within the State of Kansas. The defendant pleads not guilty.

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

1. **That the defendant knowingly (sold drug paraphernalia to [insert name of person to whom drug paraphernalia was sold]) (offered drug paraphernalia for sale to [insert name of person to whom drug paraphernalia was offered for sale]) (possessed drug paraphernalia with the intent to sell to [insert name of person to whom sale of drug paraphernalia was intended]) (delivered drug paraphernalia to [insert name of person to whom drug paraphernalia was delivered]) (possessed drug paraphernalia with the intent to deliver it to [insert name of person to whom delivery of drug paraphernalia was intended]) (manufactured drug paraphernalia with the intent to deliver it to [insert name of person to whom delivery of drug paraphernalia was intended]) (caused drug paraphernalia to be delivered to [insert name of person to whom drug paraphernalia was delivered]) within the State of Kansas;**
2. **(a) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute [insert name of controlled substance];**

OR

(b) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (use, store, contain, conceal [insert name of controlled substance specified under K.S.A. 65-4162]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance specified under K.S.A. 65-4162] into the human body);

OR

(c) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (use, store, contain, conceal [insert name of controlled substance other than those specified under K.S.A. 65-4162]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance other than those specified under K.S.A. 65-4162] into the human body);

[3. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

[3.] or [5.] That [insert name of person to whom drug paraphernalia was delivered or intended to be delivered] was under 18 years of age;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4153(a)(2), (3) and (4). The penalty provisions are found in K.S.A. 65-4153(c), (d), (e), (g), (h), and (i).

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 65-4150,

"controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. The appropriate controlled substance should be inserted in the instruction.

Instructions defining "drug paraphernalia," PIK 3d 67.18-B, and setting forth factors to be considered in determining whether an object is drug paraphernalia, PIK 3d 67.18-C, should be given. Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in this instruction.

This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

Inapplicable words should be stricken from paragraph 2.

Bracketed elements [3 and 4] and the definition of "school" should be included in the instruction if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure.

Bracketed element [3] or [5] should be given only when option 2(b) or 2(c) is used and the defendant is charged with delivery or causing delivery to a person under 18 years of age.

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

Comment

When defendant fails to present substantive evidence concerning reasonable legitimate uses for items of drug paraphernalia, an inference is raised that defendant is aware items will be used for illegal purposes and intends to sell them for such purposes. *State v. Dunn*, 233 Kan. 411, 430-431, 662 P.2d 1286 (1983).

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 primarily intended or designed 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 and 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), and amendments thereto. 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.]

[Advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, sale or cultivation of controlled substance.]

Notes on Use

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

(THIS PAGE BLANK)

_____, _____, 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, isomers, or 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(a), a violation of which 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. FOR USE IN MANUFACTURING

The defendant is charged with the crime of unlawfully (marketing) (selling) (distributing) (advertising) (labeling) any drug product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts, isomers, or 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 (marketed) (sold) (distributed) (advertised) (labeled) any drug product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts, isomers, or 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; 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(b), a violation of which is a drug severity level 2 felony.

67.29 METHAMPHETAMINE COMPONENTS—MARKETING, SALE, ETC. FOR NON-INDICATED USE

The defendant is charged with the crime of unlawfully (marketing) (selling) (distributing) (advertising) (labeling) any drug product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or 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 (marketed) (sold) (distributed) (advertised) (labeled) any drug product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above); and**
2. **That the defendant knowingly did so 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(c), a violation of which is a drug severity level 2 felony.

67.30 METHAMPHETAMINE COMPONENTS—EPHEDRINE OR PSEUDOEPHEDRINE BASE

The defendant is charged with the crime of unlawfully (purchasing) (receiving) (otherwise acquiring) at retail any (compound) (mixture) (preparation) containing pseudoephedrine base or ephedrine base. The defendant pleads not guilty.

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

1. **That the defendant knowingly (purchased) (received) (otherwise acquired) at retail any (compound) (mixture) (preparation) containing more than (3.6 grams of pseudoephedrine base or ephedrine base in any single transaction) (9 grams of pseudoephedrine base or ephedrine base within any 30-day period); 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(d), a violation of which is a class A nonperson misdemeanor.

(THIS PAGE BLANK)

68.06 NOT GUILTY BECAUSE OF MENTAL DISEASE OR DEFECT

We, the jury, find the defendant guilty of

_____.

_____
Presiding Juror

We, the jury, find the defendant not guilty of

_____.

_____
Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes _____ **No** _____

_____
Presiding Juror

Notes on Use

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

Comment

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

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

68.07 MULTIPLE COUNTS - VERDICT INSTRUCTION

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

Notes on Use

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

Comment

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

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

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

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

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).

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove 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). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. *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).

A refusal to submit to a breath test is not protected by the Fifth Amendment. *State v. Leroy*, 15 Kan. App. 2d 68, 803 P.2d 577 (1990); *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *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).

When a defendant is tried for both refusing to submit to a preliminary breath test under K.S.A. 8-1012 and driving under the influence of alcohol under K.S.A. 8-1567, the jury should be instructed that evidence of the defendant's preliminary breath test refusal is to be considered only for the charge of refusing to submit to a preliminary breath test. *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

Other than a preliminary breath test, a refusal to submit to testing may be used 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 987 (1984).

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).

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

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).

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove 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). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. State v. Kendall, 274 Kan. 1003, 58 P.3d 660 (2002).

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

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

When a defendant is tried for both refusing to submit to a preliminary breath test under K.S.A. 8-1012 and driving under the influence of alcohol under K.S.A. 8-1567, the jury should be instructed that evidence of the defendant's preliminary breath test refusal is to be considered only for the charge of refusing to submit to a preliminary breath test. *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

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).

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).

The defendant's reason for fleeing is irrelevant in determining whether to classify the offense as a felony or misdemeanor under K.S.A. 8-1568(b)(2). Only the officer's reason for attempting to capture the defendant is relevant in classifying the offense. *State v. Carter*, 30 Kan. App. 2d 1247, 57 P.3d 825 (2002).

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 _____ _____.

PIK CRIMINAL INDEX

(THIS PAGE BLANK)