Pattern
Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

TABLE OF CONTENTS

(THIS PAGE BLANK)

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)	54.17, 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)	55.03, 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
21-3412a	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-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, 56.00-A
21-3439(a)(6)	56.00-A
21-3442	56.06-A
21-3443	56.16-B
21-3446	56.43
21-3447	56.44
21-3448	56.16-C
21-3449	60.01-A
21-3449(c)	60.01-A
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

Statutory Section	PIK 3d Number
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
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
21-3728(b)	59.33-C
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

Statutory Section	PIK 3d Number
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
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 (i)	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), (4)(B), (7)	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-A-1, 64.02-B
21-4301	65.01, 65.05,
21-4301(b)	65.04

Statutory Section	PIK 3d Number
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
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	56.00
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-C, 56.00-D, 56.01-C
21-4624(e)	56.00-E, 56.00-G, 56.00-H, 56.01-F, 56.01-G, 68.14, 68.14-A, 68.14-B, 68.17
21-4625	56.00, 56.00-C, 56.01-B, 56.01-D
21-4626	56.00, 56.00-D, 56.01-C
21-4628	68.14-A
21-4710	56.22
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, 67.13-D
60-460(i)(2)	55.07
60-460(dd)	52.21
65-4101(bb)	67.26
65-4113	67.23
65-4127a	67.16
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

52.02 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

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

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

Notes on Use

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

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

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

Comment

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

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

This instruction accurately reflects the law of this State and properly advises the jury of the burden of proof, the presumption of innocence and reasonable doubt. *State v. Beck*, 32 Kan. App. 2d 784, 88 P.3d 1233 (2004).

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

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

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

52.08 AFFIRMATIVE DEFENSES - BURDEN OF PROOF

The defendant raises (describe the defense claimed) as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.

Notes on Use

This instruction should be given in connection with the instruction defining the applicable defense. See *e.g.*,

54.03 Ignorance or Mistake of Fact
54.04 Ignorance or Mistake of Law - Reasonable Belief
54.11 Intoxication - Involuntary
54.13 Compulsion
54.14 Entrapment
54.17 Use of Force in Defense of a Person
54.18 Use of Force in Defense of a Dwelling
54.19 Use of Force in Defense of Property Other Than a Dwelling
55.04 Conspiracy - Withdrawal as a Defense
55.10 Criminal Solicitation - Defense
56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
56.38 Affirmative Defense to Mistreatment of a Dependent Adult
57.01-A Rape—Defense of Marriage
57.05-B Affirmative Defense to Indecent Liberties With a Child
57.06-A Affirmative Defense to Aggravated Indecent Liberties With a Child
57.07-A Affirmative Defense to Criminal Sodomy
57.08-C Affirmative Defense to Aggravated Criminal Sodomy
58.02 Affirmative Defense to Bigamy
58.10-A Affirmative Defense to Endangering a Child
58.12-C Furnishing Alcoholic Liquor to a Minor - Defense
58.12-D Furnishing Cereal Malt Beverage to a Minor - Defense
59.07 Worthless Check - Defenses
59.33-B Criminal Hunting—Defense
59.59 Piracy of Recordings - Defenses
59.64-A Computer Crime - Defense
61.04 Compensation for Past Official Acts - Defense
62.02 Eavesdropping - Defense of Public Utility Employee
62.07 Criminal Defamation - Truth as a Defense
62.12 Unlawful Smoking - Defense of Smoking in Designated Smoking Area
64.02-B Criminal Discharge of a Firearm - Affirmative Defense

64.04 Criminal Use of Weapons - Affirmative Defense
64.07-C Criminal Possession of a Firearm by a Juvenile - Affirmative Defenses
64.11-B Criminal Possession of Explosives - Defense
65.05 Promoting Obscenity - Affirmative Defenses
65.05-A Promoting Obscenity to a Minor - Affirmative Defenses
65.10-A Dealing in Gambling Devices - Defense
65.12-A Possession of a Gambling Device - Defense
65.16 Cruelty to Animals - Defense

Comment

State v. Wilson, 240 Kan. 607, 610, 731 P.2d 306 (1987), held it was error to delete from this instruction the sentence, "The State's burden of proof does not shift to the defendant."

In *State v. Crabtree*, 248 Kan. 33, 40, 805 P.2d 1 (1991), the Court reaffirmed that "P.I.K. Crim. {3d} 52.08 should be given whenever an affirmative defense is asserted in a criminal case." However, the Court went on to hold that if other instructions such as P.I.K. 52.02 are given and these instructions make it clear that the burden of proof is on the State, then the failure to give 52.08 is not clearly erroneous.

Under the Kansas Securities Act, the defendant in a securities violation prosecution has the burden of producing evidence to support the affirmative defenses set forth in K.S.A. 17-1262. However, the provisions of K.S.A. 17-1272 do not unconstitutionally shift the burden of proof to the defendant to disprove intent. *State v. Kershner*, 15 Kan. App. 2d 17, 19, 801 P.2d 68 (1990) and *State v. Ribadeneira*, 15 Kan. App. 2d 734, 817 P.2d 1105 (1991).

Alibi is not an affirmative defense. *State v. Holloman*, 17 Kan. App. 2d 279, 837 P.2d 826 (1992).

"[A] true affirmative defense does not serve to disprove an essential element of the crime, but merely consists of facts which might exonerate a defendant." *State v. Kershner*, 15 Kan. App. 2d at 19.

Killing another in the heat of passion or upon a sudden quarrel is not an affirmative defense, and the trial court was not required to give PIK 3d 52.08. *State v. Saenz*, 271 Kan. 339, 353, 22 P.3d 151 (2001).

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.

It is inappropriate to give PIK 3d 52.18 unless there is evidence the witness has been involved in the commission of the crime with which the defendant is charged. *State v. Davis*, 283 Kan. 569, 580, 158 P.3d 317 (2006).

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).

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

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

(THIS PAGE BLANK)

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."

Giles v. California, ___ U.S. ___, 171 L. Ed. 2d 488, 128 S.Ct. 2678 (2008), 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. Under *Giles*, it is not sufficient to invoke the doctrine of forfeiture regarding testimonial hearsay for the trial court to find by a preponderance of the evidence that defendant committed the murder for which defendant is on trial, thereby causing the declarant to be unavailable to testify, if the murder was not committed to prevent the witness from testifying. However, the court observed:

> "acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal proceedings. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

The rule in *Giles* will not limit the admission of non-testimonial statements in domestic violence proceedings, such as "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment." The hearsay rule exclusively governs the admission of such statements. The court notes that a state would be free to admit non-testimonial hearsay by applying a broader doctrine of forfeiture. However, *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).

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 (i).

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 (24). 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).

54.01-A GENERAL CRIMINAL INTENT

In order for the defendant to be guilty of the crime charged, the State must prove that (his)(her) conduct was intentional. Intentional means willful and purposeful and not accidental.

Intent or lack of intent is to be determined or inferred from all of the evidence in the case.

Notes on Use

For authority, see K.S.A. 21-3201(a) and (b). This instruction is not recommended for general use. The PIK instruction defining the crime should cover either specific or general criminal intent as an element of the crime. This instruction should be used only where the crime requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. See *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973); *State v. Plunkett, Jr.*, 261 Kan. 1024, 934 P.2d 113 (1997); *State v. Isley*, 262 Kan. 281, 293, 936 P.2d 275 (1997); *State v. Mitchell*, 262 Kan. 434, 442-44, 939 P.2d 879 (1997); State *v. Yardley*, 267 Kan. 37, 978 P.2d 886 (1999).

The above instruction should not be given where intentional conduct is not a necessary element of the offense, as set out in K.S.A. 21-3201(c), reckless conduct; 21-3204, absolute liability for misdemeanor or traffic infraction; and 21-3405, vehicular homicide.

This instruction must not be confused with PIK 3d 54.01, Presumption of Intent, which is a rule of evidence and does not purport to charge the jury to find criminal intent necessary for conviction.

Comment

As to those offenses of guilt without criminal intent, in *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956), it is said: "The doing of an inhibited [sic] act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." See also, *State v. Cruitt*, 200 Kan. 372, 436 P.2d 870 (1968), in which the Court said: "And where an act is made a crime by statute, without any express reference to intent, this court has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed."

Failure to give the instruction on request of the defendant is not error where the substance of the requested instruction is present in other instructions given by the district court. See *State v. Cheeks*, 253 Kan. 93, 853 P.2d 655 (1993).

54.01-B STATUTORY PRESUMPTION OF INTENT TO DEPRIVE

You may presume that a person intended to permanently deprive the (owner) (lessor) of the possession, use or benefit of the property, when:

(a) That person gave false identification or a fictitious name, address or place of employment at the time of obtaining control over property;

OR

(b) That person

(i) (leased) (rented) personal property;

(ii) failed to return the personal property within 10 days after the date required by the (lease) (rental agreement); and

(iii) received written notice to return the property within seven days after receipt of the notice and did not do so;

OR

(c) That person destroyed, broke or opened a lock, chain, key switch, enclosure, or other device used to secure the property in order to contain control over the property;

OR

(d) That person destroyed or substantially damaged or altered the property so as to make the property unusable or unrecognizable in order to obtain control over the property;

OR

(e) That person failed to return the book(s) or other material borrowed from a library within 30 days after receiving a written notice from the library requesting its return.

OR

(f) That person

(i) (leased) (rented) a motor vehicle from a commercial (lessor) (renter);

(ii) had a written rental agreement that provided for the return of the motor vehicle to a particular place at a particular time; and

(iii) failed to return the motor vehicle within three days after (receipt of) (refusal to accept) written notice to return it.

OR

(g) That person failed to return a vehicle to its owner if, at the time the person received possession of the vehicle, the owner delivered to the person a written instruction stating (i) the time and place to return the vehicle and (ii) that failure to comply may be prosecuted as theft.

You may consider this presumption along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

(Notice is presumed to have been received three days after the notice is deposited as registered or certified mail in the U.S. mail, addressed to the person who has [leased or rented the property] [borrowed the book(s) or other material from a library] as the address appears in the information supplied by the person at the time of the [leasing or renting] [borrowing] or at [his][her] last known address.)

Notes on Use

For authority, see K.S.A. 21-3702(a)(1) on false identification; (a)(2) on failure to return leased or rented property; (a)(3) on destroying locks and other securing devices; (a)(4) on destroying the property taken; (a)(5) and (6) on motor vehicles; and (b) on failure to return book(s) or other material from a library. "Notice" is defined in 21-3702(c). See PIK 3d Chapter 59.00, Crimes Against Property, for the use of this instruction. Paragraph (e) of the instruction is to be used only for prosecution of a misdemeanor under K.S.A. 21-3701 where the object of the alleged theft is a book or other material borrowed from a library. The last paragraph may be given when there is no proof of actual receipt of notice or when receipt of notice is contested, if notice was sent by registered or certified mail. This instruction should not be given when circumstances establish lack of receipt, such as when the postal return receipt states that the addressee was not found or is unknown.

Comment

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

State v. Johnson, 233 Kan. 981, 986, 666 P.2d 706 (1983), again affirms that this instruction protects the defendant's rights when there exists a statutory presumption of intent to deprive. See also *Ulster County Court v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), which specifies when instructions on statutory presumptions are permissible.

(THIS PAGE BLANK)

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

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

Notes on Use

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

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); *State v. Holt*, 285 Kan. 760, 175 P.3d 239 (2008) (while prosecution's theory was that defendant was shooter, defendant's evidence was that third person was shooter and jury could find defendant aided third person).

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).

54.10 MENTAL DISEASE OR DEFECT (For Crimes Committed Prior To January 1, 1996)

The defendant has denied criminal responsibility because of lack of mental capacity at the time the offense was committed. In law, this is called insanity. The defendant is not criminally responsible for (his)(her) acts if because of mental illness or defect the defendant lacked the capacity either:

(a) to understand the nature of (his)(her) acts, or

(b) to understand that what (he)(she) was doing was prohibited by law.

If you have a reasonable doubt as to the defendant's capacity to understand either, then you should find the defendant not guilty because of insanity.

If you have no reasonable doubt that the defendant had the mental capacity at the time of the alleged offense to understand both what (he)(she) was doing and that it was prohibited by law, then you should find the defendant was not insane.

Notes on Use

This instruction should be given where the defense of insanity is asserted under K.S.A. 22-3219 and evidence has been introduced in support of such claim.

See K.S.A. 22-3219 for plea of insanity and notice and procedure required.

Comment

For authority, see *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960), in which the M'Naghten rule is discussed and applied. In *State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), the Court reaffirmed the M'Naghten test, saying "... no other test better protects society as well as serves its needs." (pp. 211-219)

A proposed change to the American Law Institute test was not adopted in the Kansas Criminal Code. See *Kansas Judicial Council Bulletin*, April 1968, p.35. For a most informative analysis of the American Law Institute test, see the dissent in *Smith*, supra, (pp.211-219).

In *State v. Boan*, 235 Kan. 800, 686 P.2d 160 (1984), the Court emphasized that "wrong" under the "right or wrong" half of the M'Naghten test means prohibited by law and not morally or socially wrong.

Even an adjudged lunatic is criminally responsible for acts committed during a lucid interval. *Fisher v. Fraser*, 171 Kan. 472, 233 P.2d 1066 (1951). The question of defendant's insanity at the time of the alleged crime is one of fact to be tried by the jury. *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960); *State v. Coltharp*, 199 Kan. 598, 433 P.2d 418 (1967).

Nonexpert witnesses who are shown to have had special opportunities to observe the defendant may give opinion evidence as to sanity. *State v. Shultz*, 225 Kan. 135, 587 P.2d 901 (1978).

In *State v. James*, 223 Kan. 107, 574 P.2d 181 (1977), the Court held that "an instruction on the effect of voluntary intoxication and an instruction on the defense of insanity may both be given when there has been evidence of intoxication which bears upon the issue of a required specific intent and when the defense of insanity is relied on by the defendant."

An insane person cannot be required to plead to a criminal charge and cannot be tried. *State v. English*, 198 Kan. 196, 424 P.2d 601 (1967). The test of responsibility for crime differs from that of mental competency to stand trial. These tests are stated and distinguished in *Van Dusen v. State*, 197 Kan. 718, 421 P.2d 197 (1966). See also, *Nall v. State*, 204 Kan. 636, 465 P.2d 957 (1970). For procedure, see K.S.A. 22-3302. For verdict form, see PIK 3d 68.06, Defense of Lack of Mental State—Verdict Form.

54.13 COMPULSION

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

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

Notes on Use

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

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

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

Comment

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

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

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

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

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

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

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

The defense of compulsion requires coercion or duress to be present, imminent, impending, and continuous. It may not be invoked when the defendant had a reasonable opportunity to escape or avoid the criminal act without undue exposure to death or serious bodily harm. *State v. Matson*, 260 Kan. 366, 385, 921 P.2d 790 (1996); *State v. Jackson*, 280 Kan. 16, 118 P.3d 1238 (2005); *State v. Baker*, 287 Kan. 345, 197 P.3d 421 (2008) (because the defendant was away from the threatening party for ten minutes, no compulsion instruction was required; no rational factfinder could conclude that reason for defendant's failure to escape from compulsion was because of lack of reasonable opportunity to do so).

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).

State v. Kirkpatrick, 286 Kan. 329, 184 P.3d 247 (2008), held that it was improper to give a self-defense instruction in a prosecution for felony murder because the underlying felony alleged by the prosecution was the forcible felony of criminal discharge of a weapon at an occupied building. K.S.A. 21-3214(1) does not permit use of force in self-defense by a forcible felon. See PIK 3d 54.20. The dissent in *Kirkpatrick* argued that whether defendant committed a forcible felony was a question for the jury to decide and that it thus was proper to give the self-defense instruction. The majority limits its holding "to the facts of this case," in which "at all times during the events," defendant "and his friends were the aggressors."

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).

54.20 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). See also *State v. Kirkpatrick*, 286 Kan. 329, 184 P.3d 247 (2008) (improper to give self-defense instruction in felony murder case when underlying felony was forcible felony of criminal discharge of a weapon at occupied building; imperfect self-defense not available for underlying felony either since imperfect self-defense applies only to homicide charge; thus, no duty to instruct on lesser included offense when charge is felony murder). The dissent in *Kirkpatrick* argued that whether defendant committed a forcible felony was a question for the jury to decide and that it thus was proper to give the self-defense instruction, along with instructions explaining when self-defense is not available. The majority limits its holding "to the facts of this case," in which "at all times during the events," defendant "and his friends were the aggressors."

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).

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. Stevens*, 285 Kan. 307, 318, 172 P.3d 570 (2007); *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).

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.

Attempted voluntary manslaughter is a crime in Kansas. If a defendant has formed the necessary intent to commit the crime of voluntary manslaughter, it is not logically impossible for him or her to attempt but fail after engaging in an overt action toward the accomplishment of an intentional crime. *State v. Gutierrez*, 285 Kan. 332, 344, 172 P.3d 18 (2007).

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 acts of the persons accused that were done in furtherance 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 (1997); *State v. Denny*, 38 Kan. App. 2d 724, 172 P.3d 57 (2007) *rev. denied* 286 Kan. ___ (2008).

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).

K.S.A. 65-4159(b), which denies suspended sentence, community work service or probation for the crimes of unlawfully manufacturing or attempting to manufacture any controlled substance, does not prohibit a sentencing judge from granting probation to a defendant convicted of conspiracy to unlawfully manufacture methamphetamine in violation of K.S.A. 21-3302(a) and K.S.A. 65-4159(a). *State v. Moffit*, 38 Kan. App. 2d 414, 415, 166 P.3d 435 (2007).

55.04 CONSPIRACY - WITHDRAWAL AS A DEFENSE

It is a defense to a charge of conspiracy that the defendant voluntarily and in good faith withdrew from the agreement and communicated the fact of such withdrawal to any party to the agreement before any party acted in furtherance of it.

Notes on Use

For authority, see K.S.A. 21-3302(b). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

It is a jury question whether one has withdrawn from a conspiracy when conflicting evidence as to that withdrawal is presented. *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977).

Withdrawal is a defense to conspiracy, but there is no statutory defense of withdrawal to aiding and abetting other crimes. *State v. Kaiser*, 260 Kan. 235, 918 P.2d 629 (1996); *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998).

55.05 CONSPIRACY - DEFINED

A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement.

The agreement may be established in any manner sufficient to show understanding. It may be oral or written, or inferred from all of the facts and circumstances.

Notes on Use

For authority, see K.S.A. 21-3302(a) and the *Kansas Judicial Council Bulletin*, April 1968, p.46. *State v. Campbell*, 217 Kan. 756, 539 P.2d 329 (1975); *State v. Small*, 5 Kan. App. 2d 760, 625 P.2d 1 (1981); 16 Am. Jur. 2d, Conspiracy, §§ 1, 7, and 11. This instruction should be given in all cases involving the crime of conspiracy.

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. Cox*, 258 Kan. 557, 908 P.2d 603 (1995); *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993). See also, *State v. Daughtery*, 221 Kan. 612, 562 P.2d 42 (1977).

In *Campbell*, the Supreme Court of Kansas emphasized that the essence of a conspiracy is the agreement to commit a crime, not simply to commit a particular act. The Court further held that the provisions of K.S.A. 21-3302 were not unconstitutionally vague and indefinite. 217 Kan. at 770.

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).

The agreement may be expressed or implied from the acts of the parties. *State v. Roberts*, 223 Kan. 49, 52, 574 P.2d 164 (1977); *State v. Rider, Edens & Lemons*, 229 Kan. 394, 405, 625 P.2d 425 (1981).

The agreement requires a "meeting of the minds" of at least two persons. See *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978).

55.06 CONSPIRACY - ACT IN FURTHERANCE DEFINED

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

Notes on Use

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

Comment

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

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

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

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

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

The State is not limited to the overt acts alleged in the information in its proof of conspiracy. See *State v. Taylor*, 2 Kan. App. 2d 532, 583 P.2d 1033 (1978). However, a complaint that fails to allege any specific overt act committed in furtherance of the conspiracy is fatally flawed and does not confer jurisdiction to try the defendant on the conspiracy charge. *State v. Sweat*, 30 Kan. App. 2d 756, 48 P.3d 8, *rev. denied* 274 Kan. 1118 (2002). K.S.A. 22-3201(b) requires the State to set out the essential facts of the crime. K.S.A. 21-3302(a) requires specific allegation of an overt act in furtherance of the conspiracy. The State must allege more than simply an "overt act in furtheranceof the conspiracy." See *State v. Shirley*, 277 Kan. 659, 89 P.3d 649 (2004).

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

The overt act for the crime of conspiracy to commit murder may be the commission of the murder itself. *State v. Wilkins*, 267 Kan. 355, 365, 985 P.2d 690 (1999).

CHAPTER 56.00
CRIMES AGAINST PERSONS

CAPITAL MURDER JURY INSTRUCTIONS NOTICE

Revised jury instructions for use in capital murder cases were approved by the PIK-Criminal Advisory Committee in late 2008. These instructions follow immediately as 56.00 through 56.00-H. Verdict forms are found at 68.14 and 68.17. Illustrative instructions for use in the guilt and sentencing phases of capital murder cases are found at 69.04.

Capital punishment was reenacted in Kansas effective July 1, 1994. The basic statutory framework is found at K.S.A. 21-3439 and K.S.A. 21-4624 through 21-4526. Since July 1, 1994, there have been several amendments to these statutes, most recently on July 1, 2004.

The Kansas Supreme Court has rendered a number of decisions involving capital murder. The decisions most pertinent to the formulation of these instructions are *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), and *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008). The United States Supreme Court's decision in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), also bears significantly on the revision of these instructions.

56.00 CAPITAL MURDER—PRE-VOIR DIRE INSTRUCTION

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 received a questionnaire concerning your views on 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 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 same jury decides whether the defendant should be sentenced to death. The jury will be separately instructed concerning the claims that 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 circumstances present and that they are not outweighed by any mitigating circumstances found to exist.

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 received a questionnaire concerning your views on 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 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 same jury decides whether the defendant should be sentenced to death. The jury will be separately instructed concerning the claims that 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 circumstances present and that they are not outweighed by any mitigating circumstances found to exist.

Notes on Use

This is an optional instruction that 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—ELEMENTS OF THE OFFENSE

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 _____ [and _____].**
2. **That such killing(s) was (were) 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.]

OR

(f) That the killings of _____ and (other victim[s]) (were part of the same act or transaction) (were part of two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct);

OR

(g) That _____ was a child under the age of 14 years and such killing was done in the commission of (kidnapping) (aggravated kidnapping) when such (kidnapping) (aggravated kidnapping) was done with intent to commit a sex offense upon or with _____ or with intent that _____ commit or submit to a sex offense;

[Sex offense means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution, or sexual exploitation of a child.]

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

Notes on Use

For authority, see K.S.A. 21-3439. Capital murder is an off-grid person felony subject to a possible sentence of death. For first-degree murder, see PIK 3d 56.01, Murder in the First Degree. For felony murder, see PIK 3d 56.02, Murder in the First Degree—Felony Murder.

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

When defendant is charged with a capital murder done in the commission of or subsequent to another offense, the elements of the other offense should be set out in a separate instruction.

In the case of murder for hire, any party to the contract or agreement is guilty of capital murder. Modifications to this instruction will be necessary in those cases where the defendant was not the person who performed the killing.

Comment

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

In *State v. Harris*, 284 Kan. 284, Syl. ¶¶ 6, 7, 162 P.3d 28 (2007), the Kansas Supreme Court ruled that on the particular facts of that case, under K.S.A. 21-3439(a)(6), the defendant could be convicted of only one count of capital murder for the killing of four persons.

In *State v. Scott*, 286 Kan. 54, 68, 75, 183 P.3d 801 (2008), the Kansas Supreme Court held that when a capital murder charge under K.S.A. 21-3439(a)(6) is based upon the killing of multiple victims as part of the same act or transaction, or several acts connected together, or as part of a common scheme, the elements jury instruction should specifically include a claim that the defendant killed each of the victims. Furthermore, the capital murder conviction precludes additional convictions for the deaths of the other victims on the grounds of multiplicity.

(THIS PAGE BLANK)

56.00-B CAPITAL MURDER—DEATH SENTENCE—SENTENCING PROCEEDING

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

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

Notes on Use

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

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

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

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

56.00-C CAPITAL MURDER—DEATH SENTENCE—AGGRAVATING CIRCUMSTANCES

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

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

1. **[That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.]**
   and/or
2. **[That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]**
   and/or
3. **[That the defendant committed the crime of capital murder for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]**
   and/or
4. **[That the defendant authorized or employed another person to commit the crime of capital murder.]**
   and/or
5. **[That the defendant committed the crime of capital murder in order to avoid or prevent a lawful arrest or prosecution.]**
   and/or
6. **[That the defendant committed the crime of capital murder in an especially heinous, atrocious or cruel manner. As used in this instruction, the following definitions apply:**
   - **"heinous" means extremely wicked or shockingly evil;**
   - **"atrocious" means outrageously wicked and vile; and**

- **"cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.**

In order to find that the crime of capital murder is committed in an especially heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.]

and/or

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

and/or

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

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Notes on Use

For authority, see K.S.A. 21-4624(c) and K.S.A. 21-4625. This instruction should be included in all cases involving the death sentence proceeding.

The applicable clauses in brackets should be selected as contained in the written notice and as supported by the evidence.

The definitions of the words contained in the sixth clause are taken from *Foster v. State*, 779 P.2d 591 (Okl. Cr. 1989).

Comment

"In order to find that a murder was committed in an especially heinous, atrocious, or cruel manner so as to satisfy the aggravating circumstance contained in K.S.A. 21-4625(6), the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death. The Kansas definition of 'heinous, atrocious or cruel' narrows the class of death eligible defendants consistent with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution." *State v. Kleypas*, 272 Kan. 894, 1029, 40 P.3d 139 (2001).

Also contained in *Kleypas*, 272 Kan. at 1019-25, is an analysis regarding the defendant's constitutional and evidentiary challenge to the "avoid arrest" aggravating circumstance relied upon by the State. In a later section of the opinion, the court also distinguishes the aggravating circumstance of "heinous, atrocious or cruel manner" from the aggravating circumstance of "avoiding arrest." 172 Kan. at 1082-3.

In *State v. Kleypas*, 282 Kan. 560, 570-71, 147 P.3d 1058 (2006), the Kansas Supreme Court ruled that evidence of stalking by the defendant may be admitted during the penalty phase of a capital murder case if the trial court finds such evidence to be relevant on the question of whether the victim suffered "serious physical abuse or mental anguish" prior to death, and thus whether the killing was done in a "heinous, atrocious or cruel manner."

In *State v. Scott*, 286 Kan. 54, 100, 183 P.3d 801 (2008), the Kansas Supreme Court held that duplicating an element of the crime of capital murder as an aggravating circumstance in the penalty phase is constitutional and conforms to the legislative intent in Kansas that killing of more than one person can be used for both purposes. The *Scott* court further held that the term "crime" in the list of aggravating circumstances refers to the crime of capital murder and the jury instruction on aggravating circumstances should make this explicitly clear.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

In *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993), the Supreme Court held the third aggravating circumstance, murder for the purpose of receiving money or any other thing of monetary value, is not limited to cases involving murder for hire.

In *State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), the Supreme Court returned to the problem of definitions in the sixth clause. The court noted that the definitions referenced in *Bailey* did not include the complete instruction from *Foster* and directed that the sixth clause be revised. The language approved in *Willis* is now included in the sixth clause.

Bailey, *Kingsley*, *Cromwell*, and *Willis* examined the aggravating factors in the context of a "Hard 40" sentencing proceeding. Care should be exercised in applying these opinions in a death sentence case. The Supreme Court has expressed the view that death is a penalty different from all other sanctions and therefore death penalty cases are of limited precedential value in resolving "Hard 40" cases. See *Bailey*, 251 Kan. at 171; *Cromwell*, 253 Kan. at 513. Presumably, the reverse is also true.

56.00-D CAPITAL MURDER—DEATH SENTENCE—MITIGATING CIRCUMSTANCES

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

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

The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case. Mitigating circumstances need not be proved beyond a reasonable doubt, and need only be proved to the satisfaction of the individual juror in that juror's sentencing decision. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

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

1. **[The defendant has no significant history of prior criminal activity.]**
   and/or
2. **[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]**
   and/or
3. **[The victim was a participant in or consented to the defendant's conduct.]**
   and/or
4. **[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]**
   and/or

5. [The defendant acted under extreme distress or under the substantial domination of another person.]
and/or
6. [The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]
and/or
7. [The age of the defendant at the time of the crime.]
and/or
8. [At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]
and/or
9. [A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.] and/or
10. Other_____.]

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

Notes on Use

For authority, see K.S.A. 21-4624(c) and 21-4626 and *State v. Kleypas*, 272 Kan. 894, 1075, 40 P.3d 139 (2001). The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the death sentence proceeding.

Comment

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

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

In *State v. Scott*, 286 Kan. 54, 68, 75, 183 P.3d 801 (2008), the Kansas Supreme Court held that the trial court's failure to adequately instruct the jury that unanimity is not required in order to find the existence of mitigating circumstances will likely lead to reversal of a sentence of death and a remand for a new sentencing proceeding.

K.S.A. 21-4626 is not an exclusive list of mitigating factors. In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the United States Supreme Court held that under the Georgia statute, once a jury has determined that an aggravating factor exists, "[t]he jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the trial court." 428 U.S. 197.

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

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

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

The Committee wishes to alert trial judges that, if requested, they must instruct the jury regarding the number of years in prison which a defendant will serve if not sentenced to death. The Committee has not attempted to draft such a pattern instruction, as each case will vary on its facts. However, trial judges will need to fashion such an instruction themselves if requested.

Notes on Use

"Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court." *State v. Kleypas*, 272 Kan. 894, 1081-2, 40 P.3d 139 (2001).

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

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.

Notes on Use

For authority, see K.S.A. 21-4624(e).

Comment

In *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), 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. This ruling was reversed by the United States Supreme Court in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). On remand, the Kansas Supreme Court in *State v. Marsh*, 282 Kan. 38, 144 P.3d 48 (2006), vacated that portion of its prior opinion finding the equipoise provision violated the Eighth and Fourteenth Amendments.

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

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

Notes on Use

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

Comment

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

56.00-G CAPITAL MURDER—DEATH SENTENCE—ALTERNATIVE SENTENCE

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

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances that you unanimously found beyond a reasonable doubt.

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

OR

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

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances that you unanimously found beyond a reasonable doubt.

However, if one or more jurors are not persuaded beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court to imprisonment for life with no possibility of parole.

Notes on Use

For authority, see K.S.A. 21-4624(e).

Comment

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, (1994), the United States Supreme Court held that, when a defendant's future dangerousness is at issue in a death penalty proceeding, and state law prohibits his or her release on parole, due process requires that the sentencing jury be informed the defendant is parole ineligible. The Court commented, however, that in a case where a defendant is eligible for parole, the State may reasonably conclude that information about parole eligibility should be kept from the jury.

Although *Simmons* does not seem to require it, the Committee believes it is appropriate to inform the jury that the judge will sentence a defendant who is not sentenced to death. The statement in the instruction for crimes committed prior to July 1, 2004, is phrased in general terms because the trial judge will have several options in sentencing such a defendant.

(THIS PAGE BLANK)

56.00-H CAPITAL MURDER—DEATH SENTENCE—SENTENCING DECISION

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

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

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death;

OR

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

Notes on Use

For authority, see K.S.A. 21-4624(e).

56.01 MURDER IN THE FIRST DEGREE

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, "At the common law, homicides were of two classes only, those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter." Effective July 1, 1993, however, the Legislature has deleted "malice" from the statutory definition of murder in the first degree.

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

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

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. The duty only arises when the evidence and trial would support a conviction of the lesser offense. *State v. Yarrington*, 238 Kan. 141, 143, 708 P.2d 524 (1985).

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

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

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

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

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

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

Notes on Use

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

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

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

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

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

Comment

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

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

56.01-B MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—AGGRAVATING CIRCUMSTANCES

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

1. [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.]
   and/or
2. [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]
   and/or
3. [That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]
   and/or
4. [That the defendant authorized or employed another person to commit the crime.]
   and/or
5. [That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.]
   and/or
6. [That the defendant committed the crime in an especially heinous, atrocious or cruel manner. The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; and "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.

   A crime is committed in an especially heinous, atrocious, or cruel manner when the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.]

and/or

7. **[That the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.]**
and/or
8. **[That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]**

Notes on Use

For authority, see K.S.A. 21-4625. This instruction should be included in all cases involving the mandatory minimum 40 year sentencing proceeding.

The applicable clauses in brackets should be selected as contained in the written notice and as supported by the evidence.

The definitions of the words contained in the sixth clause are taken from *Foster v. State*, 779 P.2d 591 (Okl. Cr. 1989).

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

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

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

Comment

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), an Oklahoma case, the United States Supreme Court held the terms "heinous", "atrocious" and "cruel" were unconstitutionally vague because they did not "on their face offer sufficient guidance to the jury to escape the strictures of [the court's] judgement in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972)." However, a later decision by the Court of Criminal Appeals of Oklahoma in *Foster v. State*, 779 P.2d 591 (Okl. Cr. 1989), noted the unconstitutional vagueness

problem in *Maynard v. Cartwright*, and held that the vagueness problem was satisfied with the inclusion of an additional instruction to the jury that the "term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; and `cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others."

The definitions from *Foster*, 779 P.2d 591 have been included in the sixth clause of aggravated circumstances.

In *State v. Bailey*, 251 Kan. 156, 174, 834 P.2d 342 (1992), the Supreme Court rejected defendant's argument that the second, fifth and sixth clauses of aggravated circumstances are unconstitutionally vague. The decision noted that the trial court had included the *Foster* definitions in the instructions.

In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Supreme Court rejected the argument that the fifth aggravating circumstance, murder to avoid arrest or prosecution, requires proof that an arrest was imminent or that avoiding arrest was the dominant motive for the murder. Furthermore, the sixth aggravating circumstance, murder committed in an especially heinous, atrocious or cruel manner, encompasses conduct after a victim has been rendered unconscious. Abuse of the body after the victim is dead is not relevant to the manner in which the murder was committed.

In *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993), the Supreme Court held the third aggravating circumstance, murder for the purpose of receiving money or any other thing of monetary value, is not limited to cases involving murder for hire.

In *State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), the Supreme Court returned to the problem of definitions in the sixth clause. The Court noted that the definitions referenced in *Bailey* did not include the complete instruction from *Foster* and directed that the sixth clause be revised. The language approved in *Willis* is now included in the sixth clause.

56.01-C MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—MITIGATING CIRCUMSTANCES

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

1. **[The defendant has no significant history of prior criminal activity.]**
   and/or
2. **[The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.]**
   and/or
3. **[The victim was a participant in or consented to the defendant's conduct.]**
   and/or
4. **[The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.]**
   and/or
5. **[The defendant acted under extreme distress or under the substantial domination of another person.]**
   and/or
6. **[The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.]**
   and/or
7. **[The age of the defendant at the time of the crime.]**
   and/or
8. **[At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.]**
   and/or
9. **[Other_____.]**

Notes on Use

For authority, see K.S.A. 21-4624(c) and 21-4626. The applicable clauses and the additional other claimed mitigating circumstances should be included in cases involving the mandatory 40 year sentencing proceeding.

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

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

56.01-D MURDER IN THE FIRST DEGREE - MANDATORY MINIMUM 40 YEAR SENTENCE - BURDEN OF PROOF

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances.

Notes on Use

For authority, see K.S.A. 21-4625.

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

Comment

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

Notes on Use

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

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

56.01-G MURDER IN THE FIRST DEGREE—MANDATORY MINIMUM 40 YEAR SENTENCE—SENTENCING RECOMMENDATION

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

The verdict forms provide the following alternative verdicts:

A. Life imprisonment with the defendant eligible for parole after 15 years;

or

B. Life imprisonment with the defendant eligible for parole after 40 years.

Notes on Use

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

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

56.02 MURDER IN THE FIRST DEGREE—FELONY MURDER

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

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

1. **That the defendant (or another) killed _____;**
2. **That such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) _____; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).

Notes on Use

For authority, see K.S.A. 21-3401. Felony murder is an off-grid person felony.

In addition to this instruction, the elements of the underlying inherently dangerous felony should be set out. Effective July 1, 1993, an "inherently dangerous felony" is defined to include murder in the first degree under K.S.A. 21-3401(a), murder in the second degree under K.S.A. 21-3402(a), voluntary manslaughter under K.S.A. 21-3403(a), kidnapping, aggravated kidnapping, robbery, aggravated robbery, rape, aggravated criminal sodomy, abuse of a child, felony theft under K.S.A. 21-3701(a) or (c), burglary, aggravated burglary, arson, aggravated arson, treason, and any felony offense as provided in K.S.A. 65-4127a, 65-4127b, 65-4159 or 21-4219. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment below for authority to instruct on both theories. The elements of the applicable underlying felony should be set forth either by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

Where there is some indication that a participant in the felony, other than the defendant, may actually have caused the victim's death, the parenthetical in the first paragraph may be used.

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

(THIS PAGE BLANK)

56.02-A MURDER IN THE FIRST DEGREE AND FELONY MURDER - ALTERNATIVES

In this case, the State has charged the defendant with one offense of murder in the first degree and has introduced evidence on two alternate theories of proving this crime.

The State may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed _____ and that such killing was done while (in the commission of) (attempting to commit) (in flight from [committing] [attempting to commit]) _____ or in the alternative by proving beyond a reasonable doubt that the defendant killed _____ intentionally and with premeditation, as fully set out in these instructions.

Where evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict.

In Instruction No. _____, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of felony murder, that is the killing of a person (in the commission of) (in an attempt to commit) (in flight from [committing] [attempting to commit])_____ _____.

In Instruction No. _____, the Court has set out for your consideration the essential claims which must be proved by the State before you may find the defendant guilty of premeditated murder.

If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree on both theories, then you must enter a verdict of not guilty.]

OR

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree, then you must consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter).]

Notes on Use

For authority, see K.S.A. 21-3401. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence include both felony murder and premeditated murder, this instruction must be given in addition to PIK 3d 56.01, Murder in the First Degree, and PIK 3d 56.02, Murder in the First Degree—Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. See PIK 3d 69.01, Murder in the First Degree With Lesser Included Offenses.

Comment

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the State may proceed on both theories. The defendant is entitled to notice that the State is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978); *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The State is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

State v. Hartfield, 245 Kan. 431, 447, 781 P.2d 1050 (1989), recommends that the elements of each alternative be in separate instructions, but since the instruction refers to "either or both theories" in the conclusion, no error was found.

In *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992), the Court quoted with approval its holding in *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990), that "[w]hen an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killer's malignant purpose." To the same effect, see *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989).

Before the mandatory minimum 40 year sentence is imposed, however, the jury must have unanimously found that premeditated murder occurred. In *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993), the Court upheld the use of this instruction in a "Hard 40" case where separate verdict forms for premeditated murder and felony murder were used. See also *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998).

56.03 MURDER IN THE SECOND DEGREE

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

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

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

1. That the defendant intentionally killed _____; and

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

Notes on Use

For authority, see K.S.A. 21-3402. Murder in the second degree is a severity level 1, person felony, if intentional. If unintentional, see PIK 3d 56.03-A, Murder in the Second Degree—Unintentional.

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

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

Comment

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

Intentional second-degree murder requires proof of a specific intent to kill. *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503 (1996), *rev. denied* 261 Kan. 1086 (1997).

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

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

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

(THIS PAGE BLANK)

56.03-A MURDER IN THE SECOND DEGREE—UNINTENTIONAL

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

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

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

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

Notes on Use

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

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

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

Comment

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

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

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

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

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

56.04 HOMICIDE DEFINITIONS

(a) Maliciously.

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

For a collection of cases dealing with the definition of this term, see *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). See also, *State v. Childers*, 222 Kan. 32, 39, 563 P.2d 999 (1977); *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980); and *State v. Hill*, 242 Kan. 68, 82, 744 P.2d 1228 (1987); *State v. Hebert*, 277 Kan. 61, 82 P.3d 470 (2004).

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

(b) Premeditation.

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

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

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

(c) Willfully.

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

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

(d) **Intentionally.**

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

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

(e) **Heat of Passion.**

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

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

(f) **Reckless.**

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

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

56.05 VOLUNTARY MANSLAUGHTER

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

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

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

OR

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

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

Notes on Use

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

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

Comment

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

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

"Heat of passion" is subject to an objective test. It requires an emotional state of mind of such degree as to cause an ordinary person to act on impulse without reflection. Moreover, the emotional state must arise from circumstances constituting "sufficient provocation." "Sufficient provocation" is also subject to an objective test. The provocation must be sufficient to cause an ordinary person to lose control of actions and reason. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992).

The unreasonable but honest belief required under K.S.A. 21-3403(b) must be based on the reality of the circumstances surrounding the killing and not on a psychotic delusion. *State v. Ordway*, 261 Kan. 776, 934 P.2d 94 (1997).

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

The Kansas Supreme Court has consistently rejected the argument that imperfect self-defense applies to reduce premeditated first-degree murder to voluntary manslaughter. In *State v. Hurt*, 278 Kan. 676, 683, 101 P.3d 1249 (2004), premeditation and heat of passion were described as "mutually exclusive concepts." In *State v. Bell*, 280 Kan. 358, 121 P.3d 972 (2005), the defendant challenged PIK 3d 56.05-B because it did not allow the jury to consider the concept of imperfect self-defense for the purpose of reducing premeditated first-degree murder to voluntary manslaughter. The court declined to uphold this challenge. In *State v. Lawrence*, 281 Kan. 1081, 135 P.3d 1211 (2006), the defendant challenged 56.05-B because it did not allow the jury to consider imperfect self-defense contemporaneously with premeditation and because the ordering of the jury's deliberations did not allow the jury to reconcile those two concepts. Defendant augmented his argument with cases from other jurisdictions that hold that the only difference between murder and manslaughter is the presence or absence of malice. In rejecting this argument the court noted that in Kansas, the element of malice was eliminated from both first- and second-degree murder and reiterated its prior approval of both the ordering of the instructions and the language of 56.05-B.

56.06 INVOLUNTARY MANSLAUGHTER

A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)

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

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

1. That the defendant unintentionally killed _____;

2. That it was done:

(a) recklessly;

or

(b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) _____;

or

(c) during the commission of a lawful act in an unlawful manner; and

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

Notes on Use

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

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

56.07-B VEHICULAR BATTERY

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

See PIK 3d 56.18, Aggravated Battery.

56.08 ASSISTING SUICIDE

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

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

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

   or

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

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

      or

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

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

Notes on Use

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

Comment

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

56.13 ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of assault of 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 placed _____ in reasonable apprehension of immediate bodily harm;**
2. **That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;**
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.**

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3409. Assault of a law enforcement officer is a class A, person misdemeanor. Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, PIK 3d 56.12, Assault, should be given.

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

Comment

See Comment to PIK 3d 56.12, Assault.

56.14 AGGRAVATED ASSAULT

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

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

1. **That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm;**
2. **(a) That the defendant used a deadly weapon;**
   or
   (b) That the defendant was disguised in a manner designed to conceal identity;
   or
   (c) That the defendant did so with intent to commit _____, a felony; and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

[The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).]

Notes on Use

For authority, see K.S.A. 21-3410. Aggravated assault is a severity level 7, person felony. If a firearm is used, a sentence of imprisonment is presumed although the court may impose an optional nonprison sentence upon certain findings.

Assault as defined by K.S.A. 21-3408 is a lesser included offense and where the evidence warrants it, instruction on assault should be included. See PIK 3d 56.12, Assault.

Under circumstances when the phrase "deadly weapon" should be defined, see PIK 3d Chapter 53.00, Definitions and Explanations of Terms.

Where element 2(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

Comment

In *State v. Nelson*, 224 Kan. 95, 577 P.2d 1178 (1978), it was error for the trial court to omit one of the elements necessary to establish aggravated assault with a deadly weapon. The predecessor to this instruction was cited as being correct.

56.15 AGGRAVATED ASSAULT OF A LAW ENFORCEMENT OFFICER

The defendant is charged with the crime of aggravated assault of 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 placed _____ in reasonable apprehension of immediate bodily harm;**
2. **That _____ was a uniformed or properly identified (state) (county) (city) law enforcement officer;**
3. **That _____ was engaged in the performance of (his)(her) duty;**
4. **(a) That the defendant used a deadly weapon;**
   or
   (b) That the defendant was disguised in a manner designed to conceal identity;
   or
   (c) That the defendant did so with intent to commit _____, a felony; and
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

[The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).]

Notes on Use

For authority, see K.S.A. 21-3411. Aggravated assault of a law enforcement officer is a severity level 6, person felony.

Assault of a law enforcement officer, as defined by K.S.A. 21-3409, and Assault, as defined by K.S.A. 21-3408, are lesser included offenses and where the evidence warrants it, PIK 3d 56.13, Assault of a Law Enforcement Officer and PIK 3d 56.12, Assault, should be given.

If there is a question for the jury whether the victim was in uniform or properly identified and/or engaged in the performance of his or her duty at the time, PIK 3d 56.14, Aggravated Assault, should be considered as a lesser included offense. See *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).

Where element 4(c) is applicable, the elements of the intended felony should be referred to or set forth in the concluding portion of the instruction.

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

Comment

Proof of actual knowledge that the person assaulted was a law enforcement officer is not necessary where it is undisputed that the officer was in uniform or properly identified as an officer. *State v. Farris*, 218 Kan. 136, 542 P.2d 725 (1975). This is distinguishable where the officer is not in uniform and the question of knowledge was raised in deciding what was required to establish that the officer had properly identified himself. *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

See Comment to PIK 3d 56.14, Aggravated Assault.

56.16 BATTERY

The defendant is charged with the crime of battery. 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 another person;**
   or
   That the defendant intentionally caused physical contact with another person in a rude, insulting or angry manner; and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3412. Battery is a class B, person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

56.16-A DOMESTIC BATTERY

The defendant is charged with the crime of domestic battery. 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 the defendant and _____ were family or household members.; and**
3. **That this act occurred on or about the _____ day of _____, ____, in _____ County, Kansas.**

"Family or household member" means persons 18 years of age or older who are (spouses) (former spouses) (parents and children) (stepparents and stepchildren) (persons who are presently residing together) (persons who have resided together in the past) (persons who have a child together regardless of whether they have been married or have lived together at any time) (a man and a woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time).

Notes on Use

For authority, see K.S.A. 21-3412. Domestic battery is classified as a class B person misdemeanor on the first conviction. On the second conviction within a five year period, domestic battery is a class A person misdemeanor. A third or subsequent conviction of domestic battery within a five year period is a person felony.

56.16-B BATTERY AGAINST A SCHOOL EMPLOYEE

The defendant is charged with the crime of battery against a school employee. 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 school employee;**
3. **That _____ was ([in][on] any school property or grounds upon which is located a building or structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12)(at any regularly scheduled school sponsored activity or event);**
4. **That _____ was engaged in the performance of such employee's duty; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"School employee" means any employee of a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

Notes on Use

For authority, see K.S.A. 21-3443. Battery against a school employee is a class A, person misdemeanor.

56.16-C BATTERY AGAINST A MENTAL HEALTH EMPLOYEE

The defendant is charged with the crime of battery against a mental health employee. 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;

2. **That _____ was an employee of the Department of Social and Rehabilitation Services working at (Larned State Hospital) (Osawatomie State Hospital) (Rainbow Mental Health Facility) (Kansas Neurological Institute) (Parsons State Hospital and Training Center); and**

   or

   That _____ was a person employed by (the Secretary of Social and Rehabilitation Services) (a firm or agency who contracted with the Secretary of Social and Rehabilitation Services) to provide (treatment) (supervision) (services) at a sexually violent predator 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. 21-3448. Battery against a mental health employee is a severity level 7, person felony.

56.21 ATTEMPTED POISONING

The statute upon which this instruction was based (K.S.A. 21-3417) has been repealed, effective July 1, 1993.

56.22 PERMITTING DANGEROUS ANIMAL TO BE AT LARGE

The defendant is charged with the crime of permitting a dangerous animal to be at large. The defendant pleads not guilty.

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

1. **That the defendant was the owner or custodian of an animal of a dangerous or vicious nature;**
2. **That the defendant knew of such nature;**
3. **That the defendant (permitted the animal to go at large) (kept such animal without taking ordinary care to restrain it); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3418. Permitting a dangerous animal to be at large is a class B misdemeanor and is treated as a nonperson crime for purposes of determining criminal history under K.S.A. 21-4710.

56.23 CRIMINAL THREAT

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

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

1. **That the defendant threatened to commit violence;**
2. **That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]); and**

   or

   That such threat was communicated in reckless disregard of the risk of causing (terror to _____) (the evacuation of a [building] [place of assembly] [facility of transportation]); and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[Under this instruction, a statement that defendant has already committed violence is the same as a threat to commit violence.]

Notes on Use

For authority, see K.S.A. 21-3419. Criminal threat is a severity level 9, person felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

The above instruction, less the last paragraph, was approved in *State v. Knight*, 219 Kan. 863, 867, 549 P.2d 1397 (1976), when the defendant himself did the threatening and communicated the threat. However, if the threat to commit violence is allegedly made by another person and the defendant communicates the threat with the intent to terrorize, the instruction needs to be modified to so state

as it is not essential to prove the crime that the defendant threatened to do the acts mentioned in the communication itself. It is sufficient if the defendant communicates the threat made by another person if he does so with the specific intent to terrorize the victim.

For definitions of "threat" and "terrorize," see *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

The 1984 amendment also added a proscription against threatening to adulterate or contaminate food or drink. Since this new crime requires no specific intent, a separate instruction was deemed necessary. See PIK 3d 56.23-A, Criminal Threat—Adulteration or Contamination of Food, Beverage, Etc., or Exposing Any Animal to Contagious or Infectious Disease.

56.23-A CRIMINAL THREAT—ADULTERATION OR CONTAMINATION OF FOOD, BEVERAGE, ETC., OR EXPOSING ANY ANIMAL TO CONTAGIOUS OR INFECTIOUS DISEASE

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

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

1. **That the defendant (threatened to adulterate or contaminate) (stated that [he] [she] had adulterated or contaminated) a (food) (raw agricultural commodity) (beverage) (drug) (animal food) (plant) (public water supply); and**

   or

   That the defendant (threatened to expose) (stated that [he] [she] had exposed) any animal in this state to any (contagious) (infectious) disease; and

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

Notes on Use

For authority, see K.S.A. 21-3419. Criminal threat is a severity level 9, person felony.

56.23-B AGGRAVATED CRIMINAL THREAT

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

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

1. **That the defendant threatened to commit violence;**
2. **That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly][facility of transportation]); and**

   or

   That such threat was communicated in reckless disregard of the risk of causing (terror to _____) (evacuation of a [building][place of assembly][facility of transportation]); and
3. **That a ([public][commercial][industrial] building) (place of assembly)(facility of transportation) was evacuated as a result of the threat; and**
4. **That the loss of productivity measured by the total wages and salaries of all persons evacuated as a result of the threat was ($25,000 or more) (at least $500 but less than $25,000) (less than $500); and**
5. **That this act occurred on or about the _____ day of _____, ____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3419a. Aggravated criminal threat is a severity level 6 person felony when the loss of productivity measured by the total wages and salaries of all persons evacuated as a result of the threat is less than $500; a severity level 5 person felony when the loss of productivity is at least $500 but less than $25,000; a severity level 4 person felony when the loss of productivity equals or exceeds $25,000.

56.26 INTERFERENCE WITH PARENTAL CUSTODY

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

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

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

(It is not a defense that the defendant is a parent entitled to joint custody of the child.)

Notes on Use

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

The last paragraph may be given when applicable.

56.26-A AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIRING ANOTHER

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

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

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

Notes on Use

For authority, see K.S.A. 21-3422a. Aggravated interference with parental custody is a severity level 7, person felony. The Committee is of the opinion that separate instructions would be clearer to juries than one instruction with all alternative elements. PIK 3d 56.26-A is applicable where the defendant is the non-custodial parent or anyone who hires another to interfere with parental custody. PIK 3d 56.26-C, Aggravated Interference with Parental Custody—Other Circumstances, applies to all the other circumstances listed in K.S.A. 21-3422a(a)(2).

(THIS PAGE BLANK)

56.26-B AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY BY HIREE

This instruction has been deleted due to statutory changes. Please refer to PIK 3d 56.26-C, Aggravated Interference with Parental Custody – Other Circumstances.

56.26-C AGGRAVATED INTERFERENCE WITH PARENTAL CUSTODY—OTHER CIRCUMSTANCES

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

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

1. **That _____ was a child under 16 years of age;**
2. **That the defendant (led) (took) (carried) (decoyed) (enticed) the child away;**
3. **That the child was at the time in the custody or lawful charge of _____;**
4. **That this was done with the intent to detain or conceal the child from its (parent) (guardian) (other person having lawful charge);**
5. **That the defendant:**
   has previously been convicted of interference with parental custody;
   or
   was hired to commit interference with parental custody;
   or
   took the child outside the state without the consent of either the person having custody or the court;
   or
   after lawfully taking the child outside the state while exercising visitation rights or parenting time, refused to return the child at the end of that time;
   or
   at the end of the exercise of any visitation rights or parenting time outside the state, refused to return or hindered the return of the child;
   or
   detained or concealed the child in an unknown place, whether inside or outside this state; and

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

Notes on Use

This instruction applies to all of the circumstances in K.S.A. 21-3422a(a)(2). Aggravated interference with parental custody is a severity level 7, person felony.

56.39 STALKING

For crimes committed after July 1, 2008:

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

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

[Choose either alternative A, B, or C.]

Alternative A

1. **That the defendant intentionally or recklessly engaged in a course of conduct targeted at (name of target) which would cause a reasonable person in the same circumstances as (name of target) to fear for [(his) (her) safety] [the safety of a member of (his) (her) immediate family] and (name of target) was actually placed in fear;**
2. **That the defendant did (here list the defendant's acts from the bulleted list in the "course of conduct" definition below);**
3. **That these acts occurred over a period of time between the _____ day of _____, _____, and the ____ day of _____, _____, in _____, County, Kansas.**

OR

Alternative B

1. **That the defendant intentionally engaged in a course of conduct targeted at (name of target) that the defendant knew would place (name of target) in fear for [(her) (his) safety] [the safety of a member of (his) (her) immediate family];**
2. **That the defendant did (here list the defendant's acts from the bulleted list in the "course of conduct" definition below);**
3. **That these acts occurred over a period of time between the _____ day of _____, _____, and the ____ day of _____, _____, in _____, County, Kansas.**

OR

Alternative C

1. That the defendant, after being (served with) (given notice of) a protective order prohibiting contact with (name of target), intentionally or recklessly engaged in at least one act of (here list the act from bulleted list in "course of conduct" definition below), an act that violates the protective order and would cause a reasonable person to fear [for (his) (her) safety] [for the safety of a member of (his) (her) immediate family] and (name of target) was placed in such fear;
2. That this act occurred on the _____ day of _____, _____, in _____ County, Kansas.

For the crime of stalking, the following definitions apply:

"Course of conduct" means two or more acts over a period of time, however short, which show a continuity of purpose. A course of conduct includes any of the following acts or a combination of such acts targeted at a specific person or a member of the targeted person's immediate family:

- Threatening the targeted person's safety or the safety of a member of the targeted person's immediate family;
- Following, approaching, or confronting the targeted person or a member of the targeted person's immediate family;
- Appearing in close proximity to, or entering the targeted person's residence, place of employment, school, or other place where the targeted person can be found, or, the residence, place of employment, or school of a member of the targeted person's immediate family;
- Causing damage to the targeted person's residence or property, or that of a member of the targeted person's immediate family;
- Placing any object on the targeted person's property, or the property of a member of the targeted person's immediate family, either directly or through a third person;
- Causing injury to the targeted person's pet, or a pet belonging to a member of the targeted person's immediate family;

- Any act of communication.

A course of conduct does not include conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person.

"Communication" means to impart a message by any method of transmission. A message includes any information or material by written or printed note, letter, or package. Methods of transmission include telephoning, personally delivering, sending or having delivered a message by mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer.

"Computer" means a programmable electronic device capable of accepting and processing data.

"Immediate family" means father, mother, stepparent, child, stepchild, sibling, spouse, or grandparent of the targeted person, any person residing in the household of the targeted person, or any person involved in an intimate relationship with the targeted person.

For crimes committed before July 1, 2008:

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

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

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

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3438. The Legislature's extensive revisions of this statute took effect on July 1, 2008. The prior version of this instruction is retained for any crime committed before that date.

The penalty for stalking varies with the different subsections of the statute. Alternatives A, B, and C reflect those three statutory subsections. If Alternative A is used, the crime is a class A, person misdemeanor for a first conviction and a severity level 7, person felony for any subsequent convictions. If Alternative B listed above is the basis of the instruction, it is a class A, person misdemeanor for a first conviction and a severity level 5, person felony for any subsequent convictions. Alternative C above is a severity level 9, person felony for a first conviction and a severity level 5, person felony for any subsequent conviction.

A course of conduct does not include any constitutionally protected activity.

The prior version of K.S.A. 21-3428 make stalking a severity level 10, person felony. The statute also set stalking as a severity level 9, person felony if a temporary restraining order or an injunction was in effect prohibiting the behavior against the same victim when the crime was committed. A second or subsequent conviction within seven years of a prior conviction of stalking involving the same victim is a severity level 8, person felony.

56.40 EXPOSING ANOTHER TO A LIFE THREATENING COMMUNICABLE DISEASE

The defendant is charged with the crime of exposing another to a life threatening communicable disease. The defendant pleads not guilty.

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

1. **That the defendant knew (he)(she) was infected with _____, a life threatening communicable disease;**
2. **That the defendant:**
   engaged in sexual intercourse or sodomy with another individual;
   or
   sold or donated defendant's blood, blood products, semen, tissue, organs, or other body fluids;
   or
   shared with another individual a hypodermic needle or syringe for the introduction of drugs or other substance into the other individual's body;
   or
   shared with another individual a hypodermic needle, syringe, or both, for the withdrawal of blood or body fluids from the other individual's body;
3. **That the defendant intended to expose (that individual) (the recipient) (another person) to a life threatening communicable disease; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3435. Exposing another to a life threatening communicable disease is a severity level 7, person felony.

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.

56.43 TRAFFICKING

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

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

1. **That the defendant by any means (recruited) (harbored) (transported) (provided) (obtained) another person, knowing (force) (fraud) (threat) (coercion) would be used to cause the person to engage in forced labor or involuntary servitude; and**

   or

   That the defendant (benefitted financially) (received something of value) from participating in a venture that by any means (recruited) (harbored) (transported) (provided) (obtained) another person who, by (force) (fraud) (threat) (coercion), would be caused to engage in forced labor or involuntary servitude; and

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

Notes on Use

For authority, see K.S.A. 21-3446. Trafficking is a severity level 2, person felony.

56.44 AGGRAVATED TRAFFICKING

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

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

1. **That the defendant by any means (recruited) (harbored) (transported) (provided) (obtained) another person, knowing that (force) (fraud) (threat) (coercion) would be used to cause the person to engage in forced labor or involuntary servitude;**

or

That the defendant (benefitted financially) (received something of value) from participating in a venture that by any means (recruited) (harbored) (transported) (provided) (obtained) another person who, by (force) (fraud) (threat) (coercion), would be caused to engage in forced labor or involuntary servitude;

2. **That the defendant was involved in the commission or attempted commission of the crime of kidnapping; and**

or

That the commission of the crime was, in whole or in part, for the purpose of the sexual gratification of the defendant or another; and

or

That a death resulted; and

OR

1. **That the defendant by any means (recruited) (harbored) (transported) (provided) (obtained) a person under 18 years of age knowing that the person, with or without force, fraud, threat, or coercion, would be used to engage in (forced labor or involuntary servitude) (sexual gratification of the defendant or another); and**

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

Notes on Use

For authority, see K.S.A. 21-3447. Aggravated trafficking is a severity level 1, person felony. If the defendant is 18 years of age or older and the victim under 14 years of age, it is an off-grid person felony. Unless the defendant stipulates to the ages of the victim and defendant, the Committee recommends that if the state alleges the facts support a finding that the crime is an off-grid person felony, the following special question be added to the verdict form:

If your verdict was guilty, answer the following special question:

Do you find that on the _____ day of _____, _____, the defendant was 18 years of age or older and the victim was under the age of 14 years?

Yes _____ No _____

_____
Presiding Juror

For the elements of kidnapping, see PIK 3d 56.24. For the elements of attempt, see PIK 3d 55.01.

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).

Sexual intercourse or sodomy with a child who is less than 16 years of age is a crime 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) applies only to "otherwise lawful sexual intercourse or sodomy." Thus, it does not

apply to sexual intercourse or sodomy with a child who is less than 16, since such conduct is unlawful. Nor does it apply to non-consensual sexual intercourse with a child who is between 16 and 18 years of age since that conduct is, respectively, rape or criminal sodomy. It applies only to consensual conduct with a child who is between 16 and 18 years of age. Thus, *State v. Sims*, 33 Kan. App. 2d 762, 108 P.3d 1007 (2005), held a parent was properly charged with rape of his child who was less than 14 years of age and could not be charged with aggravated incest. Decisions under former statutes, such as *Carmichael v. State*, 255 Kan. 10, 872 P.2d 240 (1994), and *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992), holding that parents could be charged with aggravated incest but not with forcible rape or indecent liberties with a child are not authoritative under current statutes.

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

In *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978), the Supreme Court in a 4-3 decision considered whether the defendant's three attempted rape convictions and two aggravated sodomy convictions were multiplicitous. The Court found that the defendant's conduct constituted one continuous occurrence because the only difference in the allegations of each charge was a lapse of a few minutes between each offense and the facts necessary to prove the acts. *Dorsey* was later distinguished in *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984), where the Supreme Court held the trial court did not err in refusing to merge two counts of rape which occurred two or three hours apart. *Dorsey* was further distinguished in *State v. Howard*, 243 Kan. 699, 763 P.2d 607 (1988), which rejected a claim that multiple rape and sodomy convictions were multiplicitous because the acts occurred over a time span of 1 ½ to 3 hours and were separate and distinct, occurred at different times and locations, and were separated from each other by other sexual acts. In *State v. Richmond*, 250 Kan. 376, 827 P.2d 743 (1992), the defendant was convicted of two counts of rape which occurred within one hour and upon the same victim. The defendant's claim of multiplicity was rejected by the Supreme Court which held the two incidents to be clearly separate. The *Richmond* opinion further notes that "the propriety of the result reached in *Dorsey* is questionable." In accord see *State v. Long*, 26 Kan. App. 2d 644, 993 P.2d 1237 (1999), *rev. denied* 268 Kan. 852 (2000), which held that five separate rape convictions involving the same victim, in the same apartment, and within a period of 1 to 2 hours were not multiplicitous.

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

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

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

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

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

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

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

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

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

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

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

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

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

The act proscribed by K.S.A. 21-3502(a)(1)(C) is sexual intercourse with a victim incapable of giving consent, but the statute requires a further state of mind of the offender, *i.e.*, knowledge of that condition if not reasonably apparent. This is a state of mind that is beyond the general criminal intent required for rape. Accordingly, the knowledge requirement of the statute justifies a voluntary intoxication defense. *State v. Smith*, 39 Kan. App. 2d 204, 178 P.3d 672 *rev. denied* 286 Kan. ___ (2008).

57.01-A RAPE—DEFENSE OF MARRIAGE

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

Notes on Use

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

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

57.02 SEXUAL INTERCOURSE - DEFINITION

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

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

(a) Generally recognized health care practices; or

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

Notes on Use

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

Comment

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

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

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

57.03 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.

57.04 RAPE, CORROBORATION OF PROSECUTRIX'S TESTIMONY UNNECESSARY

The Committee recommends that no separate instruction be given.

Comment

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

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

57.05 INDECENT LIBERTIES WITH A CHILD

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

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

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

   or

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

   or

   That the defendant solicited _____ to engage in lewd fondling or touching of the person of another with the intent to arouse or to satisfy the sexual desires of _____, the defendant or another;
2. **That _____ was then a child 14 or more years of age but less than 16 years of age; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3503. If a definition of the words "lewd fondling or touching" is desired, see PIK 3d Chapter 53.00.

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

Comment

In 1992, the Legislature amended K.S.A. 21-3503 to remove "sexual intercourse" from the statute. Sexual intercourse with children under 14 years of age is rape under K.S.A. 21-3502(a)(2). Sexual intercourse with children 14 to 16 years of age and

"lewd fondling or touching" of children under 14 years of age are both covered by K.S.A. 21-3504, Aggravated indecent liberties with a child. See PIK 3d 57.06, Aggravated Indecent Liberties With a Child.

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

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

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

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

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

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

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

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

57.12 INDECENT SOLICITATION OF A CHILD

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

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

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

   or

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

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

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

Notes on Use

For authority, see K.S.A. 21-3510. Indecent solicitation of a child is a severity level 6, person felony. The applicable unlawful sexual act as defined in PIK 3d 57.18, Sex Offenses - Definitions, should be added to the concluding part of the above instruction.

Comment

Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child unless there is a dispute as to the child's age. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979); *State v. Lowden*, 38 Kan. App. 2d 858, 174 P.3d 895 (2008).

58.05 ABANDONMENT OF A CHILD

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

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

1. **That the defendant was a (parent) (guardian) of _____;**
   or
   That the defendant was a person to whom the care and custody of _____ had been entrusted;
2. **That the defendant left _____ in a place where _____ may suffer because of neglect;**
3. **That the defendant left _____ with the intent to abandon the child;**
4. **That at the time _____ was under 16 years of age; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3604. Abandonment of a child is a severity level 8, person felony.

Comment

The 2000 legislature amended K.S.A. 21-3604 to exempt from prosecution a parent who surrenders physical custody of an infant 45 days old or younger to any employee on duty at a fire station, city or county health department or medical care facility if such infant has not suffered bodily harm.

58.05-A AGGRAVATED ABANDONMENT OF A CHILD

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

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

1. **That the defendant was a (parent) (guardian) of _____;**
   or
   That the defendant was a person to whom the care and custody of _____ had been entrusted;
2. **That the defendant left _____ in a place where _____ might suffer because of neglect;**
3. **That the defendant left _____ with the intent to abandon _____;**
4. **That _____ suffered great bodily harm because of the abandonment;**
5. **That at the time _____ was under 16 years of age; and**
6. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3604a. Aggravated abandonment of a child is a severity level 5, person felony.

58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD

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

Notes on Use

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

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

58.10-B AGGRAVATED ENDANGERING A CHILD

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

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

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

   or

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

   or

   (c) That the defendant caused or permitted such child to be in an environment where a person is selling, offering for sale or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture or attempt to manufacture any methamphetamine;

   or

   (d) That the defendant caused or permitted such child to be in an environment where drug paraphernalia or volatile, toxic or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture any methamphetamine.

2. **That _____ was then a child under the age of 18 years; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3608a. A violation of this statute is a severity level 9, person felony. It is defined as one of the "inherently dangerous" felonies by K.S.A. 21-3426.

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

58.12-C FURNISHING ALCOHOLIC LIQUOR OR CEREAL MALT BEVERAGE TO A MINOR - DEFENSE

It is a defense to the charge of furnishing (alcoholic liquor) (cereal malt beverage) to a minor that the defendant was a licensed retailer, club, drinking establishment or caterer, or holds a temporary permit, or an employee thereof; that the defendant sold the (alcoholic liquor) (cereal malt beverage) to the person with reasonable cause to believe that the person was 21 or more years of age; and that to purchase the (alcoholic liquor) (cereal malt beverage), the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document that reasonably appears to contain a photograph of the minor and purporting to establish that such minor was 21 or more years of age.

Notes on Use

For authority, see K.S.A. 21-3610(d). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

58.12-D FURNISHING CEREAL MALT BEVERAGE TO A MINOR - DEFENSE

In 2001, the legislature repealed the statute on which this instruction was based, K.S.A. 21-3610a, and incorporated its provisions into K.S.A. 21-3610. See PIK 3d 58.12-C for an instruction on defenses to the charge of furnishing alcoholic liquor or cereal malt beverage to a minor.

CHAPTER 59.00

CRIMES AGAINST PROPERTY

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.

In *State v. Watson*, 39 Kan. App. 2d 923, 186 P.3d 812 *rev. denied* 287 Kan. ___ (2008), the court held that "taking" property from the owner is not an element of theft under K.S.A. 21-3701(a)(1). All that is required is unauthorized control, coupled with intent to permanently deprive the owner of the use or benefit of the property.

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).

59.02 THEFT OF LOST OR MISLAID PROPERTY

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

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

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

Notes on Use

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

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

Comment

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

59.03 THEFT OF SERVICES

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

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

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

Notes on Use

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

59.17 BURGLARY

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

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

1. **That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is a dwelling;**

   or

   That the defendant knowingly (entered) (remained in) a (building) (manufactured home) (mobile home) (tent) (describe type of structure) which is not a dwelling;

   or

   That the defendant knowingly (entered) (remained in) a (motor vehicle) (aircraft) (watercraft) (railroad car) (describe means of conveyance of persons or property);
2. **That the defendant did so without authority;**
3. **That the defendant did so with the intent to commit (a theft) (_____, a felony) (sexual battery) therein; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No. _____) (as follows: _____ _____).

Notes on Use

For authority, see K.S.A. 21-3715. Burglary as described in the first alternative paragraph 1 is a severity level 7, person felony. Burglary as described in the second alternative paragraph 1 is a severity level 7, nonperson felony. Burglary as described in the third alternative paragraph 1 is a severity level 9, nonperson felony.

The phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the alternative phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. See PIK 3d 59.18, Aggravated Burglary, Notes on Use.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

Comment

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

A hog pen was held not to be a "structure" within the purview of the burglary statute, K.S.A. 21-3715. *State v. Fisher*, 232 Kan. 760, 658 P.2d 1021 (1983).

The opening of the bay door of a truck and reaching into the bay compartment to remove cases of beer constituted "entry" within the purview of K.S.A. 21-3715. *State v. Zimmerman and Schmidt*, 233 Kan. 151, 660 P.2d 960 (1983).

Where the consent to enter any of the structures or vehicles listed in K.S.A. 21-3715 and 21-3716 is obtained by fraud, deceit or pretense, the entry is not an authorized entry under the statute in that it is based on an erroneous or mistaken consent. Any such entry is unauthorized and when accompanied by the requisite intent is sufficient to support a burglary or aggravated burglary conviction. *State v. Maxwell*, 234 Kan. 393, 672 P.2d 590 (1983).

An information which charges burglary is defective in form unless it specifies the felony intended by an accused in making the unauthorized entry. However, if the felony intended in a burglary is made clear at the preliminary hearing or by the context of the other charge or charges in the information, the failure to allege the specific intended felony does not constitute reversible error. Such failure cannot result in surprise or be considered prejudicial to the defendant's substantial rights at trial when the intended felony was made clear in advance of trial. *State v. Maxwell*, supra.

In a prosecution for burglary, the manner of the entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if any, are all relevant in determining whether the intruder intended to commit a theft. The intent with which any entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984).

In a burglary prosecution, the elements of "intent to commit a felony or theft therein" and "without authority entering into or remaining within" are separate and distinct. The question of whether defendant had authority to enter the premises is to be resolved without reference to his intent at the time of entry. *State v. Harper*, 246 Kan. 14, 785 P.2d 1341 (1990).

An instruction as to the offense of aggravated burglary is defective unless it specifies and sets out the statutory elements of the offense intended by an accused in making the unauthorized entry. *State v. Linn*, 251 Kan. 797, 840 P.2d 1133 (1992). See also, *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. The legislature's 1980 amendment to what is now K.S.A. 1993 Supp. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, 859 P.2d 387 (1994).

59.18 AGGRAVATED BURGLARY

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

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

1. **That the defendant knowingly [(entered) (remained in)] [(a building) (a manufactured home) (a mobile home) (a tent) (describe type of structure) (a motor vehicle) (an aircraft) (a watercraft) (a railroad car) (describe means of conveyance of persons or property)];**
2. **That the defendant did so without authority;**
3. **That the defendant did so with the intent to commit (a theft) (_____, a felony) (sexual battery) therein;**
4. **That at the time there was a human being in (describe structure or conveyance); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The elements of _____ are (set forth in Instruction No._____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-3716. Aggravated burglary is a severity level 5, person felony.

As used in K.S.A. 21-3716, the phrases "entering into" and "remaining within" refer to distinct factual situations. This instruction should employ only the phrase which is descriptive of the factual situation where the evidence is clear. If it is not, an instruction in the alternative is proper. *State v. Brown*, 6 Kan. App. 2d 556, 630 P.2d 731 (1981). See also, *State v. Mogenson*, 10 Kan. App. 2d 470, 473, 701 P.2d 1339 (1985), which cites this note with approval. When a person enters the premises after the burglary has commenced but before the defendant has left the premises, the offense constitutes aggravated burglary.

The elements of the offense the defendant is claimed to have intended to commit should be referred to or set forth in the concluding portion of the instruction.

Comment

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

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

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

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

When aggravated burglary is based upon the unlawful act of "remaining without authority" after a lawful entry, intent may be formed at the time of the lawful entry or after consent to an otherwise lawful entry has been withdrawn. *State v. Mogenson*, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985); *State v. Gutierrez*, 285 Kan. 332, 172 P.3d 18 (2007).

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

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

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

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

59.19 POSSESSION OF BURGLARY TOOLS

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

(THIS PAGE BLANK)

59.22 AGGRAVATED ARSON

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

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

1. That the defendant intentionally damaged the (building) (property) of _____ by means of (fire) (an explosion);

or

That the defendant intentionally damaged a (building) (property) in which _____ had an interest, and that defendant did so by means of (fire) (explosion);

2. That the defendant did so without the consent of _____;

OR

1. That the defendant intentionally damaged _____ by means of (fire) (an explosion);

2. That _____ was an insurer of the (building) (property);

or

That _____ had an interest in the (building) (property) because (he)(she) had a lien thereon;

3. That the defendant did so with the intent to (injure) (defraud) _____;

(3.) or (4.) That the (fire) (explosion) resulted in great bodily harm or disfigurement to a firefighter or law enforcement officer in the course of fighting or investigating the fire; and

OR

(3.) or (4.) That at the time there was a human being in the (building) (property); and

(4.) or (5.) That the [(fire) (explosion)] [(resulted) (did not result)] in a substantial risk of bodily harm; and

(5.) or (6.) That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3719. Aggravated arson which results in great bodily harm or disfigurement to a firefighter or law enforcement officer in the course of fighting or investigating the fire is a severity level 3, person felony. Aggravated arson committed upon a building or property in which there is a human being resulting in a substantial risk of bodily harm is a severity level 3, person felony. Aggravated arson committed upon a building or property in which there is a human being resulting in no substantial risk of bodily harm is a severity level 6, person felony.

When defendant has been charged with aggravated arson resulting in a substantial risk of bodily harm and there is an issue as to the seriousness of the risk, PIK 3d 68.09, Lesser Included Offenses, should also be given together with PIK 3d 68.10, Verdict Form.

Comment

A definition of damage is not necessary as the word is "in common usage" and understandable by "lay and professional people alike." *State v. McVeigh*, 213 Kan. 432, 516 P.2d 918 (1973).

A dead person is not a "human being" within the meaning of K.S.A. 21-3719. *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993).

In *State v. Johnson*, 12 Kan. App. 2d 239, 738 P.2d 872 *rev. denied* 242 Kan. 905 (1987), the Court held that "any interest" in K.S.A. 21-3718(a)(1) includes a leasehold interest in real property.

In *State v. Walker*, 21 Kan. App. 2d 950, 910 P.2d 871 (1996), the Court construed the word "explosive" as used in the statute defining the crime of arson (K.S.A. 21-3718) to mean "explosion."

59.23 CRIMINAL DAMAGE TO PROPERTY - WITHOUT CONSENT

The defendant is charged with criminal damage to property. The defendant pleads not guilty.

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

1. **That _____ (was the owner of property described as _____) (had an interest as a _____ in property described as _____);**
2. **That the defendant intentionally (damaged) (injured) (mutilated) (defaced) (destroyed) (substantially impaired the use of) the property by means other than by fire or explosion;**
3. **That the defendant did so without the consent of _____;**
4. **That the property was damaged to the extent of ($25,000 or more) (at least $500 but less than $25,000) (less than $500); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3720(a)(1). Criminal damage to property is a severity level 7, nonperson felony if the property is damaged to the extent of $25,000 or more. Criminal damage to property is a severity level 9, nonperson felony if the property is damaged to the extent of at least $500 but less than $25,000. Criminal damage to property is a class B, nonperson misdemeanor if the property damaged is of the value of less than $500 or is of the value of $500 or more and is damaged to the extent of less than $500.

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.

59.25 CRIMINAL TRESPASS

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

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

1. **That the property was (locked) (fenced) (enclosed) (shut) (secured against passage or entry);**

   or

   That there was a sign informing persons not to enter the property, which sign was placed in a manner reasonably to be seen;

   or

   That the defendant was told (not to enter) (to leave) the property by the owner or other authorized person;

   or

   That the defendant had been personally served with a restraining order prohibiting defendant from (entering into) (remaining on) the property;
2. **That the defendant intentionally, without authority, (entered into) (remained on) the property; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3721. Criminal trespass is a class B, nonperson misdemeanor. Property under this section can be any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft other than railroad property. Criminal trespass on railroad property is a separate offense covered by K.S.A. 21-3761 and PIK 3d 59.25-B, Criminal Trespass on Railroad Property.

Comment

"Criminal trespass is not a lesser included offense of burglary under K.S.A. 21-3701(2)(d) because criminal trespass requires a proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. The Legislature's 1980 amendment

to what is now K.S.A. 21-3721 provides an additional method for proving constructive notice. The law as stated in *State v. Williams*, 220 Kan. 610, 556 P.2d 184 (1976) remains the law of this state." *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 859 P.2d 387 (1994).

59.32 INJURY TO A DOMESTIC ANIMAL

The defendant is charged with the crime of injuring a domestic animal. The defendant pleads not guilty.

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

1. **That the defendant willfully and maliciously administered a poison to a _____, a domestic animal;**

   or

   That the defendant willfully and maliciously exposed a poison in such a way that it could be taken or swallowed by any domestic animal;

   or

   That the defendant willfully and maliciously (killed) (maimed) (wounded) a _____, a domestic animal;

2. **That the owner of the domestic animal was _____ and that the owner did not consent to the defendant's acts; and**

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

Notes on Use

For authority, see K.S.A. 21-3727. Injury to a domestic animal is a class A, nonperson misdemeanor.

The cruelty or neglect of animals in custody may be prosecuted under K.S.A. 21-4310. See PIK 3d 65.15, Cruelty to Animals.

Comment

The exceptions under K.S.A. 21-4310(g) do not apply to a prosecution under K.S.A. 21-3727. *State v. Jones*, 229 Kan. 528, 625 P.2d 503 (1981).

59.33 CRIMINAL HUNTING

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

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

1. **That the defendant [(hunted) (shot) (harvested for fur) (pursued a bird or animal) (fished)] [(upon the land) (on a nonnavigable body of water) of another] [(upon) (from)] [(a public road) (a public road right-of-way) (a railroad right-of-way) that adjoins occupied or improved land];**
2. **That the defendant did not have permission of _____, the (owner) (person in possession) of the land in question; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3728. Criminal hunting is a class C misdemeanor. The court shall notify the Department of Wildlife & Parks of any conviction or diversion for criminal hunting.

It is a defense to criminal hunting if a person licensed to hunt follows or pursues a wounded game bird or animal on to the land of another, unless the person is instructed to leave by the owner of the land or an authorized person. See PIK 3d 59.33-B, Criminal Hunting – Defense.

59.33-A UNLAWFUL HUNTING - POSTED LAND

The defendant is charged with the crime of hunting on posted land. The defendant pleads not guilty.

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

1. **That the defendant ([shot] [hunted] [pursued]) ([a bird] [an animal]) upon the land of another;**
2. **That _____ was (the owner) (the person lawfully in possession) of the land, and had posted the land with signs stating that hunting on the land shall be by written permission only;**
3. **That the defendant did not have in (his)(her) possession written permission to ([shoot] [hunt] [pursue]) ([a bird] [an animal]) from _____, (the owner) (the person in possession) of the land in question; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 32-1013(a). Unlawful hunting upon posted land is a class C misdemeanor.

It is a defense to a charge of unlawful hunting on posted land if a person licensed to hunt follows a wounded bird or animal on the posted land.

59.33-B CRIMINAL HUNTING—DEFENSE

It is a defense to the charge of criminal hunting that the defendant went upon the land of another while following or pursuing a wounded (bird) (animal), unless the defendant was instructed to leave by the owner of the land or an authorized person.

Notes on Use

For authority, see K.S.A. 21-3721 and K.S.A. 21-3728. If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

The defense of pursuit of a wounded bird or animal is permitted in situations involving criminal hunting, as well as unlawful hunting on posted land.

It is not a defense to the charge if a person fails to leave such land when so instructed by the landowner or person in lawful possession. K.S.A. 32-1013(b).

59.33-C INTENTIONAL CRIMINAL HUNTING

The defendant is charged with intentional criminal hunting. The defendant pleads not guilty.

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

1. **That the defendant [(hunted) (shot) (harvested for fur) (pursued a bird or animal) (fished)] [(upon the land) (on a nonnavigable body of water)] of another;**
2. **That the defendant knew (he) (she) was not (authorized) (privileged) to do so; and**
3. **That the defendant remained on the land and continued to (hunt) (shoot) (harvest for fur) (pursue a bird or animal) (fish) in defiance of an order (not to enter) (to leave) the land personally communicated to the defendant by (the owner) (an authorized person); and**

   or

   That the land was posted with a sign stating that hunting on the land shall be by written permission only; and
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3728(b). Intentional criminal hunting is a class B misdemeanor. The court shall notify the Department of Wildlife & Parks of any conviction or diversion for intentional criminal hunting.

(THIS PAGE BLANK)

CHAPTER 60.00

CRIMES AFFECTING GOVERNMENTAL FUNCTIONS

60.01 TREASON

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

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

1. **That the defendant intentionally levied war against the State of Kansas; and**

   or

   That the defendant intentionally adhered to the enemies of the State of Kansas; and

   or

   That the defendant intentionally gave aid and comfort to the enemies of the State of Kansas; and

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

Notes On Use

For authority, see K.S.A. 21-3801(a). Treason is an off-grid person felony.

K.S.A. 21-3801(b) provides that no person shall be convicted of treason unless on the evidence of two witnesses to the overt act or confession in open court.

60.01-A TERRORISM

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

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

1. **That the defendant (committed) (attempted to commit) (conspired to commit) the crime of _____, a felony, with the intent to ([intimidate] [coerce] the civilian population) (influence government policy by [intimidation] [coercion]) (affect the operation of any unit of government); and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3449. Terrorism is an off-grid person felony. K.S.A. 21-3449(c) provides that both an attempted act of terrorism and a conspiracy to commit terrorism are off-grid person felonies. The elements of the felony that defendant is alleged to have committed must be set out at the conclusion of the instruction, or if the defendant is charged with that felony in another count, the jury may be referred to that instruction for the elements of the felony. If the underlying felony is attempt or conspiracy, the trial court should also instruct the jury on the elements of attempt or conspiracy.

(THIS PAGE BLANK)

60.02 SEDITION

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

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

1. **That the defendant intentionally advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and**

   or

   That the defendant knowingly (published) (sold) (distributed) a document which advocated the overthrow or reformation of the existing form of government of the State of Kansas by violence or unlawful means; and

   or

   That the defendant intentionally became the member of an organization knowing that the purpose of such organization was to advocate the overthrow or reformation of the State of Kansas by violence or unlawful means; and

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

Notes On Use

For authority, see K.S.A. 21-3802. Sedition is a severity level 7, nonperson felony.

60.03 PRACTICING CRIMINAL SYNDICALISM

The statute on which this instruction was based (K.S.A. 21-3803) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.

60.04 PERMITTING PREMISES TO BE USED FOR CRIMINAL SYNDICALISM

The statute on which this instruction was based (K.S.A. 21-3804) was repealed by L. 1992, ch. 298, § 97, effective July 1, 1993.

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).

Kansas appellate courts will not infer a private cause of action when a statute provides criminal penalties but does not mention civil liability. Accordingly, there is no civil cause of action for perjury. *Droge v. Rempel*, 39 Kan. App. 2d 455, 180 P.3d 1094 (2008).

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).

Whether obstruction of justice should be charged as a felony or misdemeanor depends on the officer's reason for approaching the defendant, not on the defendant's status. *State v. Johnson*, 40 Kan. App. 2d 196, 190 P.3d 995 (2008) *rev. denied* 287 Kan. ___ (2009); *State v. Kelly*, 38 Kan. App. 2d 224, 227, 162 P.3d 832 (2007).

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. See also *State v. Kelly*, 38 Kan. App. 2d 224, 227, 162 P.3d 832 (2007); *State v. Johnson*, 40 Kan. App. 2d 196, 190 P.3d 995 (2008).

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).

"Lawful custody" contemplates an intent on the part of prison officials to exercise actual or constructive control over the prisoner in some way that restrains the prisoner's liberty. A prisoner who fails to abide by the conditions of house arrest may be found guilty of escape from custody. The key factor is whether or not prison officials have shown an intent to abandon or give up their prisoner, leaving him free to go on his way. *State v. Kraft*, 38 Kan. App. 2d 215, 219, 163 P.3d 361, *rev. denied*, 285 Kan. ___(2007).

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).

"Lawful custody" contemplates an intent on the part of prison officials to exercise actual or constructive control over the prisoner in some way that restrains the prisoner's liberty. A prisoner who fails to abide by the conditions of house arrest may be found guilty of escape from custody. The key factor is whether or not prison officials have shown an intent to abandon or give up their prisoner, leaving him free to go on his way. *State v. Kraft*, 38 Kan. App. 2d 215, 219, 163 P.3d 361, *rev. denied*, 285 Kan. ___(2007).

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.

60.35 AIRCRAFT IDENTIFICATION - FRAUDULENT ACTS

The defendant is charged with the crime of fraudulent acts relating to aircraft identification numbers. The defendant pleads not guilty.

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

1. **That the defendant knowingly [(bought) (sold) (offered for sale) (received) (disposed of) (concealed) (possessed) (operated)] [(attempted to buy) (attempted to sell) (attempted to offer for sale) (attempted to receive) (attempted to dispose of) (attempted to conceal) (attempted to possess) (attempted to operate)] an aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations; and**

   or

   That the defendant knowingly (possessed) (manufactured) (sold) (exchanged) (offered for sale or exchange) (supplied in blank) (gave away) a counterfeit manufacturer's aircraft identification number plate or decal used for the identification of an aircraft; and

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

Notes on Use

For authority, see K.S.A. 21-3842. Fraudulent acts regarding aircraft identification numbers is a severity level 8, nonperson felony. See Title 14, Chapter 1, parts 47.15 and 47.16 of the Code of Federal Regulations for requirements of the Federal Aviation Administration as to assigned identification numbers. The trial judge will need to draft an appropriate instruction as to the relevant requirements based upon the evidence.

60.36 VIOLATION OF A PROTECTIVE ORDER

The defendant is charged with the crime of violation of a protective order. The defendant pleads not guilty.

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

1. **That the defendant knowingly or intentionally violated**
   [(a) a protection from abuse order issued pursuant to Kansas law]
   [(b) a protective order issued by a court of any state or Indian tribe]
   [(c) a restraining order issued pursuant to Kansas law]
   [(d) an order that the defendant refrain from having direct or indirect contact with another person, issued (as a condition of pretrial release, diversion, probation, suspended sentence, or postrelease supervision) (at any time during the criminal case)]
   [(e) an order issued as a condition of release after conviction or as a condition of an appeal bond that orders the defendant to refrain from having direct or indirect contact with another person] or
   [(f) a protection from stalking order issued pursuant to Kansas law]; and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3843. Violation of a protective order is a class A misdemeanor.

Comment

Consent of the plaintiff in a protection from abuse case for the defendant to have contact with the plaintiff is not a defense to a criminal prosecution for violation of a protective order. *State v. Branson*, 38 Kan. App. 2d 484, 167 P.3d 370 (2007), *rev. denied*, 286 Kan. ___ (2008).

60.41 UNLAWFUL ACTS RELATED TO MEDICAID PROGRAM

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

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

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

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

or

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

OR

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

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

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

or

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

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

Notes on Use

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

of undress;

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

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

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

Notes on Use

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

Comment

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

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

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

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

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

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

State v. Liebau, 31 Kan. App. 2d 501, 508, 67 P.3d 156 (2003), held that a parent has authority to enter a child's bathroom or other place of privacy, whether physically or electronically, if the parent has a good faith basis that is objectively reasonable to believe it is in the child's best interests. As such, when a parent seeks to use parental rights as a defense, the parent's right to enter a place of privacy, physically or electronically, depends on the purpose of the entry.

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). Violation of these subsections is a class A, nonperson misdemeanor. The instruction presents several alternative situations and only the appropriate one should be used.

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

64.02-A CRIMINAL DISCHARGE OF A FIREARM - MISDEMEANOR

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

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

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

or

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

OR

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

OR

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

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

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

Notes on Use

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

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).

K.S.A. 21-4219(b) imposes criminal liability when the defendant discharges a firearm into an occupied building or occupied vehicle but the State is unable to prove the individual had the state of mind required for aggravated assault or aggravated battery. *State v. Farmer*, 285 Kan. 541, 546, 175 P.3d 221 (2008).

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.

64.03 AGGRAVATED WEAPONS VIOLATION

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

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

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

   or

   That the defendant was (convicted of _____, a felony) (released from imprisonment for _____, a felony) prior to the commission of such act; and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

64.04 CRIMINAL USE OF WEAPONS - AFFIRMATIVE DEFENSE

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

Notes on Use

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

Comment

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

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

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

64.05 CRIMINAL DISPOSAL OF FIREARMS

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

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

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(2), Alternative B is K.S.A. 21-4204(a)(3), Alternative C is K.S.A. 21-4204(a)(4)(A), Alternative D is K.S.A. 21-4204(a)(4)(B), and Alternative E is K.S.A. 21-4204(a)(7). Each crime is a severity level 8, nonperson felony.

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

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

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

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

Comment

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

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

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

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

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

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

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

The State is required to accept a defendant's stipulation that he or she was previously convicted of a felony and was therefore legally prevented from possessing a firearm on the date in question. However, the district court must allow the State to place the actual judgment and sentence of the defendant's prior conviction or adjudication into the record, outside the presence of the jury. *State v. Mitchell*, 285 Kan. 1070, Syl. ¶¶ 3, 4, 179 P.3d 394 (2008).

(THIS PAGE BLANK)

64.08 DEFACING IDENTIFICATION MARKS OF A FIREARM

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

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

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

Notes on Use

For authority, see K.S.A. 21-4205. Effective July 1, 2008, defacing identification marks of a firearm is a severity level 10, nonperson felony. Prior to that date it was a class B nonperson misdemeanor.

Comment

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

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

64.09 FAILURE TO REGISTER SALE OF EXPLOSIVES

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

Notes on Use

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

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

K.S.A. 21-4214 specifically provides that if a prosecution for unlawfully obtaining prescription-only drugs may be brought under the provisions of K.S.A. 65-4127a, 65-4127b, or 65-4160 through 65-4164 prosecutions may not be brought under this section.

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

Comment

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

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), (i), (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

66.02 DEBT ADJUSTING

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

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

1. **That the defendant engaged in the business of making contracts, either express or implied, with a person in debt in which the person in debt was to periodically pay the defendant a certain amount of money; and**
2. **That the defendant agreed, for a benefit, to distribute the money to certain creditors of the person in debt; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

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

Comment

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

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

66.03 DECEPTIVE COMMERCIAL PRACTICES

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

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

1. **That the defendant used (deception) (fraud) (false pretense) (false promise) (knowing misrepresentations of a material fact) in connection with the sale of merchandise as follows: _____;**
2. **That the defendant intended that _____ _____ would rely upon defendant's false representations; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

The State is not required to prove that _____ was misled, deceived, or damaged by the defendant's actions.

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

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

Notes on Use

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

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

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

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

Comment

It was held in *State v. Kliewer*, 210 Kan. 820, 504 P.2d 580 (1972), that where a person is charged with unlawfully turning back the odometer on a motor vehicle as defined in K.S.A. 8-611(b), he cannot also be charged with a deceptive commercial practice under K.S.A. 21-4403 for the same wrongdoing.

66.04 TIE-IN MAGAZINE SALE

The defendant is charged with the crime of tie-in magazine sale. The defendant pleads not guilty.

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

1. **That the defendant was a wholesaler of magazines or other periodicals;**
2. **That the defendant (sold) (delivered on consignment for sale) magazines or other periodicals to a retailer;**
3. **That such (sale) (delivery) was conditioned on the requirement that such retailer agree to (purchase) (receive on consignment for sale) magazines or periodicals of another kind or name; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Retailer means a person who sells magazines or periodicals at retail.

Wholesaler means a person who sells or distributes or delivers on consignment for sale or who offers to sell or distribute or deliver on consignment for sale magazines or other periodicals to a retailer.

Sell, in addition to its ordinary meaning, means offer to sell, distribute, deliver or sell on consignment.

Notes on Use

For authority, see K.S.A. 21-4404. Tie-in magazine sale is a class B nonperson misdemeanor.

66.05 COMMERCIAL BRIBERY

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

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

1. **That _____ was an (agent) (employee) of _____;**

   or

   That _____ was a person acting in a fiduciary capacity for _____;

   or

   That _____ was a (lawyer) (physician) (accountant) (appraiser) (professional advisor) employed by _____;

   or

   That _____ was an (officer) (director) (partner) (manager) (participant in the affairs) of _____, (a corporation) (a partnership) (an unincorporated association);

   or

   That _____ was (an arbitrator) (an adjudicator) (a referee);

2. **That the defendant (conferred) (offered or agreed to offer) (solicited) (accepted or agreed to accept) any benefit as consideration for knowingly (violating) (agreeing to violate) a duty of fidelity or trust owed to _____; and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4405. Commercial bribery is a severity level 8, nonperson felony.

66.06 SPORTS BRIBERY

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

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

1. **That _____ was a (sports participant) (sports official);**
2. **That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) not to give (his)(her) best efforts as a sports participant in a sports contest; and**

   or

   That the defendant (conferred) (offered or agreed to confer) a benefit upon _____ with the intent to influence (him)(her) to improperly perform (his)(her) duties as a sports official; and
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Sports contest means any professional or amateur sports or athletic game or contest viewed by the public.

Sports participant means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

Sports official means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Notes on Use

For authority, see K.S.A. 21-4406. Sports bribery is a severity level 9, nonperson felony.

CHAPTER 67.00

CONTROLLED SUBSTANCES

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

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

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

1. That the defendant (sold) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) [insert name of narcotic drug or stimulant];

2. That the defendant did so intentionally;

[3. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

[3.] or [5.] That this act occurred on or about the ___ day of _____, ____, in _____ County, Kansas.

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

Notes on Use

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

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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.

When the optional third paragraph is given, the trial court should be aware that evidence of the first two factors implicates K.S.A. 60-455. Thus, evidence of the defendant's previous participation in the sale of a controlled substance or evidence of the defendant's use of controlled substances should only be admitted following the proper analysis under K.S.A. 60-455. This involves several steps: (1) the court must determine whether the evidence in question is relevant to provide a material fact; (2) the court must determine whether the particular material fact that forms the basis of the admission of evidence is in dispute; and (3) the court must balance the probative value of the evidence against its potential for undue prejudice. The crucial distinction in admitting evidence under K.S.A. 60-455 on the issue of intent is whether the defendant has claimed that his or her acts were innocent. When the possession of illegal substances is susceptible to two interpretations — one innocent and one criminal — then the intent with which the act was committed becomes the critical element in determining its character. However, when a defendant does not assert that his or her actions were innocent, but rather presents some other defense, there is no reason to admit evidence of other crimes or civil wrongs to prove intent. The admissibility of evidence under K.S.A. 60-455 should be determined in advance of trial or, if during trial, in the absence of the jury. Finally, the court must provide a limiting instruction consistent with PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, in informing the jury of the specific purpose for admission whenever K.S.A. 60-455 evidence is admitted. See *State v. Boggs*, 287 Kan. 298, 197 P.3d 441 (2008).

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."

In *State v. Moore*, 39 Kan. App. 2d 568, 181 P.3d 1258 *rev. denied* 286 Kan. ___ (2008), the court held that admission of prior convictions to prove possession in nonexclusive possession cases does not constitute a per se violation of K.S.A. 60-455. Rather, in nonexclusive possession cases, evidence of prior bad acts may be admissible to show knowledge, intent, and absence of mistake under K.S.A. 60-455 as long as these issues are disputed and subject to balancing of probative value and potential prejudice. The trial court errs if it fails to conduct an analysis of the admissibility of prior convictions under K.S.A. 60-455, but the error may be considered harmless.

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

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

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

1. That the defendant (sold) (cultivated) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];

2. That the defendant did so intentionally;

[3.That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

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

K.S.A. 65-4163 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are involved. For example, it refers to K.S.A. 65-4105(d), 65-4107(g) and 65-4109(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide,

marijuana, mescaline, and peyote, among many others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants, and hallucinogenic drugs. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

Notes on Use

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

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

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

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

Comment

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

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

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

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

CHAPTER 68.00
CONCLUDING INSTRUCTIONS AND VERDICT FORMS

68.01 CONCLUDING INSTRUCTION

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

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

Your agreement upon a verdict must be unanimous.

_____

District Judge

_____, _____

Notes on Use

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

Comment

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

68.04 PUNISHMENT - CLASS A FELONY

Comment

The jury choice of a sentence of death or life imprisonment in a class A felony under K.S.A. 21-4501(a) is no longer constitutionally permissible. *State v. Randol*, 212 Kan. 461, 513 P.2d 248 (1973).

68.05 VERDICTS—CLASS A FELONY

Comment

See PIK 3d 68.14, 68.14-A, 68.15 and 68.16 for verdict forms that are applicable when the mandatory minimum 40 year sentence is sought for premeditated murder occurring before July 1, 1994.

68.06 DEFENSE OF LACK OF MENTAL STATE—VERDICT FORM

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).

68.08 MULTIPLE COUNTS - VERDICT FORMS

1. **We, the jury, find the defendant guilty of (. . . crime charged Count 1 . . .).**

_____
Presiding Juror

We, the jury, find the defendant not guilty of (. . . crime charged Count 1 . . .).

_____
Presiding Juror

2. **We, the jury, find the defendant guilty of (. . . crime charged Count 2 . . .).**

_____
Presiding Juror

We, the jury, find the defendant not guilty of (. . . crime charged Count 2 . . .).

_____
Presiding Juror

Notes on Use

This form may be used when the defendant is charged with multiple counts in the same information. The verdict form may be expanded for additional counts and should be completed by specifying the crime charged in each count. The Committee recommends that the verdicts as to each count be submitted on a separate form.

Comment

Each count of an indictment is a separate offense; hence, consistency in the verdicts is not necessary. *Speers v. United States*, 387 F.2d 698 (10th Cir. 1967).

A trial court may properly retry an accused on a theft charge, where the original trial on theft and burglary charged in two separate counts in the same information resulted in an acquittal of the burglary charge and a mistrial on the theft charge due to the inability of the jury to reach a verdict; not double jeopardy; jury verdicts need not be consistent. *In re Shotwell & Grades*, 4 Kan. App. 2d 382, 607 P.2d 83 (1980).

68.09 LESSER INCLUDED OFFENSES

The offense of (principal offense charged) with which defendant is charged includes the lesser offense(s) of (lesser included offense or offenses).

You may find the defendant guilty of (principal offense charged) (first lesser included offense) (second lesser included offense) or not guilty.

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

Your Presiding Juror should mark the appropriate verdict.

Notes on Use

For authority, see K.S.A. 21-3107, substantially amended under L. 1998, ch. 185, § 1. Under the amendments, the information/evidence test as enunciated in *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), has been eliminated.

This instruction should not be used when the crime is first-degree murder under the alternative theories of premeditated murder and felony murder. Instead, use PIK 3d 68.15 and 68.16.

Comment
(Cases before July 1, 1998)

The trial court has a statutory duty to instruct the jury on lesser included offenses under K.S.A. 21-3107(3). This duty arises regardless of whether a party requests the giving of any lesser included instructions. *State v. Moncla*, 262 Kan. 58, 73-74, 936 P.2d 727 (1997). However, in *State v. Coffman*, 260 Kan. 811, 813, 925 P.2d 419 (1996), the Supreme Court noted that under K.S.A. 21-3107(3) a defendant who objects to the giving of a lesser included instruction waives any objection to the failure to instruct.

In *State v. Fike*, 243 Kan. 365, 757 P.2d 724 (1988), the Supreme Court adopted two tests to determine whether a lesser crime is a lesser included crime under K.S.A. 21-3107(2)(d). The first test is the statutory elements test. If all the statutory elements of the alleged lesser crime are among the statutory elements required to prove the crime charged, then it is a lesser included crime. If this test is not met, then the second test is applied. The second test is to examine the allegations of the information

and the evidence to determine whether the crime as charged would necessarily prove the lesser crime. If so, the latter is an included crime upon which the jury must be instructed.

"[A defendant] has a right to an instruction on all lesser included offenses supported by the evidence at trial so long as (1) the evidence when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with the defendant's theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense." *State v. Harris*, 259 Kan. 689, 702, 915 P.2d 758 (1996).

The instructions on lesser included offenses should be given in the order of severity, beginning with the offense with the most severe penalties. When instructions on lesser included offenses are given, the jury should be instructed that if there is reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lesser offense only. *State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979). However, in *State v. Massey*, 242 Kan. 252, 262, 747 P.2d 802 (1987), the Supreme Court held it was not reversible error to fail to give such an instruction.

Conspiracy is not a lesser included offense of a completed or attempted crime under the statutory test of *Fike* because a conspiracy requires an agreement between two or more persons. See *State v. Antwine*, 4 Kan. App. 2d 389, 397-98, 607 P.2d 519 (1980).

Solicitation was not held to be a lesser included offense of aiding and abetting first-degree murder. *State v. DePriest*, 258 Kan. 596, 604, 907 P.2d 868 (1995). See also, *State v. Webber*, 260 Kan. 263, 280-2, 918 P.2d 609 (1996), *cert. denied* 519 U.S. 1090, 136 L.Ed 2d 711, 117 S.Ct. 764 (1997), holding no error by the trial court in failing to instruct on criminal solicitation as a lesser included offense of either conspiracy to commit first-degree murder or aiding and abetting first-degree murder.

Examples of lesser included offenses are:

1. **Premeditated Murder** - The Court's duty to instruct on the lesser offenses of second-degree murder, voluntary and involuntary manslaughter depends on whether the evidence support instructions on any or all of the lesser included offenses. Generally, second-degree murder is included where the issue of premeditation may be in doubt. *State v. Yarrington*, 238 Kan. 141, 708 P.2d 524 (1985). Unless there is some evidence of arguments, heat of passion or an unintentional killing, generally voluntary and involuntary manslaughter are not given as lesser included offenses. Reckless second-degree murder, also called depraved heart murder, is a lesser included crime of first-degree murder. However, absent evidence to support recklessness, there is no duty to instruct. *State v. Pierce*, 260 Kan. 859, 865, 927 P.2d 929 (1996).
2. **Felony Murder** - Ordinarily, there is no lesser included offense where the killing was done in the commission of a felony. *State v. Masqua*, 210 Kan. 419, 502 P.2d 728 (1972), *cert. denied* 411 U.S. 951 (1973); *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937 (1992); *State v. Tyler*, 251 Kan. 616, 840 P.2d 413 (1992); but where there is an issue as to the felony itself, then

an instruction on second-degree murder or voluntary manslaughter may be required. *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976); *State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986). *State v. Arteaya*, 257 Kan. 874, 896 P.2d 1035 (1995). The instructions concerning lesser included offenses for the charge of felony murder should only be given if the proof of the underlying felony is inconclusive or questionable. *State v. Strauch*, 239 Kan. 203, 218, 718 P.2d 613 (1986).

3. **Second-Degree Murder** - The trial court erred in refusing to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter for the crime of murder in the second degree. *State v. Hill*, 242 Kan. 68, 744 P.2d 1228 (1987). The trial court committed error by failing to instruct on the lesser included offense of involuntary manslaughter for the crime of second-degree murder where there was sufficient evidence of self-defense. *State v. Cummings*, 242 Kan. 84, 93, 744 P.2d 858 (1987).
4. **Voluntary Manslaughter** - Includes involuntary manslaughter, *State v. Williams*, 6 Kan. App. 2d 833, 635 P.2d 1274 (1981).
5. **Involuntary Manslaughter** - Where an unintentional homicide results from operation of a motor vehicle, vehicular homicide is a lesser included offense. *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). DUI is a lesser included offense where the underlying misdemeanor to the involuntary manslaughter complaint is DUI and all the elements of DUI are required to establish the greater offense. *State v. Adams*, 242 Kan. 20, 26, 744 P.2d 833 (1987). Because an attempt requires a specific intent to commit the crime charged, there is no such crime as attempted involuntary manslaughter, an unintentional killing. *State v. Collins*, 257 Kan. 408, 418, 893 P.2d 217 (1995).
6. **Attempted Murder** - Aggravated battery is not a lesser included offense of attempted murder. *State v. Daniels*, 223 Kan. 266, 573 P.2d 607 (1977). The offenses of attempted second-degree murder and attempted voluntary manslaughter are lesser included crimes of attempted first-degree murder. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). There is no such crime as attempted felony murder. *State v. Robinson*, 256 Kan. 133, 136, 883 P.2d 764 (1994). Aggravated assault is not a lesser included crime of attempted murder. *State v. Saiz*, 269 Kan. 657, Syl. 3, 7 P.3d 1214 (2000).
7. **Aggravated Kidnapping** - Kidnapping may be a lesser included offense where there is an issue as to whether harm resulted. *State v. Corn*, 223 Kan. 583, 575 P.2d 1308 (1978); *State v. Hammond*, 251 Kan. 501, 837 P.2d 816 (1992). Rape is not a lesser included offense. *Wisner v. State*, 216 Kan. 523, 532 P.2d 1051 (1975). Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).
8. **Kidnapping** - Includes attempted kidnapping. *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982). Unlawful restraint is a lesser included offense. *State v. Carter*, 232 Kan. 124, 652 P.2d 694 (1982). Assault is not a lesser included offense. *State v. Schriner*, 215 Kan. 86, 523 P.2d 703 (1974).

9. **Aggravated Robbery** - Robbery is a lesser included offense only where there is an issue whether a weapon was used. *State v. Johnson & Underwood*, 230 Kan. 309, 634 P.2d 1095 (1981). It is not includable where the only issue is identification. *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976). Under the second prong of the *Fike* test, aggravated battery may be a lesser included offense of aggravated robbery. *State v. Warren*, 252 Kan. 169, 181, 843 P.2d 224 (1992); *State v. Hill*, 16 Kan. App. 2d 432, 825 P.2d 1141 (1991). In *State v. Clardy*, 252 Kan. 541, 847 P.2d 694 (1993), the second prong of the *Fike* test was applied in holding that an instruction on battery as a lesser included offense of aggravated robbery was required. Theft by threat, or extortion, is not a lesser included offense of aggravated robbery. *State v. McCloud*, 257 Kan. 1, 15, 891 P.2d 324 (1995).
10. **Robbery** - Theft is now considered a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985); *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974). However, theft by threat, or extortion, is not a lesser included offense of robbery. *State v. Blockman*, 255 Kan. 953, 881 P.2d 561 (1994).
11. **Aggravated Assault** - Assault generally is a lesser included offense but if there is no issue as to use of weapon it would not be. *State v. Buckner*, 221 Kan. 117, 558 P.2d 1102 (1976); *State v. Cameron & Bentley*, 216 Kan. 644, 651, 533 P.2d 1255 (1975).
12. **Aggravated Battery** - Battery generally is a lesser included offense unless there is no issue as to use of weapon. *State v. Gander*, 220 Kan. 88, 551 P.2d 797 (1976). Aggravated assault is not a lesser included offense. *State v. Bailey*, 223 Kan. 178, 573 P.2d 590 (1977). Aggravated battery classified as a severity level 4 felony includes the lesser offenses of the same crime classified as severity level 5, 7 or 8 felonies. *State v. Ochoa*, 20 Kan. App. 2d 1014, 895 P.2d 198 (1995). Under evidence that the victim had suffered bodily harm which was either the result of intentional or reckless conduct, the court held it was not error to give a lesser included instruction for a level 8 aggravated battery when the defendant is charged in the information with committing a level 7 aggravated battery. *State v. Jackson*, 262 Kan. 119, 142-43, 936 P.2d 761 (1997).
13. **Aggravated Assault on Law Enforcement Officer** - Assault on law enforcement officer is a lesser included offense. *State v. Hollaway*, 214 Kan. 636, 522 P.2d 364 (1974).
14. **Aggravated Battery on Law Enforcement Officer** - Battery is a lesser included offense. *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).
15. **Aggravated Burglary** - Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).

16. **Burglary** - Criminal damage to property is not a lesser included offense. *State v. Harper*, 235 Kan. 825, 685 P.2d 850 (1984). Criminal trespass is not a lesser included offense of burglary because criminal trespass requires proof of something more than a knowing and unauthorized entry or remaining within property; criminal trespass also requires proof of actual or constructive notice. *State v. Rush*, 255 Kan. 672, Syl. ¶ 3, 877 P.2d 386 (1994).
17. **Theft** - Unlawful deprivation of property is a lesser included offense. *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985), reversing *State v. Burnett*, 4 Kan. App. 2d 412, 607 P.2d 88 (1980). Theft of lost or mislaid property (K.S.A. 21-3703) and theft (K.S.A. 21-3701) are forms of the same crime of larceny and the former is a lesser included offense of the latter (assuming, of course, that the property is of a value of at least $500.) *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992).
18. **Theft by Deception** - Delivery of a forged check may or may not be a lesser included offense of theft by deception depending on the charging document and the evidence produced at trial. *State v. Perry*, 16 Kan. App. 2d 150, 823 P.2d 804 (1991).
19. **Sale of Narcotics** - "Delivery" is not a lesser included offense. *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976). "Possession" is not a lesser included offense. *State v. Woods*, 214 Kan. 739, 522 P.2d 967 (1974). Overruled on other grounds, *State v. Wilbanks*, 224 Kan. 66, 579 P.2d 132 (1978). *State v. Collins, infra.*
20. **Possession With Intent to Sell** - "Possession" is a lesser included offense. *State v. Collins*, 217 Kan. 418, 536 P.2d 1382 (1975); *State v. Newell*, 226 Kan. 295, 597 P.2d 1104 (1979).
21. **Rape** - Indecent liberties with a minor is a lesser included offense. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Aggravated incest is not a lesser included offense. *State v. Moore*, 242 Kan. 1, 7, 748 P.2d 833 (1987). In *State v. Mason*, 250 Kan. 393, 827 P.2d 748 (1992), aggravated sexual battery was held not to be a lesser included offense of aggravated kidnapping, attempted aggravated sodomy or attempted aggravated rape because of the additional elements of a nonspousal relationship and intent to arouse or satisfy sexual desires. In *State v. Burns*, 23 Kan. App. 2d 352, 931 P.2d 1258 (1997), the court held aggravated indecent liberties with a child is a lesser included offense of rape under the information/evidence prong of the *Fike* test. However, in *State v. Belcher*, 269 Kan. 2, 4 P.3d 1137 (2000), the Supreme Court held aggravated indecent liberties with a child under K.S.A. 21-3504(a)(3)(A) is not a lesser included offense of rape based upon sexual intercourse with a child under 14 years of age. The *Burns* decision was disapproved to the extent it held otherwise. Nevertheless, based upon the narrow holding in *Belcher*, the committee believes aggravated indecent

liberties with a child under K.S.A. 21-3504(a)(1) (sexual intercourse with a child who is 14 or more years of age but less than 16 years of age) is a lesser included offense of rape under the information/evidence prong of *Fike*.

22. **Attempted Rape** - Battery is not a lesser included offense. *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978).
23. **Indecent Liberties With a Child** - Aggravated sexual battery is not a lesser included offense. *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988); *State v. Moppin*, 245 Kan. 639, 783 P.2d 878 (1989). Nor is battery a lesser included offense of aggravated indecent liberties with a child because "lewd" is not equivalent to "rude or insulting." *State v. Banks*, 273 Kan. 738, 46 P.3d 546 (2002).
24. **Aggravated Sodomy** - Lewd and lascivious behavior is not a lesser included offense. *State v. Gregg*, 226 Kan. 481, 602 P.2d 85 (1979).
25. **Unlawful Possession of Firearm** - Carrying a concealed weapon and aggravated weapons violation are not lesser included offenses. *State v. Hoskins*, 222 Kan. 436, 565 P.2d 608 (1977).
26. **DUI** - Reckless driving is not a lesser included offense. *State v. Mourning*, 233 Kan. 678, 664 P.2d 857 (1983).

(Cases after July 1, 1998)

The general rule concerning lesser included offenses is: A trial court must instruct a jury on a lesser included offense when there is some evidence that would reasonably justify a conviction of the lesser offense. If the defendant requests the instructions, the trial court has a duty to instruct the jury regarding all lesser included crimes established by the evidence regardless of whether the evidence is weak or inconclusive. However, the duty to so instruct arises only when there is evidence supporting the lesser crime. An instruction on a lesser included offense is not required if the jury could not reasonably convict the defendant of the lesser included offense based on the evidence presented. *State v. Boyd*, 281 Kan. 70, 93, 127 P.3d 998 (2006) (quoting *State v. Drennan*, 278 Kan. 704, 712-13, 101 P.3d 1218 (2004)).

1. **Criminal Threat** - Conviction for criminal threat and harassment by telephone are not multiplicitous. *State v. Schuette*, 273 Kan. 593, 44 P.3d 459 (2002).
2. **Kidnapping or Aggravated Kidnapping** - The crimes of interference with parental custody and criminal restraint are not lesser included offenses of kidnapping. *State v. Wiggett*, 273 Kan. 438, 44 P.3d 381 (2002).
3. **Robbery or Aggravated Robbery** - Obtaining by threat control over property is not a lesser included crime of robbery or aggravated robbery. However, theft of lost or mislaid property is a lesser included crime. *State v. Sandifer*, 270 Kan. 591, 17 P.3d 921 (2001).

4. **Sexual Exploitation of a Child** - Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).
5. **Battery or Aggravated Battery** - A severity level 7 aggravated battery charge that a defendant intentionally caused bodily harm to another person in any manner whereby great bodily harm, disfigurement, or death could be inflicted is a lesser included offense of a severity level 4 aggravated battery charge that the defendant intentionally caused great bodily harm to another person because all elements of the level 7 aggravated battery are identical to some of the elements of the level 4 aggravated battery. K.S.A. 21-3107(2)(b). *State v. Winters*, 276 Kan. 34, 72 P.3d 564 (2003).
6. **Child Abuse** - Endangering a child is not a lesser included offense of child abuse. *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006). Severity level 7 aggravated battery under K.S.A. 21-3414(a)(1)(B) or (C) is not a lesser included offense of child abuse. *State v. Alderete*, 285 Kan. 359, 172 P.3d 27 (2007).
7. **Premeditated Murder** - Second-degree intentional murder is a lesser included offense of premeditated first-degree murder because all the elements of second-degree murder are identical to some of the elements of first-degree murder. *State v. Warledo*, 286 Kan. 927, 190 P.3d 937 (2008). The defendant has a right to an instruction on second-degree intentional murder as long as the evidence, when viewed in the light most favorable to the defendant, would reasonably justify a jury's conviction on the offense, and the evidence does not exclude a theory of guilt on second-degree murder. *State v. Jones*, 279 Kan. 395, 401, 109 P.3d 1158 (2005); *State v. Scaife*, 286 Kan. 614, 186 P.3d 755, 760 (2008).
8. **Felony Murder** - When murder is committed during the commission of a felony, the rule requiring instructions on lesser included offenses does not apply. It is only when the evidence of the underlying felony is weak, inconclusive, or conflicting that instructions on lesser included offenses may be required. *State v. Calvin*, 279 Kan. 193, 201-02, 105 P.3d 710 (2005). If the evidence is strong on the underlying felony, no instruction on lesser included offenses is necessary. If the evidence on the underlying felony is not strong, the court should consider whether there was evidence on which the jury could have found the defendant guilty of the lesser included offenses. *State v. Edgar*, 281 Kan. 47, 127 P.3d 1016 (2006).
9. **Aggravated Kidnapping** - Kidnapping and criminal restraint may be lesser included offenses of aggravated kidnapping under proper circumstances. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006).
10. **Aggravated Robbery** - Robbery and certain types of theft may be lesser included offenses of aggravated robbery. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006).

11. **Manufacture of Methamphetamine** - Possession of drug paraphernalia with intent to manufacture and possession of methamphetamine are not lesser included offenses of manufacture of methamphetamine. *State v. Unruh*, 281 Kan. 520, 133 P.3d 35 (2006); *State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006).
12. **Aggravated Indecent Solicitation of a Child** - Indecent solicitation of a child is not a lesser included offense of aggravated indecent solicitation of a child when the age of the child is not in dispute. *State v. Lowden*, 38 Kan. App. 2d 858, 174 P.3d 895 (2008).
13. **Involuntary Manslaughter While Driving Under the Influence of Alcohol** - Driving under the influence of alcohol is a lesser included offense of involuntary manslaughter while driving under the influence of alcohol. *State v. Brown*, 34 Kan. App. 2d 746, 124 P.3d 1035 (2005).
14. **Aggravated Battery** - The crimes of severity levels 5 and 8 aggravated battery are both lesser included offenses of severity level 4 aggravated battery because they are lesser included degrees of the same crime pursuant to K.S.A. 21-3107(2)(a). *State v. McCarley*, 287 Kan. 167, 195 P.3d 230 (2008).
15. **Attempted First-Degree Murder** - Aggravated battery does not qualify as a lesser included crime of attempted first-degree murder under K.S.A. 21-3107(2)(a). First-degree murder involves killing and aggravated battery involves bodily harm. Each crime is defined by the harm caused rather than the act performed. An attempt requires the specific intent to commit the underlying crime. *State v. Gaither*, 283 Kan. 671, 156 P.3d 602 (2007).

68.09-A ALTERNATIVE CHARGES

The Committee recommends that an alternative charge instruction not be given. If the defendant is charged in the alternative with multiplicitous charges, the jury should be free to enter a verdict upon each of the alternatives and PIK 3d 68.07, Multiple Counts-Verdict Instruction, is adequate.

However, the defendant cannot be convicted of multiplicitous crimes. *State v. Dixon*, 252 Kan. 39, 47, 843 P.2d 182 (1992). If the jury returns appropriate verdicts of guilty to multiplicitous charges, the trial court must accept only the verdict as to the greater charge under a doctrine of merger.

68.09-B MULTIPLE ACTS

The State claims distinct multiple acts which each could separately constitute the crime of _____. In order for the defendant to be found guilty of _____, you must unanimously agree upon the same underlying act.

Notes on Use

For authority, see K.S.A. 22-3421. This instruction is for use when distinct incidents separated by time or space are alleged by the State in a single count of the charging document. In circumstances where the State could have proceeded under multiple counts but chose not to do so, this instruction must be used. This form of charge presents a problem because the defendant is entitled to a unanimous jury verdict as to which incident constituted the crime.

Comment

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. *State v. Timley*, 255 Kan. 286, Syl. ¶ 2, 875 P.2d 242 (1994). See also, *State v. Barber*, 26 Kan. App. 2d 330, 988 P.2d 250 (1999) and *State v. Davis*, 275 Kan. 107, 61 P. 3d 701 (2003).

The structural error analysis used in *Timley* and *Barber* was rejected by the Supreme Court in *State v. Hill*, 271 Kan. 929, 26 P.3d 1267 (2001), where the court applied instead a harmless error analysis. Nonetheless, the court warned, "This holding should not be interpreted to give prosecutors carte blanche to rely on harmless error review, and it is strongly encouraged that prosecutors elect a specific act or the trial court issue a specific unanimity instruction. In many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless." 271 Kan. at 940.

A multiple acts case is distinguishable from a multiple means case. Unanimity is not required as to the means by which a crime was committed so long as substantial evidence supports each alternative means. *State v. Timley*, 255 Kan. 286, Syl. ¶ 1.

When the factual circumstances of a crime involve a "short, continuous, single incident" comprised of several acts individually sufficient for conviction, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act. *State v. Staggs*, 27 Kan. App. 2d 865, Syl. 2, 9 P.3d 601 (2000).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

68.12 DEADLOCKED JURY

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

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

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

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

Notes on Use

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

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

Comment

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

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

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

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

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

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

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

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

In *State v. Salts*, No. 99,533, Kansas Supreme Court opinion filed February 6, 2009, Syl. ¶ 2, the court held that the language "[a]nother trial would be a burden on both sides" in a prior version of PIK 3d 68.12 was harmless error.

(THIS PAGE BLANK)

68.13 POST-TRIAL COMMUNICATION WITH JURORS

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

Also, you may soon receive a survey in the mail about my performance as judge in this trial. This survey is confidential and is from the Kansas Commission on Judicial Performance. I urge you to take a few minutes to answer the questions and return it promptly.

Notes on Use

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

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

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

Comment

Jurors shall not be called for posttrial hearings without an order of the Court after motion. The burden is upon the party seeking the order to show the necessity for the order. *Cornejo v. Probst*, 6 Kan. App. 2d 529, 630 P.2d 1202 (1981); *Walters v. Hitchcock*, 237 Kan. 31, 697 P.2d 847 (1985); *State v. Kee*, 238 Kan. 342, 711 P.2d 746 (1985); *State v. Ruebke*, 240 Kan. 493, 731 P.2d 842 (1987).

Supreme Court Rule 169 was quoted in *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 815 P.2d 506 (1991).

68.14 MURDER IN THE FIRST DEGREE - MANDATORY 40 YEAR SENTENCE - VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath or affirmation, unanimously determine that a sentence of LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 15 YEARS be imposed by the Court.

_____
Presiding Juror

_____, _____.

Notes on Use

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

68.14-A MURDER IN THE FIRST DEGREE—MANDATORY 40 YEAR SENTENCE—VERDICT FORM FOR LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY AFTER 40 YEARS

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

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

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

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

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

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

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

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

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

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

_____

Presiding Juror

_____, _____.

Notes on Use

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

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

Comment

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

68.14-B CAPITAL MURDER—VERDICT FORM FOR SENTENCE OF DEATH

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

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

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

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

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

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

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

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

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

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

_____
Presiding Juror

_____, _____.

Notes on Use

For authority, see K.S.A. 21-4624(e).

Use only the bracketed clauses in this verdict form that have been contained in the State's notice and supported by the evidence.

(THIS PAGE BLANK)

(THIS PAGE BLANK)

68.15 MURDER IN THE FIRST DEGREE—PREMEDITATED MURDER AND FELONY MURDER IN THE ALTERNATIVE—VERDICT INSTRUCTION

The defendant is charged with one offense of murder in the first degree. This verdict instruction will guide you on the verdicts you shall consider.

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

When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only. Your Presiding Juror will sign the verdict form upon which you agree. The other verdict forms are to be left unsigned.

First, you shall consider whether the defendant is guilty of murder in the first degree. If you find defendant is guilty of murder in the first degree, the Presiding Juror shall sign the applicable verdict form and, in addition, you shall then determine the alternative theory or theories contained in "Theory 1(a)", "Theory 1(b)", or "Theory 1(c)". The Presiding Juror shall sign the applicable alternative theory verdict form(s).

Second, if you do not find the defendant guilty of murder in the first degree, you should then consider the lesser offense of murder in the second degree as defined in Instruction No. _____.

Third, in considering whether the defendant is guilty of murder in the second degree, you should also consider the lesser offense of voluntary manslaughter as defined in Instruction No. _____.

Fourth, if you do not find the defendant guilty of voluntary manslaughter, you should then consider the lesser offense of involuntary manslaughter as defined in Instruction No. _____.

Fifth, if you do not find the defendant guilty of involuntary manslaughter, you shall find defendant not guilty.

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976). The pattern should be given along with PIK 3d 68.16, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder.

The instruction should be used instead of an instruction under PIK 3d 68.07, Multiple Counts - Verdict Instruction and PIK 3d 68.08, Multiple Counts - Verdict Forms. In addition, the applicable lesser included offenses should be selected.

Comment

The basic purpose of the felony murder rule is to relieve the State of the burden of proving premeditation and malice when the death of the victim is caused by the defendant in the commission of a felony. *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

As felony murder is a method of proof to support a verdict of first-degree murder, the Court in *Wilson*, held that when an accused is charged in one count of an information with both premeditated murder and felony murder it ". . . matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilty by reason of the killer's malignant purpose. In such case the verdict is unanimous and guilty of murder in the first degree has been satisfactorily established. If a verdict of first-degree murder can be justified on either of two interpretations of the evidence, premeditation or felony murder, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another." *State v. Wilson*, 220 Kan. at 345.

The holding in *Wilson* has consistently been followed by the Supreme Court. See *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hupp*, 248 Kan. 644, 809 P.2d 1207 (1991); *State v. Davis*, 247 Kan. 566, 802 P.2d 541 (1990); *State v. Pioletti*, 246 Kan. 49, 785 P.2d 963 (1990); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); *State v. Wise*, 237 Kan. 117, 697 P.2d 1295 (1985); and *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

The enactment of the mandatory minimum 40 year sentence in premeditated murder, effective July 1, 1990, requires, however, an instruction to determine whether the jury unanimously found the defendant guilty of premeditated murder. See K.S.A. 21-4624. The purpose of this pattern and PIK 3d 68.16, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Form,

is to provide a verdict form for the jury to determine whether the defendant is guilty of first-degree murder under the alternative theories of premeditated murder or felony murder. As to a charge of first-degree murder committed on or after July 1, 1990, and prior to July 1, 1994, if the jury finds unanimously that the defendant is guilty of premeditated murder, the State having been given the required notice, the matter proceeds to a sentencing hearing before the trial jury to determine whether the mandatory minimum sentence of 40 years should be imposed. On the other hand, if the jury unanimously finds the defendant guilty of murder in the first degree from a combination of premeditated murder and felony murder, the matter does not proceed to the "Hard 40" sentencing hearing.

With the enactment of the crime of capital murder in 1994, the legislature eliminated the procedure for a jury determination of application of the minimum 40-year sentence upon findings of aggravating and mitigating factors. That procedure is now used in cases of capital murder if the death sentence is requested. K.S.A. 21-4622 to 21-4624. If the defendant is convicted of first-degree murder, rather than capital murder, upon a finding of premeditation, the court may impose the mandatory minimum 40-year sentence. The finding of premeditation remains a jury function, and the foregoing instruction must be given where the State introduces evidence upon theories of premeditation and felony murder.

68.16 MURDER IN THE FIRST DEGREE—PREMEDITATED MURDER AND FELONY MURDER IN THE ALTERNATIVE—VERDICT FORM

VERDICT FORM

1. We, the jury, unanimously find the defendant guilty of murder in the first degree.

_____
Presiding Juror

Theory 1(a) **We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of premeditated murder.**

_____
Presiding Juror

Theory 1(b) **We, the jury, unanimously find the defendant guilty of murder in the first degree on the theory of felony murder.**

_____
Presiding Juror

Theory 1(c) **We, the jury, unable to agree under Theory 1(a) or 1(b), do unanimously find the defendant guilty of murder in the first degree on the combined**

theories of premeditated murder and felony murder.

_____
Presiding Juror

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

_____
Presiding Juror

3. **We, the jury, unanimously find the defendant guilty of voluntary manslaughter.**

_____
Presiding Juror

4. **We, the jury, unanimously find the defendant guilty of involuntary manslaughter.**

_____
Presiding Juror

5. **We, the jury, unanimously find the defendant not guilty.**

_____
Presiding Juror

Notes on Use

For authority, see *State v. Vontress*, 266 Kan. 248, 970 P.2d 42 (1998); *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370 (1993); *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Hartfield*, 245 Kan. 431, 781 P.2d 1050 (1989); and *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976).

The instruction should be given with PIK 3d 68.15, Murder in the First Degree – Premeditated Murder and Felony Murder in the Alternative – Verdict Instruction.

The prosecuting attorney may only then ask for the "Hard 40" under the provisions of K.S.A. 21-4624, if the jury returns a unanimous verdict of guilty of first-degree murder under the theory of premeditated murder. As to the crime of murder in the first degree committed on or after July 1, 1994, there is no procedure for a separate sentencing hearing to determine if the defendant should be required to serve a mandatory minimum term of imprisonment of 40 years. The Court may impose the mandatory minimum 40-year sentence upon a finding of premeditation, so, as explained in the Comment to PIK 3d 68.15, this verdict form will continue to be used where the State introduces evidence on the theories of premeditation and felony murder.

If the evidence of the underlying felony for felony murder is weak or if there is evidence to support the lesser included offenses, the applicable lesser offenses should be submitted to the jury.

Comment

See Comment to PIK 3d 68.15, Murder in the First Degree – Premeditated Murder and Felony Murder in the Alternative – Verdict Instruction.

68.17 CAPITAL MURDER—VERDICT FORM FOR SENTENCE AS PROVIDED BY LAW—ALTERNATIVE SENTENCE

SENTENCING VERDICT

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

_____
Presiding Juror

_____, _____.

Notes on Use

For crimes committed prior to July 1, 2004, convicted capital murder defendants not sentenced to death by the jury are sentenced by the court as otherwise provided by law. For crimes committed on or after July 1, 2004, convicted capital murder defendants not sentenced to death by the jury are sentenced by the court to life in prison without possibility of parole. K.S.A. 21-4624(e) and K.S.A. 21-4635.

(THIS PAGE BLANK)

CHAPTER 69.00

ILLUSTRATIVE SETS OF INSTRUCTIONS

69.01 MURDER IN THE FIRST DEGREE WITH LESSER INCLUDED OFFENSES

Summary of the Facts and Issues

Wilbur Smith was married to Winnie Smith. Winnie was having an affair with John Green. On a number of occasions, Wilbur Smith and John Green engaged in fist fights and there was "bad blood" between them. On the evening of July 5, 1998, Wilbur Smith shot and killed John Green with a .22 caliber revolver while the two were at the Deluxe Tavern in Lawrence, Kansas. Both of the men had been drinking. Some of the witnesses testified that Wilbur Smith took deliberate aim and shot John Green between the eyes. Other witnesses testified that immediately prior to the shooting Smith and Green were having a heated argument and threatening one another. Wilbur Smith testified that the shooting had been accidental and that he accidentally struck the gun against the side of a booth and the gun was discharged unintentionally and just happened to strike John Green. Wilbur Smith testified that he had the gun only to frighten John Green and he thought the trouble could be avoided if he exhibited a gun.

An Outline of Suggested Instructions in Sequence Follows:

Instruction 1.	**PIK 3d 51.02, Consideration and Binding Application of Instructions.**
Instruction 2.	**PIK 3d 56.01, Murder in the First Degree.**
Instruction 3.	**PIK 3d 68.09, Lesser Included Offenses.**
Instruction 4.	**PIK 3d 56.03, Murder in the Second Degree.**

VERDICT FORMS

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

We, the jury, find the defendant not guilty.

_____
Presiding Juror

(PIK 3d 68.10)

69.02 THEFT WITH TWO PARTICIPANTS

Summary of the Facts and Issues

Acme Department Store is located in Wichita, Kansas. On July 5, 2004, two men entered the store together. The defendant Wilbur Smith had a green paper shopping bag under his arm. The other man was John Green. After entering the store, Smith and Green proceeded to the men's department. The security officer of the store observed Smith remove a blue suit from the clothes rack and then walk with the suit to the fitting room. Smith was there for about two minutes and returned from the fitting room without the suit or green shopping bag. Five minutes later, John Green was apprehended leaving the store with a green shopping bag containing the blue suit. Green has disappeared and cannot be found. Smith was charged with theft of the suit.

The State contends Smith participated in the theft by placing the suit in the fitting room so Green could pick it up and remove it from the store. The defendant Smith denies that he was a party to the crime. He contends he tried on the suit and found that it did not fit. Hence, he left the suit in the fitting room and then left the store. He admits that he knows Green casually and they just happened to enter the store at the same time.

There is a dispute as to the value of the suit which makes it necessary for the jury to determine value.

An Outline of Suggested Instructions in Sequence Follows:

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

PIK 3d 51.05, Rulings of the Court.

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

VERDICT FORMS

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

_____
Presiding Juror

(PIK 3d 68.02)

OR

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

_____
Presiding Juror

_____, _____

(PIK 3d 68.03)

69.04 CAPITAL MURDER—GUILT AND PENALTY PHASES

Summary of the Facts and Issues

Nineteen-year-old Phil Brown was an inmate at the El Dorado Correctional Facility serving a sentence for a voluntary manslaughter conviction. Brown had a slight build and was often harassed by other inmates. On a number of occasions, another inmate, Joe Jones, had been seen verbally and physically abusing Brown. On July 5, 2008, after a particularly loud argument and scuffle witnessed by several inmates, Brown killed Jones by stabbing him in the throat with a sharpened spoon he had stolen from the prison cafeteria. Some inmates testified they had heard Brown say that he was going to kill Jones and they had seen Brown sharpening his spoon. Other inmates testified that they had seen the two men arguing and that Jones never hit Brown before Jones was stabbed.

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

Suggested Instruction to be Given Before Voir Dire:

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

Outline of Suggested Instructions in Sequence—Guilt Phase:

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

PIK 3d 51.05, Rulings of the Court.

PIK 3d 51.06, Statements and Arguments of Counsel.

PIK 3d 52.09, Credibility of Witnesses.

Instruction 2. **PIK 3d 56.00-A, Capital Murder—Elements of the Offense.**

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

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

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

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

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

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

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

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

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

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

Instruction 13. PIK 3d 68.01, Concluding Instructions.

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

TEXT OF SUGGESTED INSTRUCTION TO BE GIVEN BEFORE VOIR DIRE

In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. Each of you received a questionnaire concerning your views on 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 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 same jury decides whether the defendant should be sentenced to death. The jury will be separately instructed concerning the claims that 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 circumstances present and that they are not outweighed by any mitigating circumstances found to exist.
(PIK 3d 56.00)

TEXT OF SUGGESTED INSTRUCTIONS—GUILT PHASE

Instruction No. 1.

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

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

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

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

Instruction No. 2.

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

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

1. That the defendant intentionally killed Joe Jones.

2. That such killing was done with premeditation.
3. That the defendant was an inmate or prisoner confined in a state correctional institution; and
4. That this act occurred on or about the 5th day of July, 2008, in Butler County, Kansas.

(PIK 3d 56.00-A)

Instruction No. 3.

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

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

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

Your Presiding Juror should mark the appropriate verdict.

(PIK 3d 68.09)

Instruction No. 4.

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

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

1. That the defendant intentionally killed Joe Jones; and
2. That this act occurred on or about the 5th day of July, 2008, in Butler County, Kansas.

(PIK 3d 56.03)

Instruction No. 5.

In determining whether the defendant is guilty of murder

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

If you decide the defendant intentionally killed Joe Jones, but that it was done upon a sudden quarrel or upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person, the defendant may be convicted of voluntary manslaughter only.
(PIK 3d 56.05)

Instruction No. 6.

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

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

1. **That the defendant unintentionally killed Joe Jones;**
2. **That it was done during the commission of a lawful act in an unlawful manner; and**
3. **That this act occurred on or about the 5th day of July, 2008, in Butler County, Kansas.**

(PIK 3d 56.06)

Instruction No. 7.

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

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

Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms

"knowing," "willful," "purposeful" and "on purpose."
(PIK 3d 56.04)

Instruction No. 8.

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

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

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

Instruction No. 9.

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

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

Instruction No. 10.

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

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

Instruction No. 11.

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

Instruction No. 12.

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

Instruction No. 13.

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

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

Your agreement upon a verdict must be unanimous.

_____
District Judge

_____, _____
(PIK 3d 68.01)

VERDICT FORMS

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

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

_____
Presiding Juror

OR

We, the jury, find the defendant not guilty.

_____
Presiding Juror

(PIK 3d 68.10)

Outline of Suggested Instructions in Sequence—Penalty Phase:

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

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

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

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

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

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

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

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

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

Instruction 10. **PIK 3d 56.00-G, Capital Murder—Death Sentence—Alternative Sentence.**

Instruction 11. **PIK 3d 56.00-H, Capital Murder—Death Sentence—Sentencing Decision.**

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

Verdict Forms. PIK 3d 68.14-B, Capital Murder—Verdict Form for Sentence of Death

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

TEXT OF SUGGESTED INSTRUCTIONS—PENALTY PHASE

Instruction No. 1.

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

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

Instruction No. 2.

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

Instruction No. 3

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

Instruction No. 4

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

Instruction No. 5

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

Instruction No. 6

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

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

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

and

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

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

Instruction No. 7

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

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

The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case. Mitigating circumstances need not be proved beyond a reasonable doubt, and need only be proved to the satisfaction of the individual juror in that juror's sentencing decision. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

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

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

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background, or record, and any other aspect of the offense that was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death.

Each of you must consider every mitigating circumstance found to exist.
(PIK 3d 56.00-D)

Instruction No. 8

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.
(PIK 3d 56.00-E)

Instruction No. 9

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

Instruction No. 10

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances that you unanimously found beyond a reasonable doubt.

However, if one or more jurors are not persuaded beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be

sentenced to death but will be sentenced by the court as otherwise provided by law.
(PIK 3d 56.00-G)

Instruction No. 11

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

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

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death;

OR

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

(PIK 3d 56.00-H)

Instruction No. 12

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

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

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

_____
District Judge

_____, _____
(PIK 3d 68.01-A)

VERDICT FORMS

SENTENCING VERDICT

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the square in front of such aggravating circumstance(s).]

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

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

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

_____
Presiding Juror

_____, _____.

(PIK 3d 68.14-B)

OR

SENTENCING VERDICT

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

_____
Presiding Juror

_____, _____.

(PIK 3d 68.17)

(THIS PAGE BLANK)

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).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

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).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

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).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

70.02 DRIVING UNDER THE INFLUENCE—IF CHEMICAL TEST USED

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

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

Notes on Use

For authority, see K.S.A. 8-1005 and K.S.A. 8-1006. This instruction is to be used in conjunction with PIK 3d 70.01 when chemical tests have been administered. If the result of only one test is in evidence, only the applicable bracketed paragraph should be used. This instruction is not applicable to a charge or alternative charge of a per se violation of K.S.A. 8-1567(a)(2).

Comment

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

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

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

PIK CRIMINAL INDEX